INTERNATIONAL BUSINESS TRANSACTIONS OUTLINE
Fall 2011
Professor Dibadj

I. Introduction to Legal Environments

a. Transnational Lawyering

i. The Rules of Transnational Practice:

1. Generally
   a. "Globalization" has increased transnational issues in diff types of legal practice
   b. The fact that one belongs to the bar of some other region doesn't entitle one to the rights of the local bar
   c. In many states, foreign lawyers may be licensed to practice as "foreign legal consultants" w/o taking the bar examination
   d. Cooperation bw US and foreign lawyers involves translation issues

2. Case: In re Roel, (COA NY 1957)
   Facts: Mexican lawyer (Mexican bar)—prepares docs in NY but for use in Mexico
   Held: cannot practice w/o being admitted to NY bar—he is a layman in this state

3. Rule 5.5: Unauthorized Practice of Law:
   (a) A lawyer shall not practice law in a jx in violation of the regulation of the legal profession in that jx, or assist another in doing so
   (b)(2) A lawyer not admitted to practice in this jx shall not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jx
   (c) A lawyer admitted in another US jx and not disbarred may provide legal services on a temporary basis in this jx.

ii. Foreign Lawyers

1. Steps:
   (1) Know the terms which designate members—i.e. German notaries play key role
   (2) Know the structure of the profession + groupings—i.e. member supervision

(3) Understand rules and practices about entry—i.e. many law schools: civil law
(4) Evaluate number of lawyers in diff societies—in relation to society and absolute

2. Case: AM & S Europe v. Commission of the European Communities
   Facts: CEC investigated AM&S (inc: UK) for competition infringement. AM&S doesn't turn over some confidential documents drawn up during period preceding and following the accession of UK to CEC and concerned with avoidance of conflict of Community authorities—asserting privilege
   Held: protected from disclosure:

iii. Conflict of the Law on Lawyers

1. Confidentiality is a fundamental norm, but what if a lawyer is aware that a client intends to commit an act of financial fraud by making false representations to somebody they're negotiating with.
   a. Some US states allow or require the lawyer to reveal the fact.
   b. Some foreign states don't make an exception for duty of confidentiality for fraud
2. Model Rule 8.5:
   (a) A lawyer may be subject to the disciplinary authority of both this jx and another jx for the same conduct.
   (b) In cxn with a matter pending before a tribunal, the rules of the jx in which the jx sits should apply their disciplinary conduct rules. And for any other conduct, the rules of the jx in which the lawyer's conduct occurred. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jx in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

b. International Dispute Resolution

i. Litigation in the US or Abroad

1. Generally
   a. The issue: if you put yourself in the mindset of American lawyer rather than foreign lawyer—what is unusual
   b. The American system has changed over 20-30 years—so much less π friendly bc of pleading of the facts
      i. US system is in many ways not the US system of 20 years ago
      ii. Reality: outrageous damages—a lot less prevalent today.

2. Table

American Lawyer Unusual	Foreign lawyer unusual
-in many countries, judicial exams to become lawyers -backlog in US—could be more in other countries -most of the rest of the world sees our pleading standard as unusual—other places: must present more evidence during pleading. -damages are higher in US than elsewhere bc we have class actions, punitives, and contingency fees. -even if you lose a case in US—don't have to pay other sides legal fees -advantages of US: more level playing field	-sometimes jury in civil case -US judges—not career civil lawyers -in US: discovery by parties—other places—discovery by the courts

ii. International Jurisdiction in US Courts

1. Generally:
    a. Specific jx over a Δ: when a court exercises jx w/ respect to claims arising out of a Δ's contacts w/ the forum
    b. General jx: residence or domicile will allow a court to exercise jx over Δ
    c. Doing international business jx—controversial: general jx based upon the Δ's continuous and systematic contacts with the forum
    d. Other countries' disapproval obviously does not prevent a US court from relying on a particular basis of jx, but it can affect the enforceability of the court's judgment abroad.
    e. NY says—if large cases above $1 million—and parties choose to hear it—then they don't need contacts w/ the state to come there to hear it.
    f. FL by contrast—K needs to have substantial or reasonable contacts with the state

2. Case: M/S Bremen v. Zapata (SC 1972)
    Facts: Z (US) K'ed w/ U (German) to tow Z's ocean drilling rig from Louisiana to Italy. K: "Any dispute must be treated before London Court of Justice." Z ignored K and commenced suit in admiralty in the US DC in Tampa
    Held: (pro K freedom) forum selection clauses are accepted prima facie unless shown "unreasonable"— not about if "contrary to public policy" like COA said

.

3. Carnival Cruise Lines
    Facts: elderly couple buy tix for cruise to arbitrate in FL
    Held: forum selection for people who didn't negotiate the clauses ok—expansion of Zapata

iii. Enforcement of judgments internationally

1. Generally:
    a. You could technically have won a judgment + it can be difficult to enforce
    b. Most πs are concerned in both winning a judgment and enforcing it against Δ
    c. The Full Faith and Credit Clause stops at the water's edge

2. Uniform Foreign Money—Judgment Recognitions Act
    a. Generally:
        i. Majority of US states have adopted this state. Section 3 is important
    b. Section 3
        i. (a) A foreign judgment must be recognized and is conclusive bw the parties to the extent that it grants or denies recovery of a sum of money unless
            1. The judgment was rendered under a system which does not provide impartial tribunals in conformity with Due Process,
            2. The foreign court did not have personal jx
            3. The foreign court did not have subject matter jx
            4. The Δ did not receive notice of proceedings to defend
            5. The judgment was obtained by fraud
            6. The cause of action is repugnant to public policy of state
            7. Judgment conflicts with another final judgment

3. Analysis:
    a. (1) Is there at treaty bw US and that jx that provides for reciprocal enforcement of one another's court judgments?

b. (2) If no treaty, what does local law of the jx where enforcement is sought say?

4. Clauses/Conventions
    a. Domestically: Full Faith and Credit Clause
        i. Basically makes one state's judgment enforceable in another state's jx
            1. Problem: internationally we don't have a Full Faith and credit clause—and a person has moved assets internationally
            2. So by in large, whether court will enforce that judgment will rest on the law *of that court*
        ii. If someone has a judgment against someone in Italy and they want to enforce in CA—it depends on state law.
            1. We *could* have a treaty w/ a country where we agree to honor and enforce each other's judgments, but we don't have that in the US
    b. Hague Convention on Agreement:
        i. US not signatory—if you choose a court in your transaction, other courts have to enforce that decision
    c. Brussels Convention (EU)
        i. Intra-EU Full Faith and Credit Clause
    d. Barring all these conventions, you have to depend on **local** law
        i. I.e. Under German law, has foreign court properly come to this decision? Given proper notice? Consistent w/ prior German cases? Reciprocity? (If we enforce Australian, will they enforce ours?
        ii. In US, whether a foreign judgment will be enforced depends on state law.
            1. In US states—consider (1) reciprocity and (2) public policy in deciding whether a foreign judgment will be enforced in a particular state
            2. In practice w/ reciprocity—we're similar to Germans.

.

iv. Procedural problems in international litigation

1. Service of Process
    a. **Generally**:
        i. Bc service of process is considered a judicial fxn in many countries, the use of private process servers (used in US) is often forbidden
        ii. Underlying controversy is that in the US our process rules are revolving around private service of process (that serve in civil suits)
            1. If you're a foreign company and your client is in the US and has been served by a private process server, argue improper service

    b. Hague Convention
        i. The Hague Service Convention is designed to shield other countries from methods they found objectionable in providing reliable means of service (US =member)
        ii. This convention—if you want to serve someone in a different country—you go to the central authority of each signatory country and they in turn serve the person using their national legal machinery to properly serve

c. Federal Rules of Civil Procedure

i. Generally, you'd rather go through the federal rules of civil procedure or private service company as a π rather than Hague Service Convention

1. As a Δ you'd rather them go through the Hague Service Convention in order to slow down litigation process

d. Case: Volkswagenwek Aktiengesellschaft v. Sclink (SC 1988)

Facts: π wanted to sue Volkswagen—π's lawyer says I can go through this convention and sue the parent company in Germany or sue sub in US

Held: under Illinois state law—SC said this was correct—this is determined by domestic state law—ok to serve sub as an involuntary agent for service of process as determined by ***state*** law

2. Discovery/Evidence

	US	Outside US
Parties	FRCP	FRCP Aeropatiale
Non-Parties	FRCP	???? (as far as we know—Hague Convention, unless American Citizen)

a. **Generally**:

i. Obtaining evidence poses challenges in the transnational context

ii. American lawyers are used to broader pre-trial discovery

1. Also discovery—usually managed by parties, judicial intervention is usually infrequent

a) Huge emphasis on oral presentation and language in US—not as much emphasis in other countries

b) This is important for our purposes bc different countries have diff. views re: evidence.

2. Whereas, in other countries, judge is seen as having the responsibility for developing relevant facts and fretting out the truth from witnesses.

iii. Of course discovery abroad may be blocked bc of privilege rules.

b. Hague Evidence Convention

i. Requires each state-party to designate a Central Authority to receive "Letters of Request" from the judicial authorities of other state parties.

ii. If a witness doesn't appear voluntarily, the requested country is to use whatever compulsion available in domestic proceedings

iii. If you want to request one of these from the Hague Evidence convention—must draft, get judge to sign it, judge returns to attorney, attorney sends it to Dept of State then to Ministry of Foreign Affairs then Ministry of Justice.

1. Cumbersome process

c. Case: Societe Nationale Industrielle Aeropatiale v. US District Court

Facts: French plane crashes in Iowa and company when served w/ request for evidence – had to go through Hague Convention—πs lawyers want to use Fed Rules

Held: SC supported Hague Convention and said that it did not deprive DC of the jx it otherwise possessed to order foreign national party before it to produce evidence physically located w/in signatory nation. Fed rules okay

d. Implications of Aeropatiale

i. If you are dealing w/ a party to the litigation, then you can use the federal rules of civil procedure
ii. If you have a party in the US you can use the federal rules of civ pro
iii. Even if you don't have party in the US you can still use the federal rules of civil procedure.
iv. Essentially two parties against whom you may want evidence from:
(1) Parties
(2) Non-Parties)
v. The only place that you need to use Hague Convention—whenever you want evidence from a non-party outside the US
1. Exception 28 USC § 1728: if non party outside US – but is an American, then can subpoena American nations even if not parties to litigation.

3. Privilege/Evidence

a. **Generally**:

i. Δ lawyers are saying we cant turn over info bc its privileged
ii. Rogers case—ok to not produce evidence in that case

b. Case: Societe Internationale Pour Participations et Commerciales v. Rogers

Facts: US Discovery law: allows discovery—Swiss doesn't.
Held: wink wink nudge nudge: if they don't produce—you can draw unfavorable conclusions and unfavorable influences
1. Try having a trial w/o evidence and see how that goes.

c. Gathering Evidence in the US: § 1782

i. Generally:
1. Allows a US district court to order a person within its district to give testimony or produce documents for use in a proceeding in a foreign or international tribunal upon the application of any interested person.

ii. Case: Intel (2004)
Facts: over past 10, 15 years antitrust cases that US courts will not hear go to European courts. AMD is trying to get Intel to provide evidence 2 European Commission for Intel to reveal info
Held: Intel lawyer tried to get info that was not discoverable in European statute. DC has discretion. (This case: denied—but if arbitrational tribunal –change facts—some courts have said yes, and some have said no not discoverable)
a) Rests on several factors:
(1) If the witness is a party to the foreign proceeding
(2) Receptivity of the foreign tribunal to the evidence
(3) If the request appears to be an attempt to avoid foreign proof-gathering restrictions
(4) If the request is unduly burdensome

v. **Arbitration**

1. Generally:
    a. Falls under rubric of NY Convention
    b. Most international commercial disputes are resolved via arbitration bc they're much easier to enforce than decisions handed down by courts
    c. Advantages: set your own rules, confidentiality POV of parties, NY Convention protection, speedy, cheap, informal, neutral ground
    d. Disadvantages: very difficult to appeal award, expensive since many of these cities are expensive, public policy: very little precedent in IBT bc determined privately
    e. Historically: Hostility to arbitration clauses—
        i. But now: bigger acceptance

2. Preparing Arbitration Clauses
    a. Must have an understanding of the framework in which they operate
    b. Before: hostility by countries to arbitration bc of "*gun boat diplomacy*"—association w/ inter-governmental arbitration—fear that national policies might be circumvented by resort to private and confidential arbitration tribunals.

