# Law & Int’l Economy

### Overview of Int’l Law

1. Countries follow int’l law because of the Three R’s: Reputation, Reciprocity and Retaliation
2. Int’l law is composed of three separate structures: 1) National Legal Structures, 2) Int’l Legal Institutions and 3) Int’l Arbitration Bodies
   1. Int’l law and national law can be seen as part of the same system of law (monist), or separate distinguishable bodies of law (dualist)

#### National Legal Structures

1. National legal structures are (broadly speaking) either civil or common law based
   1. Civil law is code-centric and doctrine-heavy. Scholars are interpreters. Discovery is less important
      1. Does this make civil law systems more able to combat inequality?
   2. Common law is judge-made and case-centric. Judges’ education is emphasized
      1. Which system subjects judges to a higher risk of political/economic capture?
      2. What should the link between political and judicial systems be? Which system is fair?

#### Int’l Legal Institutions

1. Super-national organizations (WTO, EU Court of Justice, and the ICJ), also provide a mechanism for int’l dispute resolution
   1. ICJ has three ways to obtain jurisdiction: 1) Ad hoc, 2) Treaty recognition and 3) Compulsory
      1. Existence of ad hoc jurisdiction lessens incentive to accept compulsory jurisdiction
      2. Protects state sovereignty and addresses concerns of int’l economic courts
      3. Benefits of super-national organizations include efficiency, neutrality, settlement incentives, and the protection of developing nations

#### Int’l Arbitral Bodies

1. Int’l Commercial Arbitration follows one of three models
   1. Under the monolocal model (old system) the law of the seat of arbitration determines enforceability of the award
   2. Under the Westphalian model (recognized in the New York Convention), the place of enforcement may determine an award’s validity
      1. Parties must enforce arbitral awards unless doing so is contrary to public policy of the place of enforcement
   3. Under the transnational model, enforceability is determined by a set of int’lly recognized principles, a la int’l norms

### Int’l Commercial Litigation

#### Treaties

1. Civil law countries tend to enact treaties with direct effect, while common law systems generally have no direct effect
   1. Common law countries that do not have direct effect (but have signed a treaty) may not take an action that would defeat the treaty’s object or purpose (VCLT Art. 18)
2. States may feel Reservations, Understandings, or Declarations (RUDs) to treaties before signing
   1. If the rule of unanimity is required for the treaty, all parties must consent to the reservation before the reserving state may become a party
   2. A reserving state may become a party to a multilateral treaty if another state expressly or tacitly accepts the reservation, binding only the reserving and accepting states
   3. Objections may result in no consequence, or non-binding status between the objecting state and the reserving state
3. Treaty interpretation includes (in order): 1) Plain meaning, 2) The context of the treaty (and other related agreements), 3) Subsequent treaties, practices, and other int’l norms and 4) Legislative history
4. Parties may accede to a treaty after it has entered into force. Parties may also terminate or withdraw from a treaty if another party has materially breached, if impossibility is claimed, or if a material change in circumstances has occurred
5. Treaties may be self-executing or not, determined by the language of the treaty. A non-self-executing treaty requires implementing legislation, in addition to ratification (*Foster v. Neilson*)
6. There are three kinds of treaties in U.S. law: 1) Article II Treaties (advice and consent of Senate), 2) Sole Executive Agreements (Executive’s exclusive powers), and 3) Congressional-Executive Agreements
   1. Does not require 2/3 Senate approval, but a simple majority in both houses of Congress

