

**UNIVERSITY OF PENNSYLVANIA
WHARTON SCHOOL
DEPARTMENT OF LEGAL STUDIES
FALL TERM 2011**

LGST 219 - DR. MAYER

LAW AND POLICY IN INTERNATIONAL BUSINESS

TEXT: Folsom, Gordon, and Spanogle, International Business Transactions. (St. Paul: West, 10th edition, 2009) and the Documents Supplement for this text. These are available in the bookstore, and copies will also be available for you at the reserve desk in the Lippincott Library.

Course Pack: The course pack (updated – not identical to ones used in earlier years) will be available from Wharton Reprographics. If current events warrant updating assignments, some new readings may be substituted for course pack assignments currently listed on the syllabus.

There is also a small paperback, International Business Transactions in a Nutshell, that is optional reading.

There will be many handouts distributed in class during the course of the semester. Students are responsible for making sure that they have a complete set. If missing a class, students should arrange to have a classmate pick up the handouts. The handouts for each class will be recorded on the course webcafe.

ASSIGNMENTS

Class lectures and discussions will assume that students have already read the assigned materials. Please note that the order of topics is settled but the sessions indicated are only approximate, as they will be influenced by the length of our discussions and potentially also by new developments. That is, what is listed as a session may extend beyond the time allotted for one class meeting and spill over to the next meeting. If past experience is any guide, we shall fall behind the syllabus, meaning that the last assignments listed here may not be covered in class. No test questions will be asked on any material not already covered in class by the time of exams! Where questions arise about how far students need to read ahead, students may contact the professor.

Questions in the textbook can assist you in focusing on issues; answers do not need to be formally prepared unless a question has been specifically assigned for class discussion.

Session 1

Overview of Course.

Introduction to basic terms and concepts. Globalization and the legal framework for conducting international business. Coping with the layers of national and transnational, regional, and international laws.

TEXT: 2-48 as background reading.

Sessions 2-3

Current problems in handling international business disputes.

Discussion of a sample problem illustrating generic legal questions raised by international business cases. Forums and institutions for international dispute resolution and strategies used in forum selection and the varieties of laws that can apply. Special features of the U.S. legal system.

TEXT: 1310-1336.

Course pack: Diversity or Cacophony (an article to be skimmed to get a sense of how frustrating it can be to try to cope with the multiplicity of legal regimes that international business currently confronts); Forum Shopping, Domestic and International (the first part of the forum shopping material is to be skimmed for background; in class we shall discuss pp. 560-74).

Sessions 4-5

Continuation of previous material. Introduction to jurisdictional problems.

International arbitration versus litigation in courts with assessments of the pros and cons Evaluation of the policy implications of privatizing the work of deciding important business disputes.

What rules do courts refer to in deciding whether they can resolve an international business dispute? Introduction to basic U.S. concepts of jurisdiction. When can foreign defendant be forced to show up in court? Attempts to standardize jurisdictional rules. Jurisdiction of international tribunals. Specific problems with getting the I.C.J. (the World Court) to hear cases involving international business. Selected concepts of jurisdiction from different countries.

Supplement: Selected provisions in the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention) and the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the EEC

Brussels Convention).

Course pack: International Commercial Arbitration; Towards a Greater Depolitization of Investment Disputes (Section on ICSID only); Public Protests, Private Contracts: Confidentiality in ICSID Arbitration; Hvide.

TEXT: pp. 1355-1372.

Sessions 6-7

Continuation of previous material. What law(s) apply/should govern international business disputes?

Problems in assigning corporate nationality to international businesses. Problems in deciding what country's law applies to an international business dispute when more than one country's law might apply. Potential advantages of being classed as a foreign corporation. Recourse to contracts to decide in advance what law will cover any disputes. Choice of law and choice of forum clauses – legal and policy dimensions.

Course pack: Nationality cases; Corporate Nationality, Investment Protection Agreements; The Current Legal Framework of Sex/Gender Discrimination Law -- Sex, Allies and Bfoqs.

TEXT: 1337-1355, and consult as background the discussion of conflicts of laws principles on 1395-1405.

Supplement: UN Convention of Contracts for the International Sale of Goods (CISG) See articles 1, 7, 10. Convention on the Law Applicable to Contractual Obligations (EEC Rome Convention) See articles 1, 2, 3, 7. Hague Convention on Choice of Court Agreements.

Sessions 8-9

Continuation of previous material. The enforceability of foreign judgments in local courts.

When will a business be liable for judgment rendered against it in an international arbitration or in foreign court? On what bases can such enforcement be resisted?

TEXT: 1439-1490.

Supplement: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (EEC Brussels Convention)

Sessions 10-13

Should uniform standards or local standards govern operations of international business?