3. NY Convention
    a. **Introduction**
        i. Generally:
            1. Key treaty here, 150 countries have signed on
            2. Articles II and V are key
            3. Underlying philosophy: enforcing agreements to arbitrate to many NY convention applicable, you have to have the award tried to be enforced in a country other than the one decided in
            4. Exception: you can try to get award enforced in a country where decision was made if events that gave ride to award were "non-domestic" – Toys R US case.

        ii. Obligations of NY Convention
            1. Enforce agreements to arbitrate
            2. Recognize awards under such agreements and enforce them by proceedings not substantially more burdensome than those applicable to domestic awards.

    b. Article II
        i. To get out of an arbitration, article II may help you if court finds
            (1) The subject matter is not resolvable by arbitration
            (2) Agreement is null and void, inoperative, or incapable of being performed
                a) (all of these words are subject to broad or narrow interpretation).

        ii. Today, Article II and Article V are both interpreted very narrowly
            1. These are the arguments that Justice Stevens makes in the dissent of Mitsubishi
                a) Vague concerns for international implications, comity
                b) If you look to Article II §3- no obligation if agreement is null and void, inoperative or capable of being performed

c. Article V

i. Is also interpreted narrowly—looking to see whether procedure has been sufficiently followed
ii. Is about enforcing award
iii. Section (2): "**ordre public**": public policy—we will refuse to enforce award if it conflicts w/ public policy of national law
    1. So a matter of domestic national Law
iv. **POLICY**: bc we want to keep commerce a party dealing w/ commercial parties, convention allows room, but we interpret narrowly

4. Federal Arbitration Act
    a. In US—is legislation
        i. Federal courts can order arbitration as specified in the agreement even if the place agreed upon is outside of the US.
    b. In terms of review of arbitration under NY Convention, Congress has put power of review in the Federal courts
    c. Enforcement of awards under NY Convention—relates to public/commercial parties—not private parties.

5. Mitsubishi v. Soler (SC 1985)

    Facts: Dispute bw Mistubishi (Japanese) and Soler Plymouth. Arbitration agreement that all disputes shall be settled in Japan w/ rules of Japan Commercial Arbitration Association. S says under Art V award from Japanese arbitration would offend Sherman Antitrust Act—public policy: antitrust is not arbitrable
    Held: must artbitrate bc of intl comity, respect for foreign and intl tribunals—Public Policy argument not enough- if real problem—it will be caught at enforcement stage.

6. Yusef v. Toys R US

    Facts: TRS (Hong Kong) and petitioner (privately owned Kuwaiti business) entered into a supply agreement. TRU then contracted w/ another Corp for same thing. Goes to arbitration in US under NY Convention bc agreement was made w/in a legal framework other than the US—so non-domestic
    Held: Not setting aside the award to Yusef Article V Convention exceptions are exclusive—bc convention is pro-enforcement, narrow interpretation, not going beyond that.
        i. Under Article V can we apply "manifest disregard" standard to a non-domestic award rendered in the US?
            1. (a) you can apply the standard here. NY Convention says set aside by competent national authority and FAA is national procedure and it recognizes room for judicial review
                a) Ok to have non domestic award reviewed by domestic law of the state
            2. (b) but manifest disregard – rather the error must have been obvious and capable of being readily and instantly perceived by the average person qualifies to serve as an arbitrator

II. Introduction to Transnational Law

a. <u>Sketch of Transnational Law (Overview)</u>

i. **Generally**

1. International Business transactions occur w/in a web of national and intl legal frameworks
2. Intl law penetrates and influences national systems in a variety of ways—while national laws shape international law
    a. Article I of Constitution gives Congress power to define and punish offenses against the "law of nations" while the Alien Torts Statute gives the federal district courts jx over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US.
3. ICJ Article 38 defines "international law"
    a. Definition
        i. Law that governs relations bw various nations—yet today, many of the parties aren't nations. But ICJ—only nations are parties (more traditional)

b. 4 sources of international law

i. Most important—harder law

<u>(1) Treaties</u>

a) Treaties can be bilateral or multilateral and they are agreements bw two or more countries that are agreements made w/ the concurrence of 2/3 of the senate.
b) Can be bilateral and multilateral
    i. Bilateral Treaties now give standing to investors to sue the nations
    ii. Before—no private right of action against act of sovereign
    iii. Today, problem resolved w/ bilateral and multilateral agreements requiring arbitration in these treaties—or include Hall Doctrine
    iv. Custom for Expropriation is basically now Hall Doctrine.
c) Looking towards systems of different nations

<u>(2) International Custom</u>

a) Results from general and consistent practice of states followed by them from a sense of legal obligation
b) Arises from actions that are consistent from practices of the countries—and must arise from obligation and duty
c) Unwritten—(customs)—although much has been written about them

ii. Less important—fuzzier law

<u>(3) General Principles of Law in Civilized Nations</u>

a) Lots of debate about what it means to be a generally accepted principle
b) Unlike treaty and custom—arise from practice of states individually
c) Lots of questions re: what constitutes civilized nations

(4) Judicial Opinions and Publicists

a) Unlike treaty and custom—arise from practice of states individually
b) Looking to what national courts are doing as an indicator of international law
c) What academics, publicists are saying about international law.

ii. Private International Law

1. Generally:
    a. Usually when we talk about international law (four sources) mentioned about—we're talking about public international law
    b. Private international law outside the US – means rules to decide private disputes having one or more jx—usually conflicts of law
        i. In US, private international law means laws that govern laws across nations

2. Traditional Private International Law: Divided into 3 parts:

(1) It deals with the Q of when a court can take jx over a foreign party or property
(2) It deals with the extent to which the judgment of a court in Country A is entitled to recognition or enforcement of courts of Country B
(3) It deals with the choice of law question—which rules should be applies

iii. Transnational Process

1. Transnational law:
    a. Incorporates all of this—is sort of the umbrella law that regulates actions events that transcend national frontiers (includes domestic law)
    b. International law is sometimes applied directly as a rule of decision to decide cases in US Courts
    c. Under Article VI of the constitution, federal courts jx may extent to cases arising under treaties
        i. Treaties: "Supremacy Clause" – Supreme law of the land

(1) How Domestic law can affect international law

d. When US doesn't want to sign onto international treaty

(2) How international law can affect national law

e. When treaties are supreme law of the land—article III of the Constitution (international law part o our law)
    i. Case: Paquete Habana (1900)

Facts: Custom of the US not seizing Mexican vessels was in force
Held: Treaty we've signed on to has a recognized custom—we must follow

iv. Charming Betsy Presumption

1. Generally:
    a. If unclear/ambiguous: Charming Betsy Presumption
        i. We must try to interpret our laws so they don't violate international law (unless absolutely necessary)
    b. If US law is in direct conflict w/ international law
        i. "**Last time in rule**" – whichever one comes later in time (international law/treaty/custom v. federal law)
            1. Supersedes the other (only international and federal law—doesn't apply to state law)
            2. Pass law that contradicts it?

a) Reconciled: can do this domestically.

2. Case: Lauritzen v. Larsen:
   Held: about interpreting statutes in a way that does not run afoul of international law

b. Customary International Law

i. **Generally**

1. 2 Elements of Customary International Law:
   (1) General Practice
   (2) Acceptance of the law
   (*Actually has to be a firm legal obligation and not out of a sense of convenience*)

ii. **Expropriation**

1. Generally:
   a. One example of custom—very complicated
      i. What should a country pay an investor to come and take their goods, etc.
      ii. Custom in developed world—Hall Doctrine—prompt, adequate, effective—we expect full market values—not custom to nationalize investment in developed world
         1. More accepted in developing countries, esp in former colonies
   b. Customary International Law concerning expropriation of foreign investments is central to international business lawyers
      i. These rules were particularly important during 20th century
      ii. Permanent court of International Justice said that expropriations required the payment of fair compensation

2. Custom on Expropriation: it's a mess
   a. One Hand: improper—at least FMV (Hall Doctrine)
   b. Other Hand: 1962/1974 UN Resolutions—"appropriate compensation w/ accordance w/ international law or settled under domestic law of the nationalists as state"-- problem: investors will either decline to invest in a country or will do so only if they can count on a high rate of return to counterbalance risk.

iii. Act of State Doctrine

1. Case: Banco National de Cuba v. Sabbatino (SC 1994)
   Facts: US company K'ed to buy sugar from Cuban sub (CAV). Castro comes to power expropriates CAV. US comp now enters into new K to buy sugar from Cuban govt. US then pays Cuban govt. CAV says wtf. Cuban govt says non-justiciable act and cannot be questioned.
   Issue: (Harlan): Courts of one country will generally not question acts of foreign state—but what if exec branch says it's a violation of intl law or etc?
   Reasoning: In these cases, courts have authority to give guidance through District Courts to develop intl law. –
   Held: (1) Look to see whether government is recognized by our country. It is an act of when (our courts cannot deal with it if): (a) domestic act within their own country or (b) if treaty (or if contrary to intl law)—saying this is more a political Q
   Dissent: (White): Send it to State Department and let them tell us what to do

2. Berstein Exception
   a. If Executive branch has said waive act of state doctrine (i.e. Secretary of State says waive it)—should courts do it?

i. Answer: We don't know
ii. Basically, Bernstein exception allows the Executive to intercede in Act of State cases when it determines that adjudication would not harm US foreign relations

b. Banco Nacional—3 judge plurality
c. Some courts will try to use it, others will not

3. Expropriating Act when Commercial in Nature
   a. Commercial Acts exception
   b. (Nuance bw commercial and political acts of a state)

4. Hickenlooper Amendments (Congress)
   a. 2nd amendment:
      i. Comes as a directive from legislature—no US court can decline to make a ruling on expropriation bc of federal act of state on the merits
         1. So there's a limited interpretation of Congress' Amdnemdnt
      ii. So Congress says—don't apply act of state
      iii. And now its an open question
   b. All we know is that the Harlan language re: 1) in domestic state and 2) no treaty is still valid

5. Case: Kirpatrick v. Environmental Tectonics Corp

   Held: Scalia said that this is the act of companies and not foreign govts. The validity of no foreign governmental act is at issue here. The act of state doctrine merely requires acts of foreign sovereigns are deemed valid in their countries—but here its not applicable—bc validity of no foreign government is at issue

6. Case: Banco Nacional de Cuba v. Chase Manhattan Bank

   Facts: Lawsuit by Cuban bank against Chase Manhattan-- $10 million Cuban money on deposits and the money has been taken. Chase lawyer says we don't dispute it, but we just want the money that you expropriated to all these other places in Cuba

   Held: Court says they can hear it bc issue: standard of compensation
      i. US perspective: prompt, adequate, effective
      ii. Full compensation or appropriate compensation
         1. Appropriate compensation can be full compensation—overlap

c. Law of Treaties

i. **Generally**

1. Private lawyers
   a. More likely to deal with treaty law than with customary rules
   b. Treaty—allows rules to be generated to keep up with complex economic activity

2. Treaty v. Executive agreements
   a. Treaty—Article II §2
      i. Generally
         1. Treaties: closest domestic analogy to a treaty: statute or K
         2. Article VI: treaties like statutes shall be the supreme law of the land and judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

3. Complicated w/ treaties: no intl. legislative bodies who can write these statutes w/ exception of European Parliament)
4. Problems of statute/k interpretation exist w/ treaty interpretation
    a) Interpretation of a Treaty:
        (1) Text of a treaty (but is malleable)
        (2) Legislative history (floor debated committee reports, what sponsors said—for statutes)—for treaties—**travaux preparatoires**—examining records of negotiations
        (3) Purpose/Spirit of the treaty: intent behind it (Scalia—says this is too fuzzy)

ii. Two Kinds of Treaties

(1) Self-Executing

a) Valid law, private party can rely without implementing legislation (less controversial ones)

(2) Non Self-Executing

a) More common, non self-executing treaties—needs implementing legislation for a private party to rely on—problems: what if implementing legislation has extra factors for us to rely on

b. Executive Agreements

i. Some questions can only be dealt with by President + not private lawyers

ii. Two kinds of Executive Agreements

(1) Legislative Executive Agreement

a) Congress authorizes President (majority of house and Senate) to enter into agreement or approves his acts

(Think NAFTA and GATT)
(Argument that GATT & NAFTA are not legal entities bc were not properly passed)

(2) Sole Executive Agreement

a) The President acts on the basis of powers given that office directly by the Constitution—usually commander in chief powers.

ii. Sumitomo Shoji America v. Avagliano

Facts: π employees of Δ company (US corp—sub of Japanese corp)—and bring class action alleging Title VII violation of Civil Rights Act bc Δ corp only seemed to hire Japanese males for exec positions. Δ claims—its ok under our Treaty bc intent was to cover subs regardless of place of incorporation