#### Other Forms of Int’l Law

1. Customary int’l law must be a uniform, consistent state practice that most states believe to be legally compelled (*opinio juris*) (*Paquete Habana* – fishing boats historically not prizes of war)
   1. Related to *jus cogens*, an int’l norm from which no departure is ever warranted
      1. Based on notions of universal morality and justice
   2. Customary int’l law not recognized if a state has persistently objected
   3. Customary int’l law is a form of “soft law”, along with vague treaty provisions, codes of behavior, or political pacts
      1. Soft law is so named due to a lack of enforcement, but may eventually “harden” into law
      2. Soft law is not always customary int’l law, since it is not always widespread
   4. Tools for ensuring a strong “compliance pull” include reporting/monitoring, independent verification, capacity-building, and sanctions
2. In the U.S., state law in conflict with federal law (or int’l obligations) is struck down under the Supremacy Clause (*Crosby v. National Foreign Relations Trade Council* – MA law on Myanmar sourcing)
   1. Preemption may be express or implied (Congress intended federal occupation of a specific legislative field, such as int’l commerce)
   2. Federal foreign policy may also be invoked to invalidate state statutes (*American Insurance Association v. Garamendi* – Holocaust insurance law)
   3. However, non-self-executing executive agreements is not binding on states (*Medellin v. Texas* – Texas ignores ICJ notice requirements)
   4. Treaties do not infringe on states’ rights under the 10th Amendment (*Missouri v. Holland*)
      1. What is the limit? The existence of a national interest or national problem?

#### Choice of Forum & Law

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| **Arbitration** | **National Courts** |
| * Relatively inexpensive and quick * Customizable procedure * Confidentiality * Expertise of arbitral bodies * Neutrality/lack of political bias * Finality * Easy enforcement | * Predictability * Eliminates the need to customize procedure * May provide procedural advantages * Verdicts may be appealed * Less potential for capture, since a judge isn’t worried about future business |
| Treaty coverage:  New York Convention | Treaty Coverage:  Brussels I  Hague Convention  Bilateral Treaties |

1. The Hague Convention on Choice of Court Agreements stipulates that the court designated in a Forum Selection Clause (FSC) has jurisdiction to hear cases, and all other courts shall dismiss proceedings unless contrary to public policy
   1. Enforcement may also be refused if incompatible with the public policy of the enforcing state
   2. A state may declare its courts’ jurisdiction is limited if there is no connection between the dispute and the chose court, and may refuse to enforce an award between two parties of the state where judgment was recorded
   3. The U.S. has not ratified the Hague Convention, but is bound the by VCLT’s obligation not to harm the object/purpose of the treaty
2. In the U.S., an FSC is prima facie valid unless unreasonable (*Bremen v. Zapata* – oil rig damaged in storm)
   1. Standard is that for all practical purposes, a litigant will be deprived of his day in court
   2. Other possible concerns include fraud, undue influence, or a strong public policy against enforcement of the FSC
   3. Rationales include certainty/predictability, reciprocity, and the impact of globalization on the future of commerce
   4. This logic also holds for FSCs naming an int’l arbitration body (*Scherk v. Alberto-Culver*)
   5. Even if foreign arbiters may not apply domestic law, an FSC is not to be disturbed by national courts (*Vimar Seguros v. Sky Reefer*)
3. Under Brussels I, domiciliaries of an EU member state may sued in another state if the place of performance (or, in the event of a tort, the place of harm) is in that state (Art. 5 §§1, 3)
   1. Exclusive jurisdiction exists for suits *in rem* of immovable property (Art. 22 §1)
   2. Exclusive jurisdiction also exists if an FSC has so indicated, even if neither party is an EU member (Art. 23 §§1, 3)
4. In civil law systems, *lis pendens* prohibits all but the first court seized upon from exercising jurisdiction. Common law, however, uses *forum non conveniens* to find the most appropriate court
   1. Under FNC, there are several private and public interest factors to determine the most convenient court. These include ease of access to evidence and witnesses, other practical issues relating to an expeditious and inexpensive resolution, administrative concerns, local interest in having local controversies heard at home, and avoiding unnecessary application of foreign law at home (*Gilbert*)
      1. The possibility of a change in substantive law is not dispositive for FNC (*Piper Aircraft*)
         1. FNC is only reviewed for an abuse of discretion
      2. FNC may be a threshold question, even before consideration of jurisdiction (*Sinochem*)
         1. What if the more convenient forum may refuse to hear the case?