To what extent can international businesses "escape" strict environmental, health, labor, safety, and other regulations in their home countries by moving operations to loosely regulated markets overseas? Should the race to the bottom be regulated – and, if so, how? What international legal standards may apply? New risks of lawsuits in OECD countries against international businesses based on harms they have caused overseas.

Special problems of recourse to U.S. forums to determine liability for harms and accidents caused overseas. ATCA cases. Forum non conveniens dismissals of cases filed in US courts. The Bhopal accident litigation.

Attempts to regulate the international transport and disposal of hazardous wastes, and US resistance to the Basel Convention.

TEXT: 1215-1244, 1372-1395.

Supplement: Alien Tort Claims Act and Torture Victims Protection Act.

Course pack: Binding Corporations to Human Rights Norms through Public Law Settlement – part up to section III.A being required reading, the remainder optional reading; Keeping Africa Out of the Global Backyard; In My Backyard: How Enabling Hazardous Waste Trade to Developing Nations Can Improve the Basel Convention's Ability to Achieve Environmental Justice; India's Toxic Landfills: A Dumping Ground for the World's Electronic Waste.

Session 14

APPROXIMATE DATE FOR MIDTERM (The class may decide by majority vote that the timing for the midterm should be adjusted in the light of other exams and events; the professor is open to changing the date.) Whenever scheduled, the midterm exam will be taken during our regular class period in our regular classroom.

Sessions 15-16

Regulating foreign direct investment (FDI).

Various approaches to regulating incoming foreign investment, laws and related policies and how they have shifted in relation to changing political currents. The European Union and NAFTA systems. U.S. attitudes and the role of CFIUS.

TEXT: 1060-1097, 1101-1106, 1114-1132, 1276-1283, 1294-1307.

Course pack: The Committee on Foreign Investment and National Security Act of 2007.

Supplement: North American Free Trade Agreement, Foreign Investment Law of the United Mexican States.

Sessions 17-18

Continuation of previous material. Dealing with expropriation risks in foreign investment.

Different types of expropriation of foreign-owned property. What are the applicable standards for deciding when such takings are legal? What is the current status of international law in this area? Types of political risk insurance programs. Long-term development contracts.

TEXT: 1244-1256, 1272-1275.

Course pack: A Canadian Commentary on Constructive Expropriation Law under NAFTA Article 1110; Mississippi Judicial System: Failing to Meet the Minimum Standard of Justice in *Loewen Group, Inc. v. O'Keefe*; Economic Development Agreements; Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War.

Sessions 19-20

Legal problems facing businesses suing foreign governments and their agencies.

The doctrine of sovereign immunity. What rules decide whether a foreign government can claim legal immunity when sued by a private party? The U.S. Foreign Sovereign Immunities Act of 1976 and unresolved problems.

TEXT: 1259-1264.

Supplement: Foreign Sovereign Immunities Act

Sessions 21-22

Continuation of previous material. The act of state doctrine as currently applied in U.S. courts.

The impact of foreign relations concerns on U.S. litigation involving acts by foreign governments. How closely related are the policy concerns underlying sovereign immunity defenses and act of state defenses? Do the

rules as they now stand make sense?

TEXT: 1264-1272

Course pack: IAM V. OPEC.

Sessions 23-24

Force majeure and frustration as excuses for non-performance of contracts.

Different national and international rules on excusing parties for non-performance of contracts in specific circumstances. Special legal problems of suing state-run/state-related enterprises for breach of contract.

TEXT: 146-185.

Course pack: States and State-Controlled Corporations.

Session 25

Patterns of extraterritoriality in the area of antitrust.

Issues that are raised when national economic regulation extends beyond a country's own frontiers. Extraterritorial applications of U.S. antitrust law and European competition law and responses to these. What are the policies behind such extraterritorial extension of economic regulation? Do we need a uniform international approach to regulating competition?

TEXT: 1406-1427, 1434-1439.

Course pack: International Antitrust at the Crossroads; Global Antitrust and the Evolution of an International Standard; Extraterritorial Jurisdiction – European Responses.

Supplement: UK Protection of Trading Interests Order 1992; Order Requiring Persons in Canada to Give Notice

Session 26

How far does the reach of SEC enforcement extend beyond U.S. borders?

Extraterritorial application of U.S. securities regulations in suits involving conduct by non-U.S. citizens or securities transactions in other countries.

Course pack: Morrison v. National Australia Bank Ltd.

Session 27

Penalizing international business for corrupt overseas payments.

The U.S. policy of criminalizing questionable payments to foreign

officials. The U.S. Foreign Corrupt Practices Act. Other responses to the problems of corruption/corrupt payments. New international and OECD initiatives and Transparency International.

The U.S. Foreign Corrupt Practices Act. Other responses to the problems of corruption/corrupt payments.