Held: American corporate law focuses on locus of incorporation, so sub is US and is subject to The statute —(Justices missed "later in time principle"—to support their argument—they could have said Civil rights statute came after the treaty therefore it applies)

d. Extraterritorial Application of National Law

i. Introduction

1. Generally
    a. Nations are often legitimately concerned with conduct outside their borders and they may wish to regulate certain conduct—through nationals abroad.
    b. Congress sometimes states explicitly that a statute applies to conduct outside the US, but more frequently it *does not* and so when its up to the courts to decide whether or not they will apply it—usually there's a *presumption against extraterritoriality*.
        i. Sometimes they apply Charming Betsy Presumption where a statute should be construed so it doesn't violate international law.
    c. The first and foremost presumption imposed by international law today is that it may not exercise its power in any form in the territory of another state (unless otherwise stated)
        i. The jx of a nation to apply its law to activities or persons, (*Lotus)* is known as "legislative jx" or "jx to prescribe"

2. Fundamental Problem
    a. Superimposing cross border transactions among national law
    b. If we have international antitrust—we wouldn't worry—but problem: we don't have robust international law in these areas
    c. **Problem**: Can these national laws be applied extraterritorially?

    d. **Related factor**: since extraterritoriality is so complex many of the US laws are confused in their application
    e. **Presumption**: countries have not agreed on whether a certain body of law applies or its not possible to delegate the law ex ante.
    f. **Charming Betsy Presumption**: Easier said than done
    g. **Can specify**: a forum, a law, an arbitration
        i. When public enforcement mechanism for law (like antitrust) → cannot specify if it applies

ii. Standard: Lotus Case

1. Standard

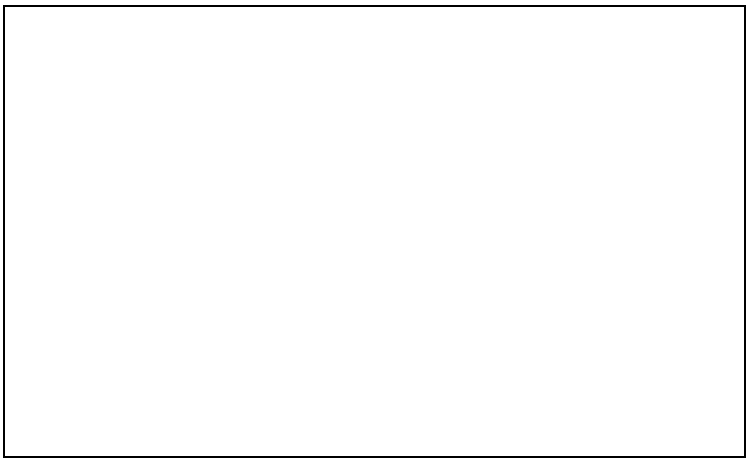
2 part test for extraterritoriality	
(1) If **conduct** within territory **AND**	(2) Some **effect** in territory that we **can** exercise jx (extraterritorial jx on nationals outside country)

2. Case: Lotus (1927)

    Facts: French ship collides w/ Turkish ship. It docks in Istanbul. Turks file involuntary manslaughter charges against French officer on watch. French protect largely bc crime didn't occur on Turkish territory.
    Held: If the act happens in one state, as long as one of the crucial elements of the offense, especially its effects, then you can apply the foreign state's laws
        i. Today: A state can interpret its law as committed w/in its national territory if:
            (1) if one of the constituent element of the offense (conduct) and

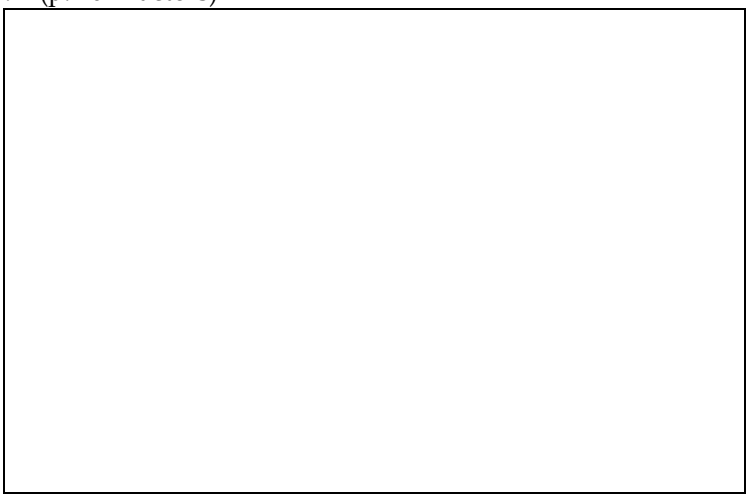
(2) especially its effects have taken place there.

3. Restatement § 402 and 403
   - **a. Restatement § 402:**
     - i. Conduct and effect test—just phrased more modernly.
   - **b. Restatement § 403:**
     - i. Even if have one of the bases of 403, if its unreasonable, then no jx.
     - ii. Multi-factor balancing test: P. 97
       1. Query as to whether its actually adding anything – so in extraterritoriality—we have not gone farther than conduct + effects.



iii. Example: Anti-Discrimination

1. Generally/historically
   - a. Congress amended the statute –Title VII antidiscrimination statute—to make it apply to American employers overseas after Aramco
     - i. Normally look to principal place of incorporation—but there are some factors that could make a non-US company seen as US Citizens
       1. (p. 107 Factors)



   - b. **Policy**

(1) Who's an American Employer?
(2) Are we screwing over companies in terms of how competitive they are? (Rehnquist)

2. Case: Equal Employment Opportunity Commission v. Aramco

Facts: US citizen hired by Aramco sub to work in Houston. Later transferred to Saudi. Discharged bc of his race, religion, national origin. Δ argued we're outside the US you cant exercise jx

a. **Held**: (Rehnquist): Legislation applies w/in US—presumption *against* extraterritoriality
    i. Can overcome this: affirmative, clear language of statute to apply extraterritorially.
    ii. **POLICY**: Rehnquist presumes statutes should not apply extraterritorially bc of international comity—bc rest of the world will be upset—but doesn't tell us why.

3. Mahoney Case

Generally:

i. Example of problems you run into when applying extraterritoriality
ii. Went

Facts: RFE/RL DE corp w/ principal place of business in Munich. There are collective bargaining agreement w/ unions and one provision: employees must retire at 65. Congress amended the Age Discrimination in Employment Act to have extraterritorial reach two years later. Works Council said okay Americans can work past 65. 2 πs are terminated at 65. They file suit.

Held: for Δ: when a company fails to comply w/ labor K it violates the law.

iv. Example: Antitrust

1. Introduction

a. Our interest:

i. Intersection of antitrust and extraterritoriality and intl business txns

b. 2 fundamental parts of the statute

Section 1: provision that outlaws collusion (when to prevent cartels)

1. Give lots of credit here in the US

Section 2: provision that tries to limit and stop monopolies

2. US lax in applying § 2.

c. Standard/Test

Antitrust Extraterritorial Test	
(1) **conduct**—part of conduct occuring in the US (how much conduct occurred in US) **AND/OR**	(2) Effects—what effect did it have on the law

2. Case: Hartford Fire Insurance Co. v. California

Facts: 19 states and private πs allege that domestic and foreign insurers conspired in violation of § 1 of Sherman Act to restrict coverage of commercial general liability insurance, which was meant to affect the market for insurance in the US

Reasoning: Court thinks that this is not stating a conflict bc no conflict exists where a person subject to regulation by two states *can coply with laws of both.*

i. Whether there is enough interest for the US to be interested in this case—so Souter is applying effects part of extraterritoriality test.

Held: There is no conflict where a person subject to regulation by two states can comply with the laws of both. (Really looking at the effects test

of extraterritoriality— place of implementation of conduct is what really matters)
Dissent: (Scalia) Start w/ presumption that our laws will not be applied extraterritoriality. Charming Betsy: cant use US law if another possible construction

ii. Intellectual split, but law of the land is the majority

3. Majority Analysis from Hartford Fire
   (1) Have we passed the effects test? (If yes→ question 2)
   (2) Is there a conflict between US and British law?
   (3) Can the corporation comply with law of both countries? (if yes→ no conflict)

4. Case: Wood Pulp
   Facts: In this case, the ECJ upheld the authority of the Commission to impose fines under Article 81 on foreign wood pulp producers who had agreed on prices to be charged to buyers in the European community
   Take-away: Just like the US struggles about whether to apply their laws extraterritorially, other countries do too, especially in Europe w/ sophisticated antirust systems as well
   Wood Pulp Test: (1) Conduct and (2) Implementation thereof (effects)—
   i. Place where it is implemented—decisive factor—arguably same as US
   ii. Principle of non-interference: similar to Souter and international comity

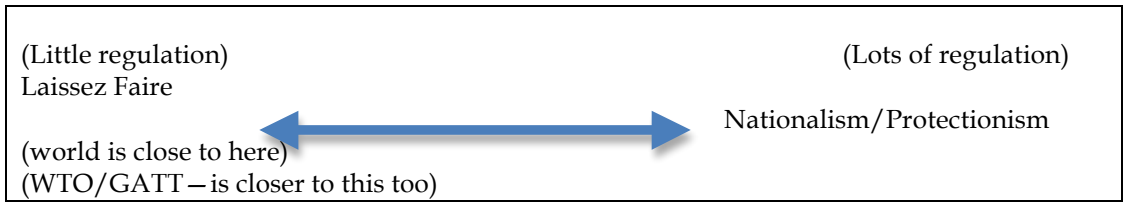
5. Case: Empagran (SC 2004)
   Facts: Re: interpretation of FTIA statute—πs claim there's a vitamin conspiracy—who were foreign purchasers of vitamins for delivery outside the US
   Held: Sherman act is not applicable to commerce regarding import of goods. No domestic effects here (US does not want to be a venue for foreign purchasers who have foreign delivery)
   i. US is moving towards saying RST §403 sucks (like Scalia's Dissent in Hartford Fire)—so this is the latest relevant pronouncement from US SC

III. World Economic Environment: WTO, GATT, IMF

a. Introduction: Models for Trade Regulation

i. Basic Competing Models:

(1) Free Market Economies—very little regulation (laissez-faire)
(2) Foreign Trade Politics—more protection/less wealth
(3) International Models



b. International Trade System

i. GATT

1. Overview
   a. GATT: the foundational document for our world trade system (product of WWII)

Article	Provision
Preamble	"Directed 2 the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce"
Article I	Trying to steer protectionist measures towards *tariffs*.
Article VII	Levies and Taxes: must value goods in a reasonable way
Article XI	No longer can put limits on how many items can come in through other countries
Article XII	However, if *balance of payment* issues (i.e. not enough foreign currency), you *can* put in quotas—but must consult with other countries
Article XVIII	can offer lower tariffs for developing countries (useless though)
Article XIV	(*give w/ one hand take w/ the other provision*) If you have a legitimate purpose to place a tariff then go ahead and do it—"escape clause" if unforeseen developments or if serious injury to domestic producers—you can have higher restrictions
Article XX	General exceptions (when you're allowed to deviate) - So for lawyer who wants to deviate: look to XX first then XIV
Article XXIII	Dispute Resolution: informal contact/resolution—if that doesn't work, then there are more formal mechanisms (sophisticated)
Article XXIV	Allows Customs unions and Free Trade Areas to not abide by GATT -This exception is almost becoming the rules—CU/FTA cannot have any duties and regulations that are more restrictive than GATT, but can be more free than GATT (i.e. EU: CU, NAFTA: FTA)
Article XXV	Need 2/3 majority to waive GATT obligation
Article XXVII	Negotiations are in 3 year intervals—can modify tariffs whenever they like, but if within 2 years, other countries will retaliate
Article XXX	2/3 supermajority exception: if you want to make ANY change w/ Article I (tariffs) you need 100% of people to vote—for the rest: 2/3 majority

2. Negotiations
    a. **Early years of GATT**:
        i. Were about lowering tariffs

    b. **Kennedy Round, Japan Round 60s, 70s, 80s**:
        i. Became more sophisticated—talking about non-tariff measures, government procurement

    c. Uruguay Round (1994)
        i. High point of optimism for several reasons:
            1. For the first time, a physical word trade organization headquartered in Geneva which led the GATT
            2. Countries sent ambassadors to GATT—had different councils
            3. Agreements on services (not just trade)- freer trade on services
                a) US wanted this bc we run a surplus on services and a deficit on goods
            4. Agreement on TRIMS (trade related investment measures)
            5. TRIPS: agreement on IP
                a) Set trade related aspects of IP—to encourage notion of harmonization w/ regards to IP
                    i. Problem: Developing world says: we accepted the *imposition* of IP and services agreement, we want in return lower tariffs on textiles (less controversial) and lower tariffs on agriculture—in exchange for giving up on these areas—it was an understanding that there would be concessions—but they haven't happened
                    ii. Huge reason why GATT is stuck—also increasingly vocal protests—so now meetings are in remote locations where no one can go

