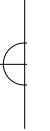
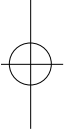
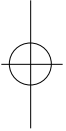
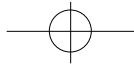
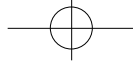


# United States Trade Law and Policy

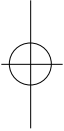




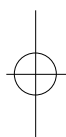
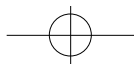


# United States Trade Law and Policy

**Michael K. Young**



**Carolina Academic Press**  
**Durham, North Carolina**

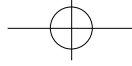


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ISBN 0-89089-998-3  
LCCN 00-110717

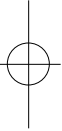
Carolina Academic Press  
700 Kent Street  
Durham, North Carolina 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
E-mail: [cap@cap-press.com](mailto:cap@cap-press.com)  
[www.cap-press.com](http://www.cap-press.com)

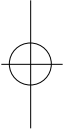
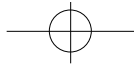
Printed in the United States of America.

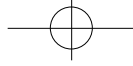


## DEDICATION

This book is dedicated to Suzan, who never quite seems willing to strike a self-interested bargain, but rather always gives much, much more than she receives, and to Stewart, Kathryn and Andrew, who are ably learning, far better than I ever have, to make their way in our increasingly small global community.

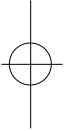
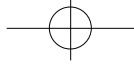




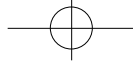


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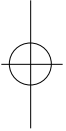
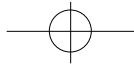


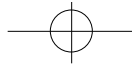




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## Preface

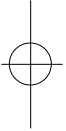
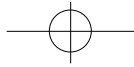
As is always the case in a project of this scope, far more people deserve thanks than I can even recall. And for those I can recall, words cannot express my appreciation. I have had the exceptionally able research assistance of a number of students at the School of Law of Columbia University, where this project was first begun, and at The George Washington University Law School, where it was completed. These include, at Columbia, Michael Bliss, Tom Cox, Batia Zarey, Fedra Fatey, Sean Feller, Michael Garcia, and, at The George Washington University, Mariya Talib, Rita Boggs and Heecheol Kang.

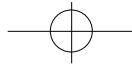
Others who taught me much about trade law and its various political aspects when I was serving as a trade negotiator for the U.S. government and who later critiqued various drafts of this manuscript also deserve my deepest thanks. These include Stewart Baker of Steptoe and Johnson, Merit Janow of Columbia University, Raj Bhala of The George Washington University Law School, and Peter Ehrenhaft. They were all extraordinarily generous with their time and attention to detail and I have avoided many errors and misstatements because of their passion for accuracy. And I am particularly grateful to Robert B. Zoellick, who first gave me the opportunity to engage in trade negotiations for the U.S. Government. I may not have learned trade law from Bob, but I certainly learned from him more than I can say about trade negotiations and the domestic and international politics surrounding trade law and trade negotiations.

I am also very grateful to the KOCHAM, the Korea Foundation and Columbia University's Center for Korean Legal Studies, which I used to direct but which is now in the exceptionally able hands of my former Associate Director, Professor Jeong-Ho Roh. The foresight of the Korea Foundation and KOCHAM in funding this project and other related studies and the assistance and support of the Center have been essentially to the successful completion of this book. Indeed, this book belongs to these organizations as much as to anyone.

Finally, I have had the tremendously able editorial assistance of my Executive Assistant, Ms. Kathy Bethea. She has spent countless hours with the manuscript and I cannot adequately describe just how much she has improved it.

Of course, this book undoubtedly still has errors. I would love to blame them on any and all of the above people. But their contributions were only positive and the errors remain mine alone.





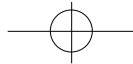
## Introduction

Think back on your breakfast this morning, the coffee you drank, the fruit you ate, even the toaster you used for your bread or bagel. Some significant part of that meal, as is true of virtually all your meals, was, in all likelihood, made possible, or at least cheaper, in part through international trade. The clothes and shoes you wear, the car you drive, the appliances you use, the radio to which you listen, the television you watch, and even the books you read, all of these things, and many, many more of the objects and activities that make up our daily lives derive in some large measure from the extraordinary economic interdependence of virtually all countries around the world. Even the computers on which this book was written and the presses on which it was printed are made in some significant measure from parts of foreign origin.

Nor are we alone in this dependence on foreign produced goods. Much of the world eats better because of the productivity of American farmers. Moreover, the ownership of many of the ideas and concepts that make possible these foreign goods actually originate in the U.S., as does much of the funding that makes the factories and plants that produce these goods possible. In short, life would be nothing like we know it without international trade and the United States is squarely and overwhelmingly in the center of all this international economic activity.

The centrality of international trade in general and American goods, services, capital and markets, in particular, make American trade law a topic of inestimable importance. Foreign lawyers and business people must understand it almost as well as American lawyers and business people. Government officials in Washington have great need to understand this field, but, then, so do government officials in almost every other country in the world. Not each of these professionals needs to claim this field as their primary area of professional expertise. But for this system to function effectively, enough professionals in enough countries must understand this field and understand it well. And a much larger number of people, both in the United States and abroad, must have at least enough familiarity with the topic to know when they are engaging in activities that may activate U.S. trade laws, as well as to know when to consult real experts. They must also know enough to understand what those experts tell them.