TEXT: 851-885.

Supplement: Foreign Corrupt Practices Act (as amended); UN Convention Against Corruption 2003; Convention on Combating Bribery of Foreign Public Officials (OECD).

Session 28

International economic boycotts and anti-boycott laws.

U.S. restrictions on exports. What policies underlie U.S. boycotts and anti-boycott laws, and how effective have they been? What are the costs? Current issues.

TEXT: 819-851.

Supplement: Export Administration Act of 1979 (as amended) and Export Administration Regulations.

PLEASE NOTE THAT PENN SETS THE FINAL EXAM SCHEDULE: Our final exams in this course are always on the date and time and in the room scheduled by the University. This university wide scheduling system assigns final exams based on the day of the week and hour of the first class meeting of each course. Information on the date and time for the final exam is available on various Penn websites. The final exam room assignment is usually made during the last week of classes.

LGST 219 EXAMINATIONS:

There will be a midterm and a final examination. The midterm will be held during a regular class period. A tentative date will be proposed; if it happens to clash with too many other exams on class members' schedules, it can potentially be moved to another date. The final examination date is NOT decided by the professor; the final will be held at the time and place

scheduled by the University according to the day of the week and time of the first class meeting. The exam date and time can be found in the front of the University course guide, and the location will be announced in the Daily Pennsylvanian shortly before the beginning of the exam period.

Purpose of examinations

The examinations are not designed to test whether you are qualified to be lawyers!! They examine your ability to demonstrate an informed and intelligent appreciation of legal problems that are typically encountered in the conduct of international business. Where the course has covered international legal standards or conflicts in different countries' laws affecting business, you will be responsible for understanding these. You must grasp the basic rules affecting the international business cases that will be covered in the course and appreciate the policy implications of various approaches to regulating international business. To handle the questions you will need to show that you can identify the relevant legal rules and apply them and/or recognize what kinds of legal strategies are likely to be successful in achieving certain business goals and also what the legal risks and potential liability may be of a proposed course of action. Among other things, you should be able to demonstrate on an examination that you know how to plan and structure international business operations so that you do not incur avoidable legal liabilities.

Cases will be read on various topics. You will not be tested on your ability to remember the exact captions or names of the cases. You will be responsible for understanding the holding, or basic legal principle, enunciated in the assigned cases, and why the court reached the conclusion that it did. This is essential for coping with the implications of case decisions for international business.

The questions will not be designed to test your mastery of definitions of all legal terms used in the readings, but you are responsible for all legal terms used in class lectures and discussions. These should be clarified by the readings and in-class presentations, but, if they are not, you should ask the instructor for explanations of any terms that you find confusing.

Style of examinations

The examination format changes somewhat from semester to semester. In the past, examinations have included essay questions, short answer questions, and multiple choice questions, though multiple choice questions have been rarely used. If multiple choice questions are being used, you will be advised well before the examination. The types of questions could include the following:

- 1) Statements of fact situations that could occur in international business, where the student is asked to analyze what legal issues these would raise and explain what legal risks or penalties, if any, might be incurred by the parties involved.

- 2) Descriptions of hypothetical legal cases involving international business, where the student is asked to identify what legal rules would govern the case and with what likely result.
- 3) Descriptions of proposed courses of action in international business, where the student is asked to recommend what should be done, presenting arguments based on legal and policy considerations about the advisability of different courses of action and explaining why a particular action is the best one to take.
- 4) Short descriptions of actions that could be taken by a person in international business that call for brief explanations about whether the action would or would not be legal.
- 5) Descriptions of an actual or hypothetical law affecting international business, where the student is asked for a critical appraisal of whether or not the law is sound in terms of the policies involved or the impact it could be expected to have.

Submitting answers to sample exam questions

Please note: Handouts will be distributed in class on topics we address with questions designed to help you focus on the major themes and issues that we are covering. (These are NOT substitutes for class notes; they do not offer comprehensive listings of every angle that we cover or all the important points in the readings.) Sample exam questions will also be included. Students may want to practice for the exams by writing answers to these questions and submitting them to the professor for evaluation. Submitting these sample answers for evaluation must not be delayed until the day before an exam! Students who wait till the last minute to submit their sample answers, waiting till the eve of the exam, will be unlikely to get their answers evaluated in time for the exercise to be useful. Preferably, they should be turned in at the latest several days before an exam.

Material covered in examinations

The questions are designed to give you the opportunity to show that you have mastered the materials that are presented in lectures and discussed in class. Good class notes are very important for this course. Your class notes, if they are complete and accurate, will provide a good study outline for both the midterm and the final. You may find that group study and comparing class notes with other class members will help you improve your notes. It is your responsibility to cover the assigned readings, which are important as background for understanding what is discussed in class. However, the examinations will not test you on points that are mentioned only in the assigned readings and are never touched on in class.