3. Dispute Settlements
    a. **Generally**:
        i. Issue: I could have a treaty, but if no enforcement—what good is it?
        ii. Uruguay Round: adopts a Dispute Resolution Provision
            1. If you have a dispute you can refer it to a panel's report, the panel's decision is adopted
                a) Unless the winning party wants to change sides, then the winning side wins
                    i. [In the past: we used to have a virtually identical process: you could just object and the panel would not be applicable—now there's nothing you can do unless winning side votes against themselves.]
                    ii. [Effect today: you can appeal or not, but decision of panel +appellate body is considered final, unless consensus against it—winning party against itself]

        iii. Effect of this:
            1. As a matter of domestic law: no binding precedential value on domestic court

2. However, if offending country fails to abide by decision or change its behavior, then injured party can suspend trade obligations
3. Caseload has gone up bc before 1994, you just objected- now more bite

b. **Case: Shrimp Turtle**

Facts: US had domestic statute re: protection of endangered sea turtles, which get caught in commercial fishing fleets out to catch shrimp. US required other countries to use exclusion devices for sea turtles. SEA countries saw this as a violation of GATT/WTO. US Argued Article XX, SEA argues Article XI
Held: US loses bc of "chapeau" language—"chapeau of the statute"
Analysis:

(1) Article XX—(exceptions)
US has shown sea turtles are an exhaustible natural resource
(2) Is it Discriminatory:
Yes
(3) Is a disguised restriction on international trade?
Yes- bc absolute ban, no effort by US to engage in multilateral negotiations, do this through intl treaty, not unilateral legislation.

ii. Customs Unions/Free Trade Agreements

1. Regional Trade Agreements
   a. **Generally**:
      i. Regional Trade Agreements (RTA) are prima facie *contrary* to GATT
         1. Article XXIV tries to fix this by allowing RTA's w/ conditions
            a) Chief condition: duties and regulations on commerce imposed by RTA should not be higher or more restrictive than those that existed prior to its creation

b. Advantages of Regional Trade Agreements

i. May be quicker and easier to negotiate—fewer countries: could use a RTA as a laboratory for bigger wide scale policies
ii. A small number of like minded countries may be able to achieve greater trade liberalization than the WTO can achieve
iii. RTAs can also provide a testing ground for issues like competition, environment, investment, and labor on which no broad consensus exists
iv. It has been a mechanism to move things forward—esp since Doha failed

c. Disadvantages of Regional Trade Agreements

i. Primary effect of RTAs: distorts trade by shifting imports from more efficient producers outside RTA to less efficient producers w/in it
ii. RTAs undercut bargaining position of developing countries—which are more powerful negotiating as a block in WTO than in 1-on-1 negotiations w/ large developed countries like the US.
iii. The more RTAs get formed—the less WTO/GATT moves forward
iv. RTAs undermine WTO system

1. In principle—deviating from Most Favored Nation Rule

2. Customs Union
    a. Customs Unions (CU) involve the unification of its members duties and other restrictions w/ respect to non members—setting up a low-tariff or no tariff zone w/ respect to non members
        i. I.e. EU—has lawmaking institutions

3. Free Trade Agreement
    a. Whereas Free Trade areas each retain their own separate duties + restrictions w/ respect to outsiders, zone of low or no tariffs among themselves—but each of the members is allowed to pursue their own policies vis-à-vis the rest of the world
        i. I.e. NAFTA (has panels to deal w/ investor claims but no lawmaking institutions), CAFTA (central America), MERCOSUR (South America), ASEAN (Asia).

4. Common Notion CU/FTA
    a. They intellectually and philosophically run parallel to GATT bc they are regional agreements that are more free trade than GATT

iii. GATT and Developing Countries

1. How Developing Countries see GATT
    a. GATT/WTO: rich man's club serving needs of developed world
    b. Benefits from MFN rule are marginal—bc they're generally not in a position to compete for export markets in the manufactures or semi-finished products
    c. GATT perpetuates reliance on developed world for manufactures

2. Provisions Within GATT to Help Developing Countries
    a. Article XVII
        i. Gives countries authority to deviate from the GATT's general rules to implement programs and politics to raise standard of living or to place measures affecting their imports as long as they facilitate attainment of GATT objectives—policy of "*protecting infant industries*."

    b. UN Conference on Trade and Development (UNCTAD 1964)
        i. New forum for developing countries to voice concerns
        ii. GATT members want concessions and response from developed world re: agriculture

    c. Preferential Access to Other Markets for Products
        i. Article I of GATT grandfathered trade preference bw countries that had shared common sovereignty before WWII, allowing countries like Britain and France and Spain to continue preferences for their former colonies

3. WTO and Developed Countries
    a. All WTO agreements now contain special provisions for developing countries, including longer time periods to implement commitments, etc.

iv. US Trade Law on Tariffs and Other Trade Barriers

1. Table of rates laid mandated by Congress
    a. 3 rates:
        i. General Rate
            1. GATT/MFN rule

2. (Your rate is generally determined by treaty or agreement)

ii. Special Rate

1. Rate that is more beneficial to developing countries—lower tariffs for them

iii. Column II Rate

1. Countries with whom we have political problems

2. Presidential Powers to Determine Rate

a. Smoot-Hawley Tariff Act (1930)

i. Basically gives President powers to adjust those rates

b. Section 301 of the Trade Act of 1974

i. Gives president power to respond by imposing unilateral sanctions to "unfair" foreign trade practices, discriminatory policies burdening US exports, or to unjustifiable restrictions on access to resources and supplies.
ii. EU challenged this in 1999, WTO found no violation
iii. These are the same powers that don't bide well w/ GATT
iv. Article 19: allows you to impose high tariffs to protect your industry if high injury
v. GATT: "unforeseen developments"
vi. Domestic statute: doesn't say that—so arguably too broad?

c. "Fast Track" Procedure

i. Legislative instrument in 1970s—
   1. Congress would decide w/in a certain number of days, bar floor amendment of submitted proposal, limit floor debate re: status of legislation—just vote up or down

d. Trade Promotion Authority

i. 2002: Congress gave Bush this authority to negotiate Doha Round. Expired in 2007. Has not been renewed.

c. International Monetary System

i. **Generally**

1. Today's world: we have currencies that are floating—can buy and sell freely w/o much restrictions—so very limited national controls
2. Structurally, Bretton Woods world is still with us
3. So the question is: is the structure that we have with the IMF still valid and even something we want?
4. Specify currency, exchange rate, what currency, date/time, place of payment—ex ante in K
5. Hedging a transaction: contracting to buy that currency at that price at a later date
   a. I.e. Southwest and Oil prices.

ii. Exchange Control Systems

1. Designed to protect the value of the country's currency and to preserve its foreign exchange reserves
2. It characteristically appoints a limited number or other instrumentalities as the only authorized agents for transaction in exchange
3. Thus an exporter is required to turn over to the bank any foreign currency it receives, along w/ documents showing that the amount surrendered is the amount actually received
4. Top priority: imports by govt agencies or vital necessity goods

5. You want to restrict so that domestics don't buy outside your country—you need money and revenue in your country and so you want to keep it in as much as you cant—trying to prevent capital flight.
6. Disadvantage: your money is not worth anything outside your country.
7. About fewer than 20 exchange control countries.

iii. International Monetary Fund

1. IMF Generally
    a. The institution that came out of Bretton Woods in 1944.
    b. So that countries maintain a proper balance of payments
    c. More towards a world that eliminates these restrictions
    d. We allow under Article 14: exchange control systems, although we try to move away from it
        i. Because at the time of Bretton Wood, many countries had fixed currencies
            a) Started w/ Nixon taking us off gold standard

2. Offers loans
    a. World Bank (US head) and IMF (Euro Head) both loan money—
        i. **IMF**
            1. Loans money to make sure countries' money situations don't go out of wack
            2. Short term loans to maintain balance of payment

        ii. World Bank
            1. A developing bank—usually to developing countries
            2. Longer time frame

3. IMF Relevance with Floating Currencies
    a. A huge question—that remains—esp when we look at Iceland
    b. Are they only loaning based on conditionality?
    c. Argument regarding poverty traps and IMF

IV. Corporate Actors in the Transnational Business Environment

a. Nationality of Corporations

i. **Generally**:

1. Corporations can be citizens of a state or foreign country for purposes of diversity jx (Article III) but not to claim "privileges and immunities" under Article IV of the Constitution
2. Nationality of a corp is important bc it determines the laws that govern and apply to it.
3. Nationality was important in *Sumitomo*
4. Basic law in the US: we rely on state of incorporation
    a. You can have exceptions:
        i. Many times courts will look to place of mgmt, headquarters

ii. Importance of Nationality of Corporations

1. Internal affairs rule
    a. Under the *internal affairs rule*, the rights and duties of a corporation's directors, managers and shareholders are determine by the law of its domicile
    b. US and UK: jx of incorporation

Pertinent factors:
(1) Nationality of shareholders (2) Nationality of directors (3) Nationality of employees (4) Nationality of the holders of debt obligations (5) Nationality of owners of patents or trademarks which the corporation is now licensed to use (6) Nation in which the industrial or commercial activities of the corporation are centered and (7) Nation which the corporation is most significantly identified

2. The rights of corp under intl law may depend upon its nationality
    a. Case: Barcelona Traction
    Held: ECJ held that only Canada had standing to bring a claim of expropriation on behalf of company incorporated in Canada and which had its office registered there—despite the fact that 88% of SHs were Beglian
    -The nationality of a corp may also determine whether it is entitled to claim rights under a treaty.

3. A corp may incur obligations under national law by reason of its nationality
    a. I.e. Corps organized under US law—subject to US taxation
        i. Foreign corps only taxed on US source income

4. Restrictions on a corporation's activities may be imposed bc of foreign nationality
    a. Section 310 of Communications Act:
        i. Foreign corps can't hold broadcast licenses.

iii. Nationality within the EU

1. Generally
    a. ECJ has also dealt with cases re: nationality of corporations
    b. EU wants to allow citizens to have flexibility to do business in member states
        i. Moving towards a pan-European economic model

2. Case: Centros LTD v. Erhvervs-og Selkabsstyrelsen, ECJ (1999)
   Facts: Danish nations incorporated Centros under UK law bc no minimum capitalization requirement whereas in Denmark $200,000. Denmark didn't allow them to register a branch in Denmark
   Reasoning: This is about formation of companies (falls w/in Treaty) and not rules re: carrying on of trades or businesses. Also, just bc someone wants least restrictive law is not an abuse of establishment.
   Held: (for Danish)—National measures that are allowed to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill 4 conditions:
      (1) Applied in a non-discriminatory manner, (2) must be justified by imperative requirements of general interest, (3) must be suitable for securing the attainment of the objective which they pursue, and (4) must not go beyond what is necessary in order to attain it.
3. Post Centros
   a. **Generally:**
      i. Movement towards more "Delaware of Europe"

   b. **Case: Daily Mail**
      Facts: British company wants to transfer management and residency to Netherlands to avoid British Taxes—about emigration.
      Held: ECJ held that the company had no right under the treaty to move its residence w/o UK's consent, emphasizing that companies exist only by virtue of their varying national legislation which determines their incorporation and functioning

   c. **Case: Uberseering**
      Held: As long as Uberseering was still recognized as a valid corp by the Netherlands, Germany was required under the EC Treaty to recognize it and allow it to bring suit

   d. **Case: Hughes Lasteyrie du Saillant v. Ministere de L'Economie**
      Held: France could not impose a tax to discourage an individual from changing his tax residence.

   e. **Case: Marks and Spencer**
      Held: Not only allowing them to deduct losses from domestic subsidiaries

   f. **Case: AG v. Amtsgericht Neuwied**
      Held: Required Germany to recognize the merger of a German company w/ a foreign one on the same basis as a merger bw two German corps

4. Societas Europaea (SE)
   a. **Generally**:
      i. Basically a company incrporated under the law of a member state may transform into an SE if it has had a subsidiary incorporated under the law of another member state for at least wto years
         1. Minimum capitalization: $100,000 euros
         2. When ambiguities: fall back to national law bc no robut European law yet
         3. This is the first super-national corporate law

b. **Advantages**:
    i. Makes mergers w/ other European companies easier
    ii. Allows companies to change their domiciles easier (avoid high tax jxs)
    iii. Forming largely bc you can avoid domestic (German) law requirements

b. Treatment of Foreign Corporations

i. Right to Sue

1. As a matter of legal evolution we allow states to recognize other states that have not been incorporated there—based on international comity, full faith and credit
2. Practical reality: if you are a foreign company and you want the state of CA to recognize you—through friendship, commerce and navigation
    a. France: only recognize a foreign corporation if treaty recognizes or court says its ok
    b. Form a sub or register your company as a foreign company—i.e. register as a DE corporation in CA
3. Each state will allow a foreign corporation to bring suit in its courts w/o complying w/ local requirements:
    a. However, if foreign corporation has been engaged in so many activities so as to be regarded as "doing business" w/in the state—but has not qualified—it may forfeit the right to sue
        i. Lesson: register your company

ii. Right to Do Business

1. Generally
    a. States have said that foreign corps can do business but they must meet certain requirements
        i. I.e. register as a foreign company, give some info, pay local taxes