#### Enforcing Foreign Judgments

1. A foreign judgment not repugnant to public policy that grants or denies recovery of money is entitled to full faith and credit under the Uniform Money-Judgments Recognition Act
   1. National political interests are not equivalent to public policy, and cannot impact U.S. obligations under the New York Convention (*Overseas v. RATKA*)
   2. If the substantive law under which the judgement was reached is repugnant to U.S. law, the policy exception may be invoked (*Matusevitch v. Telnikoff* – contradictory libel standards)
      1. This is *one* approach. Another could argue that principles of comity and reciprocity should render differences in substantive law irrelevant, a la *Overseas*
   3. However, courts will not re-try issues found in foreign courts (*Lloyd’s v. Siemon-Netto* – breach of contract finding would not be overturned on public policy grounds)
      1. Re-emphasized in *Overseas* where arbitral body’s incompetence was alleged

#### State Defenses to Lawsuits

1. Sovereign immunity is an almost complete bar to suit, even in violations of *jus cogens* norms
   1. Under the Tate Letter, the State Department will not recommend immunity if a case involves the commercial acts of a foreign government which could have been carried out by private parties
      1. Why is this theory of restrictive immunity superior to absolute immunity?
2. Under the Foreign Sovereign Immunities Act (FSIA), a foreign state (or separate legal entities that are “organs” of the foreign state or have the foreign state as its majority shareholder) may be sued in U.S. courts
   1. The starting point of determine whether an agency is an “organ” is whether the entity engages in public activity on the foreign government’s behalf
   2. The foreign government must be a direct majority shareholder for FSIA jurisdiction (*Dole Food v. Patrickson*)
   3. There remains a presumption of separateness; showing an instrumentality performed some illegal act is insufficient
   4. A foreign state is subject to U.S. jurisdiction if:
      1. It has expressly (or impliedly) waived its immunity through treaty or contract
      2. Its action is based upon a commercial activity with a direct effect in the U.S. (*Argentina v. Weltover*)
         1. When a foreign government acts, not as a regulator, but as a private player in a market, its actions are commercial under the FSIA
         2. An effect is direct if it follows as an immediate consequence
      3. The foreign state commits an act of expropriation of tangible property with a nexus to American commercial activity
      4. The state is a designated sponsor of terrorist activity, if the claimant or victim is a U.S. national
3. Under the Act of State doctrine, domestic courts generally decline to sit in judgement on the acts of a foreign government in that government’s territory
   1. A major rationale for this rule is reciprocity
   2. For the act of state doctrine to apply, the act in question must be one of the government, not individuals within (*Kirkpatrick v. Environmental Tectonics* – bribery)
   3. Customary int’l law does not seem to be a sufficient reason to disregard the act of state doctrine (*Banco Nacional de Cuba v. Sabbatino*)

### Int’l Trade & Investment Law

1. Keep trade and investment regimes distinct. Be aware of differences in permitted actors, dispute resolution mechanisms, and availability of damages/awards
2. Trade/investment law is amorphous and confusing. This is due to the lack of precedent and variability of judges and panels

#### Int’l Trade Regime

1. The WTO governs global trade. The major agreement for the WTO is the General Agreement on Tariffs and Trade (GATT)
2. Most-favored nation (MFN) clauses prohibit discrimination among trading partners (GATT Art. I)
   1. There is an exception for Free Trade Agreements and customs unions if a substantial part of all trade is included in the FTA (GATT Art. XXIV)
3. National treatment clauses prohibit treating imported goods and locally-produced goods differently (GATT Art. III §4)
   1. National treatment only applies once the good has entered the country
4. Both MFN and National treatment clauses are subject to a series of exceptions. The most common is measures to protect human, plant or animal life and health (GATT Art. XX)
   1. Both clauses only apply to “like” products. In the *EC – Asbestos* case, the WTO appellate body delineated four criteria to examine likeness: 1) Product properties, nature and qualities, 2) Product end-uses, 3) Consumers’ tastes and habits and 4) Product tariff classifications.
      1. These criteria must be examined separately and distinctly
   2. The public health exception may only be invoked if the restriction used is the least restrictive necessary to achieve the stated policy objective
   3. GATT generally applies only to goods; services are exempted from MFN and National treatment