This book is designed to provide at least some of the information necessary to train both groups. Students, legal practitioners and government officials who hope to become genuine specialists in this field will, I hope, find this a useful introduction to this highly complicated area. Indeed, that is why I first wrote it. The longer I taught U.S. trade law at Columbia University, the more I realized that most of my teaching materials could only be understood - and classroom discussion regarding those materials could only proceed - if the students had pre-



viously mastered certain basic foundational legal rules, structures and concepts of U.S. trade law.

Though I am a huge fan of the Socratic method, when it is done well, I consistently found that discussion and dialogue were very inefficient and, in most cases, highly ineffective ways of teaching this basic overview material. I found myself lecturing more and more and did not much like it. After all, all my students read much faster than they listen, and, frankly speaking, usually absorb more through the written medium. Hence this book was conceived. And, happily, it has served the purpose. Some of those students on whom I first experimented with these materials have gone on to very successful careers as trade law specialists.

Of course, this book is not substitute for a serious course in U.S. trade law for people who intend to make this their primary field of specialization. But it does present a useful overview of the major facets of U.S. trade law and serves as an introduction to the more complicated and complex rules, regulations and practices that a true specialist must master.

At the same time, as I shared successive drafts of various chapters with friends and acquaintances, it became clear that this book can also serve as a useful primer to those lawyers, government officials and even business people who do not intend to become true specialists, but whose professional activities bring them into frequent contact with the vagaries and complexities of this arcane field. Indeed, part of the sponsorship of this project came from foreign business organizations that realized just how much their members needed to understand at least the rudiments of U.S. trade law and how little written material was available to accomplish the purpose. Experience suggests that this book meets those needs, as well.

That, of course, also explains some of the initial chapters in which the structure of the U.S. Government is discussed in a way that should be common knowledge to American lawyers and law students. Still, even parts of those chapters seem to prove useful in explaining even to Americans precisely where trade policy formation and implementation is situated in the complex of the U.S. Government.

Two distinctive features of this book are worth particular emphasis. First, I have found that the diagrams that chart the actual progress of a trade law case through the bureaucratic and judicial labyrinth have proved particularly helpful in explaining U.S. trade law. Seemingly incomprehensible timetables or superficially contradictory standards and burdens of proof become easily understood when put in the context of their precise position in the proceedings. When the different types of trade law actions are diagramed, moreover, it becomes much easier to understand their quite different purposes and hence their widely diverging legal standards and procedural formats. Accordingly, I have made much of these charts and diagrams in the text and have constantly tied the substantive and procedural aspects of these laws back to the diagrams.

Second, after considerable experience as both a negotiator for the U.S. Government and a teacher of U.S. trade law, I continue to be amazed at how extraordinarily misunderstood are our trade laws. It is clear that many of those misunderstandings result from a singular focus on the way in which trade law cases are

processed as a technical legal matter. While that dimension of U.S. trade law is certainly important - indeed, it must be understood -, it does not enhance our understanding of the important role trade law plays in the trade policy formation process. Nor can we understand how and why trade law is employed in certain instances and not in others if we focus solely on these technical legal dimensions. Our trading partners make this mistake and, resultantly, they often mythologize, or, more commonly, demonize, U.S. trade law, ascribing it much more importance or, on occasion, much less importance than it actually has.

Put slightly differently, to be understood fully and correctly, U.S. trade law must be properly situated in its broader political and legal context. Most importantly, we must understand how trade law often serves as the medium through which the struggle plays out between the executive and legislative branches of our government over trade policy and, on occasion, even over domestic economic policy. Without a more refined sense of the way in which each branch of government wields power against the other - and often uses trade law as one important lever of that power -, we cannot hope to understand U.S. trade law in actual practice. Nor can we make any sense of the constant tug of war between the executive and legislative branches over trade until we understand how each is influenced by its respective constituencies. That might seem a bit far afield from the central preoccupations of trade law, but let me warn the reader that it most assuredly is not. It is often at the very core of the formation, structure and implementation of U.S. trade law. We cannot hope to understand this field without considering these matters and their centrality to the entire process.

A fuller understanding of these variables also helps explain why trade rules often develop and evolve in distinctive and quite unexpected ways. Laws created for one reason morph into something entirely different. Only a fully developed sense of the political and constitutional situation in which they are created and implemented enables observers to make any sense of the entire field.

This books makes an effort to do precisely that, to put these laws and their patterns of execution into that broader context. That, in turn, leads to an appreciably enhanced understanding of these laws and their legal technicalities, as well as the ways in which they are implemented and executed and the manner in which they evolve over the years.

With this brief introduction, I now invite the reader into one of the most interesting and certainly among the most important areas of U.S. law. It will not necessarily be an easy journey, but it will engage and amuse and, in the end, will certainly be worth the effort.