2. Restrictions on Foreign Corps Right to do Business
    a. US law places certain limits on the activities of corporations that are considered "foreign" under various criteria
        i. I.e. Nuclear REgulatry Commission may not issue licenses for facilities that produce or use nuclear materials to any entity that is owned or controlled by an alien, foreign corp, or foreign government
        ii. I.e. US airlines must have at least 75% of their voting shares owned or controlled by US citizens and at least 2/3 of their managing officers be US citizens.

    b. Case: In re Application of Fox Television Stations (1995)
        Facts: Murdoch wanted to make a 4th network- but he's running an Australian company. Had to either (1) revise capital structure or (2) show how its ok pursuant to public interest
        Held: (1) reorganization as debt does not actually change anything, (2) public interest arguments are met: good faith understanding of statute, tax consequences on investors, Murdoch is an American citizen + had de facto control over the company

c. The Multinational Enterprise/ MNFTs

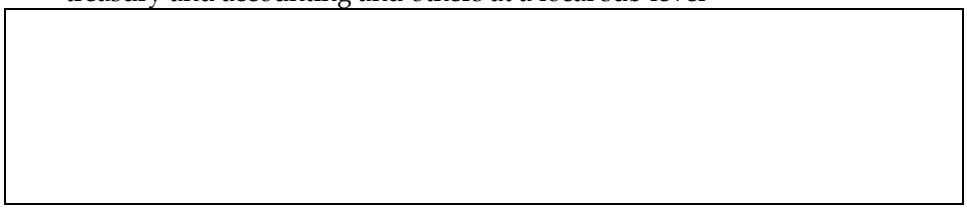
i. **Generally**:

1. An MNE is a structure made up of many entities—each organized under the laws of some nation→ they are creatures of national, not international law.
2. Arguably better called Transnational Corporation
3. We don't have multinational corporate law, we only have national laws
4. Tied together in ways meant to minimize liabilities, taxes, and costs

5. Controversial point: MNEs have been a focal point bw developed/developing nations—most of them are headquartered in developed world
6. 77,000 MNEs operate in the world today
7. 60% of intl. trade takes place inside MNEs

ii. Organization/Accounting

1. Organization
   a. Typically: Headquarter and series of subsidiaries
   b. Like a matrix: certain functions can be centralized in holding company: treasury and accounting and others at a local sub level



2. Accounting
   a. Companies keep 2 sets of accounting books
      (1) Tax accounting (done at national level)
      (2) Public accounting books (consolidated at holding company level)
      1. We allow consolidated statements—so little transparency
      2. Positive aspect: moving towards more international public accounting standards

iii. Limited Liability

1. Generally
   a. **Basic idea**:
      i. When there's any company—each has limited liability→ investors are not personally liable in tort or in K that the corporation may incur

   b. Piercing the Corporate Veil Test

   (1) **Unity of Ownership and Interest** (i.e. lack of corporate formalities)
   AND/ (or)
   (2) **Perpetuates Unfairness, Inequity, and Injustice**

2. Case: Union Carbide Corporation (Bhopal)
   Facts: Poisonous gas escaped a factory in Bhopal and 2000 people died. UC (US corp) says they have limited liability and you cant show unity of interest and ownership.
   Held: Here court made piercing the corporate veil test a "OR" test

iv. MNEs: Heroes or Villains

1. General Arguments
   a. Hero: efficiency, enable free trade, maximum production
   b. Villain: extractive, imperialistic, threat to sovereignty, national democracy.

2. Two methodologies:
   (1) **Voluntary codes of conduct**: can be industry specific or company specific
   (2) **Force of law being used**: some statute, custom, common law to go after these MNEs (i.e. ATS)

3. OECD Guidelines for MNEs (HQ: Paris)
   a. Concerns: Disingenuous, very empty: no real direction

b. Other side: it's a great starting point, so much of international law is custom

4. Case: Nike

Facts: Allegation under CA's Unfair Competition Law that Nike has unfair business practices that they were using sweatshops and lied about it

-Nike's lawyers—false information is protected under 1st amendment—Nike is involved in political speech re: labor conditions, so it doesn't necessarily have to be true. SC granted cert and then retracted its position

Held: Now it's a moot point—bc CA amended law where you have to allege actual damage/injury—our point—we have these types of laws—like CA—but prob can be successful

5. Alien Torts Statute

a. **Generally**:

i. Can try to bring/raise a claim under ATS

ii. US DC have jx over "any civil action on alien for tort committed in violation of law of nations or treaty of US"

1. "Law of nations" part is unclear

iii. Human rights have tried to latch on and bring human rights violations under this statute in the US

iv. Relevant here: can you use ATS to sue a MNE that you consider to be a villain and argue that they're acting in violation of law of nations and get recourse?

b. Case: Sosa (US SC)

i. If serious human rights abuse, then you have standing

1. Human rights abuse: definition unclear

ii. If back in late 18th century (when statute was created), we'd consider it to be a violation of the law of nations, then you will have standing

c. Case: Barclay's (2007)

Facts: claim brought against 50 corporate Δs under ATS. Barclays was aiding and abetting acitivties in apartheid South Africa via instruments of oppression. Barclays knew money was being used for these purposes. Department of State + South Africa want this dealt private in South Africa

Held: Remanded back down DC. (2-1)

1. Korman (1): does not see a link bw Barclays and govt of South Africa: dismiss bc of judicial imperialism
2. Hall + Karzman (2): arguing over how to define "accomplice liability":
    a) International standard versus
    b) Federal common law standard (Hall→ look to RST)

d. Case: Talisman Energy (2009)

i. Looks at Karzman case: and says "international standard" is correct

e. Case: Royal Dutch Petroleum (recent- in courts)

i. All of this is a waste of time bc its unclear that corporations could be "aliens" under ATS—currently asking for cert

6. Ways to Sanction MNEs:
    a. ATS
    b. Voluntary Recourse (OECD)
    c. Market

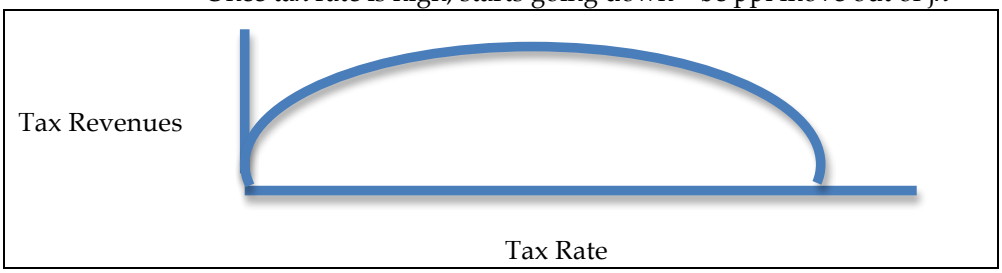
V. International Tax Environment

a. Introduction

i. **Generally**:

1. Basic idea here: Focus on basic 1st principles and ask the right qs of tax lawyers
2. Fundamental economic problem from govt POV:
    a. Balance bw imposing taxes in order to generate revenue and taxing too heavily and having them move out of the jx
3. **Laffer Curve** (about tax rates/revenues)

-Once tax rate is high, starts going down—bc ppl move out of jx



4. Fundamental economic problems for corporation POV:
    (1) Lower Taxes
    (2) Avoid being taxed twice

b. Bases for Income Taxation

i. **Generally**

1. Status:
    a. Presence/connection to a nation
    b. Most nations consider not citizenship, but residence, headquarters, domicile
        i. (With tax, US still likes citizenship)

2. Source
    a. Source of income
    b. Fallback→ source of your income is within our jx
    c. Relevant for non-resident aliens and foreign corporations
        i. I.e. in US: definition of "alien" is different in tax code than immigration
            1. If non-resident alien or foreign corp, only taxed on domestic source income
        ii. In various forms, the US has created incentives to encourage exports—through minimum export taxation
            1. Case: AP Green
                a) Held: title passes wherever it was made—so if foreign soil by definition then it's a sale made outside the US—so sales made outside the US

3. Systems countries can have:
    a. Global Systems:
        i. Some systems that are more unitary--- not taxed based on gradation—US and UK

    b. Schedular Systems
        i. Fine gradations bw different types of income (i.e. dividends v. earned income) i.e. Latin America

c. Usually:
- i. Combination of the two

d. Case: Cook v. Tait (SC 1924)

Facts: US citizen domiciled in Mexico—income earned only from Mexico
Held: Citizenship determines Taxation
POLICY: By being a US citizen they benefit from services that the US govt can offer—i.e. they should pay

e. Consequence of Cook v. Tait
- i. What if wealthy person w/ lots of money has effectively abandoned citizenship in order to not pay taxes?
  1. Congress passed *Benedict Arnold Tax*—to prevent them from coming to US—has been really ineffective
     a) I.e. Mark Rich

f. Section 911 of Tax Code
- i. Government index exempts you for first $84,000 of income that is earned overseas

g. Residence in the US
- i. Is a basis for "status"
- ii. Section 7701(b)—resident: must have at least spent 183 days of the year in the US (different than complex immigration laws)
- iii. Foreign countries use residence more than US does when determining status

h. **Inversion**
- i. US company (holding) and subsidiary is in foreign country and so you make US company foreign and subsidiary a US company
  1. You basically invert in order to avoid heavy taxes in US
  2. Bc US places so much emphasis on incorporation

i. Case: De Beers (1906)

Facts: Famous mining company registered in South Africa but most of board is in UK, meetings in UK, etc.
Held: where control and management is—is where the company residence—i.e. subject to British taxation
1. British have <u>broad</u> definition of corporation for taxation
2. Bright line US rule

ii. Abuses and Reactions

1. <u>Generally</u>:
   a. 2 ways US businesses w/ foreign operations reduce domestic tax burdens:
      (1) **Shift income derived into foreign subsidiaries**
      (2) **Establish a foreign corp** to conduct its manufacturing, thereby **eliminating all US taxation of foreign earnings until** dividend payments or liquidation—**repatriate**
      1. Normally never want to use a <u>branch</u> for liability reasons—bc u have to pay taxes on it—and no limited liability—foreign sub: LL
         a) Only want a branch when you're losing money—so you can deduct as losses
      2. <u>Tax advantage</u>: no US taxes until income earned is repatriated to US—like deferral on US taxation

a) So you want to go to a low tax jx like Switzerland to pay low Swiss tax rate until Congress gives 1 time tax break and then you repatriate

2. Transfer pricing
   a. **Generally**:
      i. Trick companies play with transfer pricing:
         1. Play games with the prices with which you sell semi finished goods so that you show high profit in low tax jxs and low profit in high tax jxs
      ii. So Internal Revenue Code 482:
         1. There needs to be pricing of internal transfers at an "**arm's length**" price- so you have arms length transactions
            a) I.e. if Laptop screen costs $100 it would be suspicious if your internal price was $10
      iii. So States: Single Formula:
         1. Case: Barclays Bank PLC (SC)

            Held: SC upheld CA's right to levy a tax so measured on the worldwide income of a British bank, finding that it did not violate the commerce clause of the Constitution. (not last word on the issue)
               i. CA wanted to tax Barclays based on its CA percentage of worldwide income

   b. Control Foreign Corporations
      i. Generally:
         1. Talking about rules insulating foreign source income of foreign subsidiaries by US citizens and corps from US taxation until repatriation.
         2. Here US: not obsessing over state of incorporation with CFCs and Tax

      ii. 2 arguments for revision of tax laws:
         1. **Neutrality**
            a) Existing "deferral" rules depart from norm of neutrality bw tax treatment of domestic and foreign investment by US Shareholders
            b) SHs investing abroad: more favorable position

         2. **Equality**
            a) Unfair to provide more advantageous rules for Americans investing abroad

      iii. Compromise: Internal Revenue Act of 1962
         1. Subpart F
            a) Treats all/part of undistributed income of certain corps as it if HAD been distributed to SHs and imposes a tax payable by SHs on the income

         2. CFCs generally:
            a) Foreign corp in which US SHs own more than 50% of voting power or more than 50% of stock's value—measured in 10% increment

3. **Effect of Subpart F:**
    a) Statute takes categories of foreign base income and treats them as "distributed"
    b) If you're a company and more than 70% of your income falls into CFC—fishy