Experience has shown that failure to attend this course on a regular basis and to stay

abreast of the readings tends to have negative consequences for the students' ability to master the material. The material is not intrinsically difficult, but it cannot be comfortably digested by last minute cramming. Students who keep on top of what is going on in class on a regular basis will find that the pieces fit together neatly by exam time.

If you have kept up with the readings, understood everything covered in class, and have reviewed your notes so that at exam time all the points are fresh in your mind, you will be well prepared to answer all the questions.

Grading

You will be graded not on an absolute scale but in relation to the performance of other class members in the same semester.

LGST 219

Dr. Mayer

GRADING SCHEME – TWO ALTERNATIVES:

There are two ways to take this course:

One way is to take the midterm and the final. In that case, the midterm will count for 40% of the course grade and the final for 60%.

The second way is to do the optional paper requirement. In that case, the midterm will count for 30%, the final for 30% and the paper for 40%.

In cases where students are on the border between two grades, the course grade will be influenced by the quality of student preparation and participation in class discussions.

DESCRIPTION OF PAPER OPTION:

Students electing the paper option must notify the professor by September 28, and by that date they must submit an outline of at least one page of the proposed paper, along with a list of representative sources. The outline and sources must have approval for the paper to qualify as a fulfillment of the paper option. The final paper must be submitted in BOTH hard copy AND electronic format to the professor no later than our last class scheduled meeting. Papers submitted after that date and time will be graded down one full grade, and papers submitted after 3PM on December 9 will not count as fulfillment of the paper option. The paper must be typewritten, double-spaced. Although quality of research and analysis will ultimately be more important than quantity of pages, students should aim for a paper of at least 16 pages in a normal-sized font (approximately 4,000 words), excluding tables, bibliography, and the footnotes/endnotes.

The paper must be completed in accordance with Penn's academic integrity code. It must be documented with appropriate citations to the sources relied on. The footnotes/endnotes must be done according to standard styles like those of the University of Chicago or the MLA.

The paper should be problem-oriented and offer a critical perspective on a legal aspect of international business. The most successful papers are ones dealing with problems in which the student authors have a personal interest or that pertain to students' career objectives. They might be on topics like the legal problems affecting investment in a particular country, whether a given law is sound in terms of its actual impact on international business, a recent dispute among various countries regarding laws affecting international business, or an important lawsuit involving the liability of international business. Students will be required to take a position on the issue being researched and to justify their conclusions via coherent reasoning.

Mere description of the information available on a topic will not be sufficient. Instead, students will be required to analyze the problem that they have chosen and to reach intelligent and informed conclusions about the legal issues involved, demonstrating their own judgment and comprehension.

The purpose of the paper is to provide students with the opportunity to in depth research and original analysis regarding legal questions in the area of international business. This requires appropriate sources. Therefore, students should plan to use materials like interviews with persons in government or business, Congressional hearings, scholarly publications, case reports, UN documents, and articles and books written by and for specialists wrestling with legal dimensions of international business. Serious journalism, like reports in the Economist, the Financial Times or the Wall Street Journal, may also be used. Compilation of materials in

textbooks, USA TODAY, TIME and CNN, and other mass media sources will not constitute adequate research. There are many sources on the Internet that students may find helpful, but care must be used avoid being ensnared by Internet sites that disseminate low-quality information or that take biased approaches to issues.

As the paper option should ideally test the student's ability to work independently on an aspect of law and international business, students taking the paper option are expected to exercise initiative and to work largely on their own. The professor is available, however, for any consultations that could prove helpful (choosing a topic, reviewing paper outlines, identifying and locating sources, etc.). Consultations can be arranged during office hours or at other mutually convenient times.

Please consult the professor promptly with regard to any preliminary questions or difficulties. Call 215 898-5717 or use e-mail <mayera@wharton.upenn.edu>.

PLEASE NOTE: ANY FAILURE TO COMPLY WITH THE LISTED PROCEDURES MAY MEAN THAT YOU WILL NOT GET CREDIT FOR YOUR PAPER.

SOURCES THAT YOU MAY FIND HELPFUL:

<http://www.lib.berkeley.edu/TeachingLib/Guides/Internet/Style.html> -- guidelines on documenting papers.

<http://owl.english.purdue.edu> -- Purdue University's On-Line Writing Lab, with links to many useful "handouts" on a wide range of writing issues.

http://www.columbia.edu/cu/cup/cgos/idx_basic.html -- The Columbia Guide to Online Style.

<http://nutsandbolts.washcoll.edu/nb-home.html> -- Michael Harvey, The Nuts and Bolts of College Writing, with coverage of most aspects of paper writing in a clear format.