#### Int’l Investment Regime

1. Four regimes were discussed in class: 1) Goods = GATT, 2) Investments = BIT, 3) IP = TRIPS and 4) Government (technical) regulations = TBT
2. Private parties may get standing to sue governments through a bilateral investment treaty (BIT)
3. Most BITs have MFN and National treatment clauses similar to GATT
   1. Complaints of unequal national treatment may be brought under a disparate impact theory
4. Both China and the U.S. have a complex procedure for FDI approval
   1. The U.S.’s CFIUS reviews potential issues relating to national security or that results in a foreign state controlling a U.S. company
      1. Most companies do not go through with a CFIUS review, due to the negative publicity associated with an investigation
      2. Purchase of one private corporation by another is usually (but not always) approved
      3. The President makes ultimate decisions that may or may not reflect CFIUS recommendations. Presidential decisions are not subject to judicial review
      4. May be seen as highly political and discretionary (arbitrary) by foreigners
   2. China publishes a list of encouraged, restricted and prohibited categories of FDI
      1. Foreign investors may invest in any non-prohibited category after receiving approval from various levels of Chinese government, including anti-monopoly, national security, land-use, commerce, and local/prefecture government authorities
      2. Appeals processes are available, but of little practical significance
5. TRIMS is a non-exclusive list of investment restrictions impermissible under GATT. These restrictions include local sourcing and trade-balancing requirements (imports must be related to volume of exports)
   1. Note that disputes concerning TRIMS violations are brought under the WTO, and thus can only be brought by nation-states, not individual investors
      1. Import quotas are quantitative restrictions, in violation of GATT Art. XI (*India – Autos*)
6. NAFTA has similar investment protections for parties, and contains an Investor-State Dispute Settlement (ISDS) clause (NAFTA Art. 1116)
   1. States are required to give fair and equitable treatment to foreign investments. This requirement does not create additional, unlisted obligations (such as transparency) (*Mexico v. Metalclad*)
7. Under TBT Art. 2.2, technical regulations shall not be more trade-restrictive than necessary to achieve a legitimate objective
   1. Might present sticky questions of “When is enough,” since not *every* measure other than an outright ban has been attempted *See Philip Morris Asia v. Australia* – tobacco plain packaging
      1. Note again, that Philip Morris brought an action under the Hong Kong-Australia BIT, and Ukraine brought an action under GATT, TRIPS and the TBT
         1. The BIT provides detailed damage calculations. If the value of the Philip Morris trademark was 0 (as Philip Morris claims) when the proposed legislation was announced, the damages would also be 0!
      2. This case animates the debate over the wisdom of ISDS. Should private parties be able to force legislatures to repeal/change laws through int’l lawsuits?
8. TRIPS claims that IP protections should contribute to innovation and technology transfer
   1. Under TRIPS, governments must ensure IP rights are enforceable, with infringement penalties that deter future violations (TRIPS Art. 41)
      1. TRIPS encourages governments to create processes to deal with IP, without requiring specific results. As a result, China (for example) has the process, but questionable results
      2. Proving violations is extremely difficult. Is China really doing the best it can to deter systemic IP theft?
      3. Because TRIPS is enforced locally (and not int’lly), it isn’t very effective

### Extraterritoriality

1. Is a system where companies may be prosecuted for the same action in multiple countries simultaneously efficient? Desirable?
   1. Increases costs for multi-national corporations
   2. Is a system of multiple watchdogs that all define crimes differently more effective at reducing normatively “wrong” behavior?
   3. Does extraterritoriality place some countries at an advantage, due to relative size and power?
      1. Can extraterritorial prosecutions become a form of protectionism?
   4. At what point can countries regulate the actions of others beyond their own shores?