4. **Foreign Base Income (FBC): Types of Fishy Income**
    a) Foreign personal holding company income
        i. **Passive income** (dividends, interest, license feeds, and rents) NOT derived from active conduct
        ii. POLICY: bc worried about setting up this corp to delay payment of US taxes

    b) Basic Idea:
        i. If you have a CFC—then we will treat certain % of your income **distributed** if more than 50%
        ii. Repatriation
        iii. Treating the income as Distributed to the US Shareholders—and therefore triggers tax liabilities immediately
        iv. Similar to De Beers case—here with CFC—US is NOT obsessing over state of incorporation

c. Accommodation Among National Tax Systems

i. **Generally**:
1. Problem of Double Taxation
    a. Problems of overlap or underlap occur bc nations use explicitly different principles as bases for income taxation
    b. So basic problem: avoid double taxation

ii. Unilateral Technique
1. Generally:
    a. Tax Credit:
        i. Allow to credit against taxed owed—i.e. I've paid X amount of taxes overseas and I'd like to count towards my taxes

    b. Exemption Approach:
        i. About $84,000—we would exempt the first $84,000 that someone has earned overseas

2. The Foreign Tax Credit
    a. **Generally**:
        i. You are taxed either at US rate or higher rate of taxation
            1. I.e. US citizen working and living in Sweden—get taxed at higher Swedish rate. But if living and working Switzerland, pay US rate (bc higher than Swiss)
                a) So you are limited to the amount you would have paid in the US

iii. Bilateral Technique
1. Generally:
    a. Sign a treaty w/ another country—usually source country gives up right to tax ppl of other country

2. Tax Treaties
    a. **Generally:**
        i. As of 2007, US is party to 58 income tax treaties covering 66 countries
        ii. 2006: US and Germany signed a protocol amending their 1989 treaty—now will tax US residents on German Source Income
            1. Problems arise re: definitions of "residence" and "permanent" establishment

    b. **Case: Johansson v. United States**
        Facts: Johansson (Swedish boxer who lives in Switzerland) fought Patterson 3x for heavyweight championship in NYC. He is the sole employee of Scannart—Swiss company. US wants to tax him. He says I'm a resident of Switzerland, my company is Swiss. Swiss govt says he's ours
        Held: in the US we look to "intention to remain" to determine residence—he had no intention in Switzerland—no legitimate business—sole employee
            1. **POLICY**: point of Swiss treaty—avoid double taxation—not protect wealthy stars—tax where services rendered—they're rendered here in the US

VI. Problem 1: Transnational Sales

a. Generally

i. Most problems:

1. Will involve the laws of the US and some other country, occasionally mediated by international law.
2. You have a foreign customer—they meet a new company—and they want to do business together—an invoice simply wont cut it
    a. Basic idea: Avoid problems we're about to talk about through drafting ex ante.

ii. Transnational Sales

1. Small and mid sized firms account for than a ½ of total merchandise exports from the US
2. Sometimes export activities can become unexpectedly complicated

b. Choice of Law and Choice of Forum: International Commercial Law

i. National Law

1. Modern law of sales is *national* law—in US : **state** law
2. Nearly every state in the US has adopted Article II of UCC
    a. UCC perfect tender rule: a buyer has the right to reject a shipment of goods if they fail in any way to conform to the K—must notify the seller of the rejection and must follow any reasonable instructions from the seller w/ respect to the goods
3. I.e. If Suez canal is terrorized:
    a. US law: commercial impracticability excuses duty
    b. China: impossibility
4. Battle of the forms:
    a. China—more strict than UCC
    b. UCC: Additional terms: if merchant part of K unless expressly limited

ii. Private International Law (Conflicts)

1. Conflicts of law: what rules to use to determine what to apply
    a. When a txn touches more than one jx, courts determine which law governs by using what Americans called conflict of laws rules and what the rest of the world calls private international law.
2. UCC: look for when txn bears a reasonable relation to the state
3. Chinese: closest connection to the K

iii. International Law

1. UN Convention on K for the International Sale of Goods (CISG)
    a. **Generally**
        i. Self executing treaty
        ii. Applies to Ks of sale of goods bw parties whose places of businesses are in different states (who are signatories to the convention) or if the conflicts rule leaves to states that have adopted CISG
        iii. CISG—doesn't deal w/ as controversial of issues as UCC
            1. Given that CISG applies and parties are signatories—you can end up under it without knowing
        iv. CISG allows exporters to avoid choice of law issues as the CISG offers accepted substantive rules on which contracting parties, courts, and arbitrators may rely.

b. Case: Asante-Technologies (CA)

i. Under CA law, CISG is applicable to Ks where contracting parties are from different countries that have adopted the CISG

ii. CA is under federal law, which is under CISG—so CISG is basically CA law under supremacy clause.

iv. Forms and Drafting in international Sales

1. Generally:
   a. To the extent you can when drafting—important to specify the law that applies
   b. As a shorthand to remove ambiguity—incorporate by reference—UCP—what expectation about line of credit is

2. Case: Filanto v. Chilewich

   Facts: Chilewich (NY) Ks w/ Filanto (Italian). C's agent Byerly madea K with R (Russian), which said arbitration, is in Russia. F sues C.
   Issue: does CISG apply?
   Held: Yes, CISG trumps local law when there is a K bw parties w/ places of business in different nations

c. Transportation and Financing in International Trade

i. Transportation in International Trade

1. Generally
   a. Best practice from lawyer's POV: incorporate terms into K
   b. In Ks under the UCC—FOB CIF terms are incorporated into K
      i. 2 questions here
         1. Who pays for it?
         2. Who bears risk of loss?

2. Bill of Lading
   a. Key document—shows that the person holding the bill of lading has the right to receive the goods—it's a K with the carrier and a quasi title to the goods
   b. US laws not updated bc a lot of transportation is done through private K

ii. Financing in International Trade

1. Risks of Financing in International Trade:

   (1) **Foreign exchange risks** (importer of foreign luxury goods—value of euro)
   (2) **Buy insurance against catastrophes**
   (3) **Letter of Credit**
      i. Generally:
         1. Most common way to protect yourself
         2. If manufacturer of sophisticated med group and signing a K w/ another entity around the world to sell your goods—big worry: not paid
         3. The Letter of credit substitutes the buyer's credit with the bank's credit
            a) If the document matches—the bank pays (extra layer protection)
            b) Worried about goods sitting on a dock around the world
            c) UCP governs
               i. Basically banks should examine based on documents alone—Documents,

Documents, Documents—if any discrepancies—banks can waive for a fee

ii. Case: Sztejn v. Schroder Banking Corporation

Facts: π + Schwarz K'ed to purchase a quantity of bristles from Δ Transea (PPB: India). They K'ed with Schroder Banking (domestic) for issuance of letter of credit. Πs find out before goods are shipped that they're fraudulent. They warn Schroder not to issue letter o credit.
Held: In the situation where the seller's fraud has been (π must establish this) called to the bank's attention **before the drafts and documents have been presented for payment**, the principle of independence of the bank's obligation under the Letter of Credit should not be extended to protect the unscrupulous seller

iii. UCC and Fraud Exception: §5-109 (Sztejn Fraud exception)

1. Similar to piercing the veil with corporations—with the letter of credit transactions
2. UCC codifies it if there's some kind of collusion bw seller and bank issuing letter of credit
    a) Just like Piercing the veil—this is rare

d. United States Regulation of Export Trade

i. **Generally**

1. 3 types of regulation affecting exports from the US:

(1) Export Controls
i. Govern not just the sale of goods but the transfer of technology and may therefore be implicated in licensing transactions

(2) Anti-boycott legislation
ii. Prohibits not just a refusal to do business for boycott reasons but discrimination in employment for such reasons

(3) Foreign Corrupt Practices Act
iii. Applies to the bribery of foreign officials in connection with any sort of business transaction

ii. Export controls

1. Historically:

a. Cold War Era:
i. Compliance with rules limiting exports for national security reasons was a major nuisance, or worse for American exporters
ii. American businesses complained that Soviet purchasers got most the material we controlled from other sources

b. 1996 onward: Wassenaar Arrangement
i. Since December 2001, controls on exports to potential terrorists
ii. Starting point for determining whether to license export of a controlled item—is it on the Commerce Control list?
    1. (1) Nuclear materials, (2) materials, chemicals, 'microorganisms,' and toxins, (3) materials processing, (4) electronics, (5) telecommunications and information security, (6) computers, (7) lasers and sensors, (8) navigation and avionics, (9) marine, and (10) propulsion systems, space vehicles, etc.
iii. In this US—we take the WA and we implement through ENR—within the Department of Commerce that will issue you as license for it

1. Here—the 10 areas up there

c. Third Party: Re-exportation Problem

i. There's a control for country X and Country X will transport to Country Y

ii. Argument: we want US companies to do business

2. Case: Compagnie Europeene de Petrole SA v. Sensor Nederland (1982)

Facts: CEDPSA (French) ordered 2400 strings of geophones for delivery to USSR from Sensor. Sensor – sub of Geo-source (American corp). Sensor tells CEDPSA it cannot deliver bc of US export embargo. (1970s—end of Cold War: Carter is boycotting Olympics)

Held: Sensor should perform bc of extraterritoriality. (1) There's a friendship commerce and navigation treaty bw Netherlands and US—recognizing right of incorporation and each other's law. (2) This case about effects test—you need nationality or protection exceptions. (3) This is ok bc it's a Dutch company.

-In this case US govt is placing importance on export control and not place of incorporation (Which is the Netherlands)—today, practically easier for foreign subs to ignore US parent corp which abides by US export controls.

iii. Anti-Boycott

1. These are another set of rules—1977—that may affect US exports—prohibiting Americans from cooperating w/ foreign boycotts—in particular that are instituted by the Arab states against Israel.
2. Bc the anti-boycott legislation applies to "any person" it becomes important to understand who "persons" are
   a. Domestic concerns include partnerships, corporations, companies, associations, and other entities organized under the laws of the US or one of its states, territories, or possessions
      i. Under the regulations, the anti-boycott legislation applies to foreign companies controlled in fact by domestic concerns
         1. Controlled in fact: consists of authority
      ii. Applies to US citizens have *control in fact* of the organization—counter to usual ways of how US determines identity
         1. Exceptions: Compliance w/ local laws
            a) So huge excuse for US companies—has to be formal law—not unspoken law.

iv. Foreign Corrupt Practices Act

1. Introduction
   a. Statute passed in 1977 in response to documented bribery of government officials overseas by large airplane companies
   b. For many years—dormant area of practice—now resurgence past 2-3 years
   c. US implemented this unilaterally and US business are upset bc of competition—other companies from other companies don't face these hurdles.

2. Two Parts

(1) **Substantive Prohibition**

i. Making bribes in attaining or retaining government officials
   1. So what's a bribe? Facilitating payments? How is that different than a bribe?
      a) No distinction on the part of the govt official
   2. If its routine: *facilitating payments*

ii. As a defense lawyer:

(a) if the payment is effectively legal under the foreign law
(b) And is a bona fide expenditure of the govt official then its okay

a) Problem—what's a bona fide expenditure

(2) **Procedural aspect**

i. Required internal control mechanisms

2. You have to have financial control systems that you would certify as bona fide—you have to follow the money so you have to have a bona fide system
3. In 2002 when Sarbanes Oxley implemented internal control mechanisms in §404—everyone was upset—didn't realize we've had this law on the books.

ii. As a defense lawyer:

4. You get around Sarbanes Oxley—by hiring a compliance expert to say you've met the checklist.

VII. Problem 2: Agency and Distributorship Agreements

a. Introduction

i. **Generally**:

1. A US manufacturer wishing to increase its sales abroad will employ foreign rep of some sort
    a. This person will have a good knowledge of local Market

ii. 2 basic sorts of foreign reps

1. Agents
    a. Agents arrange sales for manufacturer—but never take title to the goods
        i. Title passes directly from the manufacturer to the customer
        ii. Sometimes are given authority to enter into Ks w/ customers on manufacturer's behalf—(rare bc this gives rise to legal consequences)
    b. Agents: receive % commission

2. Distributors:
    a. Distributors buy goods from manufacturer and then resell them to the customer
    b. Distributors: make money when they resell, do take %

b. Termination: Detour EU—EU Body Make-up:

i. **Council**

1. Bifurcated legislative branch, legislative body: these are ministers—president of the European Council presides over it, role is ceremonial: do not propose laws

ii. **Commission**

1. Most powerful branch—one part of the executive, they propose laws, enforce laws, represent EU in international bodies HQ in Brussels—"Eurocrats"

iii. **Parliament**

1. Bifurcated legislative body, elected representative body (Strasbourg)—it has been deemed the weakest of the branches, very little participation in elections: democratic deficit—so power goes to Council.

iv. Court of Justice

1. Will hear cases—General Court: national courts will send cases up for disposition of EU law—Advocate General: write briefs re: legal solutions to the court

v. Directive and Regulations

1. Directive
    a. Interesting political compromise—gives a little sovereignty back to the state—binding as to result but leaves actual implementation to the actual state.
    b. Most controversial EU mandates come in the form of Directives

2. Regulation
    a. Binding and directly applicable

c. Commercial Agent Legislation

i. Generally: US and Europe

1. Notably in Europe, we have protections for commercial agents—doesn't exist in US

ii. U.S.

1. Only thing we have in US: Auto Dealers act in "good faith"
    a. In the US—little vested protection for employers
2. Most of the action in US employment law—is about discrimination
    a. Other parts of the world: about a vested right in employment
        i. That concept of "Vested right"—not being an employee at will—is to some extent is a fundamental philosophical push behind this European directive.
    b. Agents are protected ostensibly bc the policy choice is that they are vulnerable, they are smaller players, they don't have assets to protect them, etc.
        i. We protect the underdog in the US

iii. **Europe**:

1. The protections in Europe are fundamentally different
    a. EU Directive
        i. (1) Notice—Article 15
        ii. (2) Remedies—Article 17—damages

iv. Case: Ingmar GB Ltd. v. Eaten Leonard Technologies, INC.

Facts: CA hires Ingmar to be their exclusive agent in UK—and K said CA law will govern. Terminate him. He says I should get damages bc I'm British. ECJ takes on the case.

Held: He has rights—cannot just K certain things—cannot throw that away.

v. Rome Regulations

1. Article III(1)
    a. Ostensibly is about freedom of K

2. Article III (3)
    a. If you're picking a choice of law that has no connection to the transaction—the country that hugely connected to the transaction—may be mandatory as the choice of law.
    b. Big Question—does Ingmar survive Rome Regulation?
        i. Most would say it probably does bc of Article III (3)
        ii. At some point ECJ will tell us.

d. Exclusivity

i. **Introduction**

1. General Problem
    a. There could be in Ks bw manufacturers and agents/distributors—certain clauses that could raise antitrust problems
        i. I.e. manufacturers could give agent exclusive right to sell product in certain territory—this might be bad for intra-brand competition—bc distributors are not carrying multiple products
        ii. I.e. can place restrictions on distributors—we can only distribute our product and you can only do so in Italy.
    b. Antitrust law:
        i. A matter of *federal common law*.

2. Fundamental antitrust statutes/prohibitions:
    a. **Section 1**: About unreasonable restraint on trade—anti-collusion statute
    b. **Section 2**: Illegalizes monopolies—anti-monopoly statute.

3. Standard of review
    a. **Rule of reason**
        i. Absent evidence of price fixing, court applies a balancing test to look at overall economic factors and whether the situation is hurting economic competition.

    b. **Rule of per se**
        i. Certain restraints have predictable anti-competitive effects and when those effects are present those restraints are per se illegal: basically its horizontal price fixing

    c. **Generally**
        i. We are moving away from a world of rule of per se to a world of rule of reason—this has been a big gift to Δs bc there is a litany of defenses under rule of reason—defense lawyers want to argue here.

    d. **Extraterritoriality and Antitrust**
        i. Applying the effects test

    e. **Antitrust laws aggressive w/ horizontal**
        i. I.e. if retailer

ii. US Cases:

1. Case: GTE Sylvania
    a. Basic idea: freedom of K, efficiency, and so forth

2. Case: Khan
    a. Maximum price fixing—cannot sell above a certain price—not deemed to be per se violation

3. Case: Leegin Creative Leather Products (SC)

    Held: You cannot sell below a certain price—minimum price fixing is okay bc it doesn't reduce inter brand competition—so its efficient and so its okay
        i. Minimum price fixing—not a per se violation—not having this as a violation will stimulate inter-brand competition, among manufacturers while it is true that it will reduce competition intra-brand (retailers selling the same goods).

4. General rule:
    a. If its bw an agency relationship and a distributor relationship under US law you worry about the distributorship relationship bc there would be more of an agreement—whereas the agent would be more of an extension of the manufacturer.

iii. EU Competition Law

1. Generally
    a. **Parts of the Statute**
        i. **101**: covers agreements that effects trade bw member states—generally: anti-collusive
            1. **Exemptions within 101**
                a) Vertical agreements block exemptions: these are areas where they want to prevent certain types of litigation

i. No vertical agreements as long as market share isn't more than 30%: so it's a safe harbor
ii. Idea here: vertical agreement can be pro competitive—we're not that worried about them and there is a bright line rule that if you are equal to or less than 30% of market share then we wont worry.

b) Block Exemptions: Article IV
i. Fixed pricing
ii. If you violate Article IV—goes to 101

c) Block Exemptions: Article V
i. Non compete agreement
ii. If you violate Article V, specific restriction is out, but the rest is ok under block exemption
iii. Agreement is not thrown out—particular contractual term is okay.

ii. **102**: illegalizes monopolies—anti-monopoly

b. Extraterritoriality
i. 101+102 both have language about territoriality
ii. There is some language in these statutes that talk about jx but that is w/in the boundaries of the EU
iii. It is effectively the effects test when you want to apply these tools extraterritoriality

2. Problem with Distributor:
a. Could be collusion—so 101 analysis—because it's a separate entity with whom you can collude

3. Problem with Agent
a. General rule:
i. Contracts that agents negotiates generally fall outside 101

b. Exception:
i. But there could be problems bw agent and principal if poster non-compete agreements—here can be under 101
ii. I.e. you cant ever compete with us ever after your employment K

c. POLICY:
i. Less concerned w/ agent relationship with we don't see agent and principal with whom you can collude—more like an extension of the principal

e. Taxation
i. **Generally**:
1. If you are hiring an agent for a distributor overseas—risk that country will say they are extension and you owe taxes overseas—so you don't let agent conclude contracts on your behalf in the contract
2. Not as risky with distributor—independent "no permanent establishment problem"

ii. Case: Taisei Fire & Marine Insurance Co. v. Commissioner:

Held: An agent could be considered to have "independent status" if it were legally and economically independent of its principal, although that decision would not, bind German taxing authorities in their application of the treaty

a. Countries other than US pay close attention to the Sales tax or Value Added Tax

iii. Antitrust versus Tax (Points of View)

1. Antitrust Point of View:
   a. Better off with agent versus distributor
   b. Can be overcome by putting in a K—you can make contracts on our behalf

2. Tax Point of View
   a. Better off with distributor versus agent
   b. Can be overcome by vertical block exemptions

iv. Value Added Taxes

1. In European jxs, a tax that can be assessed at each stage—usually paid at the end is buried in the value of goods.

VIII. Problem 3: A Licensing Agreement

a. Introduction to IP Law

i. Common characteristic:

1. The owner of the property is given the right to exclude others from using something the owner has created by application of inventive talents and/or investment of funds
2. Tension: monopoly of owner v. free competition of antitrust laws

ii. **Generally**:

1. From POV of IBT, most important part of IP law→ regimes that are till governed by national law
   a. No huge body of law dealing with IP laws
2. Problem: no global enforcement—so national enforcement is all that you have
   a. You have *some* international treaties beginning in the 19th century:

Paris Convention 1883:

1. Foreign inventors get the same treatment of as national treatment guaranteeing legal protection for industrial property

Berne Convention 1886:

1. Same protection as Paris Convention for copyright

WIPO

2. Administers Paris and Berne Conventions today

TRIPS (GATT/WTO Treaty)

Generally

a) GATT wanted to offer protocol for IP through TRIPS
b) Framework for IP regulation for GATT/WTO countries
   i. HUGE tensions bw developing and developed worlds here!
c) Under TRIPS, WTO members must amend their domestic laws to provide a minimum level of protection

Part II of TRIPS (minimum requirements, re: scope, term)

a) Article 6: members are free to adopt their own rules re: *exhaustion of IP rights*
   i. Argument used: once the creator of the IP releases that good into the stream of commerce, their rights are exhausted
b) Article 10: provides that computer programs and compilations of data are entitled to copyright protection
c) Article 27: patents should be available for any inventions whether products or process in *all* fields of technology
   ii. EXCEPTION: for **diagnostic**, **therapeutic**, and **surgical methods** of treatment of humans and animals.
   iii. EXCEPTION to the EXCEPTION: no exclusion for **pharmaceuticals** (so they're taken care of)

d) Article 31: allows for *compulsory licensing* of patents—i.e. if you can't get patent holder to authorize, then government can authorize third party to use technology if patent holder is paid adequate remuneration in case by case basis
e) Article 33: term of a patent: 20 years, life of author + 50 for copyright (less than US)

Part III of TRIPS:

a) Generally:
   iv. Requires WTO members to ensure that enforcement measures will permit effective action against any of the act infringement of IP rights.
   v. Remedies: right to injunctive relief +Damages
b) Article 41: procedures re: enforcement of IP rights: fair and equitable.

iii. Other Countries and IP

1. The patent, copyright, and trademark systems of other countries are different than the US
2. Some countries give the authors of works of art "moral rights" against debasement of the conception even by those who purchased the works.
3. Traditionally, each of these varied systems was independent and territorially limited

iv. **Patents**

1. Form of Federal law
2. A patent is designed to give protection to the investor of any new and useful process, machine, manufacture, or composition of matter
3. In order to obtain patent—must be useful, new, non-accessible, non-obvious
   a. I.e. computer chips
4. Have to file with Patent and Trademark office
5. Term of a patent per TRIPS agreement: 20 years from the date of the application.
6. A patent *may* be sold to another party—an assignment
   a. Licenses can be issued allowing limited uses of the invention by other parties

v. Copyrights

1. Form of Federal law
2. Designed to protect creative expressions (as opposed to ideas)
   a. I.e. book, song, or painting—appropriate fro copyright protection
3. Obtaining a copyright involves the deposit of copies of the work in question
4. Duration: life of the author + 70 years
   a. Corporate authors== 95 years from date of publication or 120 yrs from creation

vi. Trademarks

1. Form of Federal law
2. Permit a seller of a product or service to market those items in a distinctive manner that will distinguish themselves from products of others
3. It protects substantial investment that the producer may have made in advertising, customer service, and other things that build and maintain customer acceptance of them
4. Duration: no specified term of trademark—indefinite but can lose it by non-use, lapses

5. Should register with Patent and Trademark Office

vii. Trade Secrets

1. Form of State law
2. Information that is protected by the ordinary operations of contract and agency law
3. A company makes employees sign agreements not to reveal information
    a. Advantages: can be used to cover items which are not sufficiently novel to obtain patent protection and it does not expire over a period of time
    b. Disadvantage: secret is lost if it is unraveled by legitimate means
        i. I.e. "reverse engineering" (take it apart and note how components work) and imitate it.
4. I.e. Coca Cola secret formula

viii. Right of Publicity

1. Form of State law
2. What if you're famous and someone is using your image to benefit their product

b. IP and Developing Countries

i. **Generally**:

1. Developing countries argue that it is not a good idea to have IP in developing countries pragmatically—because they don't have the resources so what's the point
2. Long and short of it: By adopting TRIPS, developing countries argue that in theory since they're abiding with IP—in exchange they want concessions in agriculture (hence the problem in the Doha round- developing world feels like they've already made some concessions with IP in TRIPS)

ii. Andean Community and IP Approach

1. Here, the Andean community of South America (only a select group of countries—not all Latin American countries) have agreed to require governmental approval for licensing agreements.
2. These are licensors in developed world as different sides of the agreement than licensee.
3. Register with the government and they look to see if there are any alarming clauses.
4. Arguments Against: you're not being efficient—would be more powerful if all Latin American countries were involved.

iii. TRIPS, Public Health, and Developing Countries

1. Generally:
    a. Disputes have arisen over extent to which a government's ability to respond to public health crises is limited by the patent protection for pharmaceutics that TRIPS agreement provides in Article 27 and requires WTO members to provide.

2. TRIPS
    a. Ability of WTO members to respond to public health crises is shaped by 2 parts:
        i. Article 6: allows WTO members to set up their own rules re: exhaustion of IP rights when a good is placed in the stream of commerce
        ii. Article 31: "**compulsory licensing**" framework
            1. Basically requiring government or third parties of other countries to make efforts to obtain authorization from right holder on reasonable commercial terms and

conditions—if not possible then they can use if adequate remuneration is paid.
    a) *Reasonable*: has to be predominately for domestic market

c. Antitrust Aspects of IP

i. Intro

1. There is an inherent tension bw IP law and Antitrust law
2. IP rights by definition exclude others from practicing the novelty that is produced

ii. Licensing and US Antitrust Law

1. DOJ and FTC have issued Antitrust Guidelines for IP Licensing
    a. These guidelines—have a favorable attitude toward *licensing agreements*
    b. Rule of reason analysis
    c. Licensing agreements: treated as vertical agreements unless licensor and licensee would have been *actual* or *likely competitors* in relevant market in the absence of a license.
    d. Here the licensor is seen as the small vulnerable power and the licensee is seen as being stronger
        i. Argument: (since its usually the reverse) maybe this is done on purpose—done rhetorically to show that we're not worried about protecting licensees.