#### Bribery & Corruption

1. Does corruption inhibit growth, or does increased growth reduce corruption?
2. Bribery may present problems of identifying cultural practices of another country as normatively wrong
   1. How is the line drawn between legitimate practices (paying extra for express shipping, tipping waiters, taking company executives to sporting events) and bribery?
3. In the U.S., the FCPA criminalizes an action that a covered person (a domestic concern, or anyone acting in U.S. territory) takes in furtherance of a payment of anything of value to any foreign official corruptly for the purpose of influencing that person in order to obtain, retain, or direct business to any person
   1. The FCPA contains exceptions for “grease payments” to government officials to perform routine governmental action
   2. Another affirmative defense is that the payment at issue is legal under the written laws of the foreign official’s country
   3. The FCPA requires reasonable assurance that accounting controls will prevent corrupt practices
   4. A business nexus between bribes and favorable business treatment may be sufficient to constitute a violation of the FCPA (*United States v. Kay* – tax treatment from custom official)
4. Although the OECD has an anti-bribery agreement, it does not create a cause of action, so countries may not sue for treaty violations. Domestic law that complies with the treaty is necessary
   1. Why do countries like Russia and Brazil sign on to anti-corruption treaties?
      1. Cynical reasons include to take advantage of extradition provisions
      2. Self-interested reasons include not being left out in the cold, potential of being able to join the OECD, and signal good intentions to others
   2. Is the OECD treaty effective, since its only enforcement mechanism is follow-up and monitoring?
5. The UK Bribery Act is much more far-reaching than the FCPA. It criminalizes:
   1. Offering or promising an advantageous bribe to persuade another to perform a relevant function improperly or reward that person for doing so
   2. Accepting a valuable bribe with the intent of performing a relevant function improperly, regardless of whether the function is actually improperly performed
      1. A defense is possible if the breach is approved in the jurisdiction’s written law
   3. A company’s failure to prevent bribery (strict liability)
      1. This charge can be rebutted by showing adequate anti-bribery procedures were in place
   4. Any UK citizen or company can be liable for actions taken anywhere in the world
      1. Bribes offered through third parties are not exempt and may still be prosecuted
      2. Grease payments are not exempt as they are in the FCPA
6. One of the major concerns with both the FCPA and the UK Bribery Act is its potential for limiting the competitiveness of UK and U.S. companies int’lly
   1. Will U.S. and UK companies avoid developing countries known for widespread corruption?

#### Corporate Social Responsibility

1. The Alien Tort Statute (ATS) provides a cause of action against foreign actors that commit torts in violation of customary int’l law
   1. At what point does the ATS begin to kick in? Are corporations liable for aiding and abetting violations of customary int’l law?
   2. Applicability of the ATS in a foreign-cubed situation (foreign plaintiff, foreign defendant, tort occurred overseas) is an open question, but highly unlikely (*Kiobel v. Royal Dutch Petroleum*)
      1. *Morrison* provides a presumption against a statute’s extraterritorial application
      2. Roberts’ majority opinion presents a test that the claims must touch and concern the U.S. with sufficient force to overcome the presumption
      3. Alito’s test is narrower, denying applicability to any non-universally recognized torts, such as torture and slavery
      4. Breyer’s test is broader, arguing that any claim that adversely effects distinct American interest (including the interest in not being a safe harbor for violators of int’l law) should be admissible under the ATS, if the tort occurred at home and the defendant is an American national
         1. What exactly is the disagreement between Roberts and Breyer? Breyer’s test lays out three conclusive tests, while Roberts leaves the door open with vague “touch and concern” language
   3. *Shimari v. CACI* was not a foreign-cubed case, since the defendant is not foreign, and (arguably) did not occur overseas (at Abu Ghraib prison). The appellate court allowed the case to proceed
2. Whose job is it to regulate the int’l economy? Which aspects are deserving of int’l regulation? Labor (Rama Plaza disaster)? Environmental? IP violations?
   1. Does intense int’l regulation create barriers to entry to the int’l market for smaller start-up companies or entities out of developing nations?