2. Safety Zone
    a. Absent extraordinary circumstances, DOJ and FTC will not challenge a restraint in a licensing agreement if
        (1) The restraint is not facially anti-competitive
        (2) The licensor and licensees do not collectively account for more than 20% of the market affected by the restraint

iii. Licensing and EU Competition Law

1. Historically
    a. EU treated the competition law issues that arise in licensing agreements differently—they focus on block exemptions in 81(1) of the EC Treaty
        i. Block Exemptions
            1. **Permitted**: white lists
            2. **Prohibited**: black lists
            3. **Permitted if Commission notified and did not object**: grey list

2. Modernly
    a. The commission shifted towards an approach that focused more heavily on market power of the parties—Technology Transfer Block Exemption Regulation
    b. In Europe, try to get it covered by a block exemption
        i. Applies to licensing agreements bw two parties for the licensing of patents, know-hows, and software copyrights
            1. TTBER treats agreements bw *competing parties more seriously* than non-competing parties
                (1) Applies to agreements bw **competing** parties where their combined market share doesn't exceed 20% and
                (2) Applies to agreements bw **non-competing** parties where their individual market shares don't exceed 30%

c. TTBER Provisions:
    i. **Article III**: threshold
    ii. **Article IV**: hardcore restrictions
    iii. **Article V**: clauses that wont take your entire agreement out of TTBER—but clause that triggers it will be null and void
    iv. **Article VI**: if agreement otherwise fits in with proscribed behaviors but hinders competition—then it can be revoked.

d. Royalty Arrangements

i. How royalty payments are structured—up to the parties and depends on their respective financial and accounting goals

Types of Royalties	
Initial Royalty	
Royalty based on production, sales, or revenue	
Minimum Royalty	

ii. Currencies—another complexity about royalties
iii. Taxes: what's going to be taxed on the currency you're getting paid

e. Infringing and Grey Market Goods

i. Difference between Grey market good and infringing goods
    1. **Grey market good**—doesn't necessarily infringe—its just licensed to a particular market, and its grey once it finds its way back to the domestic market
        a. It is a validly/legitimately sold good—valid intellectual property—in a particular market
            i. I.e. Panasonic wants a camera it wants to sell in developing world in country X and it sells it at a lower price though available in US for 3 x the price. Someone goes to X buys it at a low price and sells them to the US for more money
        b. Question: is that a violation—difficulty here: re interpretation of Article 6 of TRIPS:
            i. A lot of it depends on Article 6 of TRIPS and your philosophy regarding whether the holder of a license has exhausted their patent once it is in the stream of commerce
                1. Debate: Article 6: do you exhaust your IP rights by releasing something into the stream of commerce.

    2. **Infringing good**—violates intellectual property—i.e. fake Gucci bag, etc.
        a. Tools for IP owners against those who have infringed:
            i. Seek **damages, injunction** (Federal court)—difficult remedy bc its rare that you'll know who these people are.
            ii. Under **337 of Tariff Act**—can ask International Trade Commission to effectively ask customs to seize the goods—difficult remedy bc you need to follow the shipment and this can be hard as well

ii. US Patent Law:

1. US patent law has been used less frequently to prevent parallel imports, but it provides substantial protections.
2. Although the first sale of a patented good generally exhausts the patent owner's right to control the subsequently resale or use of that good

3. This "first sale" doctrine does not apply to sales outside the US, even if authorized by the patent holder.

iii. US Copyright Law Copyright § 602:

1. Says that you cannot import without authority of the owner of the copyright under this title.
2. Case: Quality King Distributor v. L'anza Research international

   Facts: L'Anza sells hair product only sold to high-end salons in the US—available 40% cheaper outside US. Quality King goes outside US buys it then sells it cheaper than L'Anza

   Held: US SC says first sale doctrine exhausted copyright owners right to resell—so Quality King could resell. The first sale of a copyrighted work exhausts the owners right to control its subsequent sale. SC did not address whether 602(a) might apply to foreign-made copies.

iv. EU and Gray market goods

1. EU has similar rule with a little nuance—
   a. Nuance: "first sale" doctrine only applies if its within the EU community
      i. Article 7: "The trademark shall not entitle the proprietor to prohi
         1. If someone puts something into European product as a first sale—then they are not protected. Once you place a product in stream of commerce in Europe, then in that economic area, you have relinquished any restrictions on the particular product

2. Case: Levi Strauss v. Tesco Stores

   Facts: Tesco saw some Levi Strauss products outside EU bought them, that purchase price + transportation cost allowed them to sell at a lower price than Levi Strauss was selling through traditional distribution channels.

   Held: Its not okay for *Tesco* to do it—because the goods were not initially sold in the European Union—therefore the manufacturer has not given up the right to restrictive resale. So effectively Tesco should not be allowed to do
      i. If outside Europe, trademark owner must unequivocally renounce their rights.

IX. Problem 4: Establishment of an Operation Abroad

a. Introduction

i. **Generally**:

1. Foreign Direct Investment (FDI) is investment by an enterprise from one country in an enterprise from another, involving:
   (a) A long-term relationship, and
   (b) A significant degree of control by the foreign investor
2. Greenfield Investment: the establishment of a new operation owned and controlled by a foreign investor—our traditional understanding of FDI—you're starting from scratch
   a. Here it's a new, fresh operation—not done through traditional channels of mergers and acquisitions, or joint ventures.
3. FDI: is defined as involving more than 10% of capital stock in a foreign enterprise
   a. Anything less is known as "portfolio investment"
4. FDI has booked—2005: $916 billion of FDI inflows
   a. $18 billion of that figure: going to Mexico
   b. FDI investment flows are not evenly distributed—developed countries attract 60% of FDI
   c. 2/3 from developed to developed
   d. 1/3 of money—going from developed to concentrated areas of developing world
      i. 2/3 of 1/3→ going to Mexico, India, China, Brazil etc—very large powerful developing countries
      ii. 1/9→ of FDI is going to the smaller developing countries
5. Key Document at the end of this section: NAFTA

ii. Advantages of FDI

1. Avoid transportation costs or tariffs in serving a foreign country's market
2. Lower labor costs and better access to raw materials make it cheaper to produce a product abroad.
3. FDI allows a company a greater measure of control over its IP and control of product (unlike licensing)

iii. Disadvantages of FDI

1. It's difficult to acquire knowledge of local markets and conditions necessary to make a foreign operation successful
2. It's difficult to understand and respond to local conditions
3. There are a variety of regulatory risks:
   a. I.e. host country may impose exchange controls, preventing a foreign investor from repatriating the profits from its operations or the proceeds from selling its investment
      i. You need a lot more capital to engage in FDI
      ii. Compared to licensing—depends on how much control you want (licensing—less control)

b. Choice of Corporate Form

i. **Introduction**:

1. Generally:
   a. Whenever a company wishes to establish a more permanent presence abroad, one of the decisions it must make is whether:
      (1) To incorporate a separate entity under local law or,
      (2) To operate simply through an undifferentiated branch of the company

2. Analytical questions
    (1) **Branch or Subsidiary**:
        i. As a general matter, the way to go here→ subsidiary: bc of Limited Liability
    (2) **What form should it take**?
        i. Once you're a subsidiary—must contemplate form of corporation

3. Form of corporation from which to choose: (i.e.)
    a. Corporations (US)
    b. Unincorporated Associations (US)—[LP, LLP, LLC (pass-through taxation)]
    c. Large public corporation (Germany)
    d. Small or close corporation (Germany)
    e. Corporation with variable capital (Mexico)

ii. **Branches v. Subsidiaries: Factors to Consider**:
1. Tax Considerations
    a. **Advantage of Subsidiaries**:
        i. Allow the parent company to "defer" paying taxes to the parent company's home country on the income of its foreign operation until those profits are repatriated, as dividends for example
        ii. Advantage: If host country's tax rate is lower than home country's

    b. **Advantage of Branches**:
        i. A company may deduct losses of foreign branch to reduce its taxable income but not the losses of a foreign subsidiary.
            1. However, you cannot "defer" paying taxes until repatriation

2. Limited Liability
    a. **Advantage of Subsidiaries**:
        i. The debts and liabilities of a foreign subsidiary are its own and the subsidiary's creditors generally may not look to the parent for payment
        ii. The parent company's liability for its foreign subsidiary's operations are thus "limited" to the amount of capital the parent company has invested in the subsidiary – (barring any piercing of the corporate veil)

    b. **Disadvantage of Branches**:
        i. A foreign branch is not an entity distinct from the company, and the company is liable for its debts and other liabilities.

3. Implication of Treaty
    a. US-Japan Treaty
        i. Sumitomo case: The treaty would not allow a NY subsidiary of a Japanese company to claim benefits of the US-Japan treaty under its terms
            1. I.e. a Branch could claim benefits of Friendship, Commerce, Navigation Treaty

    b. NAFTA Treaty
        i. Chapter 11 of NAFTA applies to investments of investors from one NAFTA country in the territory of another NAFTA country regardless of whether the investment takes the form of subsidiary or branch.

1. Brilliant because you get protection of Limited Liability AND protection of a treaty if you are a subsidiary

iii. Mexican Corporations Law

1. Generally:
    a. A foreign corp may establish a branch in Mexico, but subject to extensive requirements, so generally its better to have a subsidiary (3 options)
    b. For an American lawyer advising someone to start a sub in Mexico- these are your three options

Option 1: The Public Corporation

- Similar to a US corporation
- May transact business and bring suit in its own name
- The liability of shareholders is limited to the amounts of their capital investments
- No duration on its existence and shares may be freely transferred
- However: capital is fixed in its charter and cannot be increased or reduced w/o amending charter and receiving approval from Mexican government
- Benefits: used for financial companies
    - Similar to a US public corporation

Option 2: The Corporation with Variable Capital

- Similar to the Public Corporation but without the rigidity of the capital structure
- Its charter may provide for an unlimited amount of variable capital for which shares may be issued when additional capital is needed w/o prior govt. approval
    - Closest that we have to a US public corporation
- Most Mexican corps take this form—used for everything other than fin companies

Option 3: The Limited Liability Corporation

- Lies somewhere between a corporation and a partnership
- It may transact business and bring suit in its own name and the liability of its members is limited to their capital contributions
- However: ownership interests may not be transferred w/o consent of members holding a majority of its capital stock
- Mexican LLC: best choice for joint venture bw foreign investors and Mexican party
    - Can avoid double taxation
    - Similar to US LLC

c. Restrictions on Foreign Investment

i. History of FDI in Mexico

1. Generally:
    a. Mexico has had a long and difficult history with foreign investment
    b. Mexico still places restrictions on ownership

2. 1876-1911:
    a. US investors and foreign investors came to dominate the Mexican economy, holding huge amounts of land and controlling the mining, banking, railroad, electricity, and oil industries.
    b. 1910: revolution began

3. 1917-1940
    a. 1917: Constitutional amendments

i. **Article 27**: Foreigners could be granted the right to own land and to operate concessions for the exploitation of natural resources only if they agreed to a "Calvo clause" under which they would be considered Mexican nationals and could not invoke the protection of their home governments upon penalty of forfeiting their property
    1. Amended in 1958 to prohibit granting and continuation of oil and gas concessions and the exploitation of these resources was expressly reserved to the state.
ii. **Article 28**: reserved certain activities to the state, including the issuance of money, postal services and telegraph services.

b. Mexico soon began to expropriate and redistribute large land holdings many of them owned by foreigners
c. Hull Letters 1938: Letters exchange bw US Sec of State and Mexico— we want *prompt, adequate, effective compensation*—what developed world argues
    i. Developing world: we'll give you what's fair, but we shouldn't owe you anything at all. There's no customary international law that requires FMV
d. Mexico ultimately paid out $64 million to US foreign investors

4. 1940-1958:
    a. Mexico pursued a more open policy to FDI—allowed foreign companies in to drill for oil

5. 1958-1982:
    a. Mexico closed off again to FDI w/ election of President Lopez Mateos
    b. Article 27 was amended

6. 1982- Present
    a. Mexico's debt crises resulted in its need to attract foreign investment and change its policies and so it adopted a new Foreign Investment Act
    b. It also joined NAFTA (Chapter 11—protected US investors)

ii. Mexican Foreign Investment Act of 1993

1. Generally:
    a. **Categories**:
        i. Categories of Activities reserved for Mexican State
        ii. Categories of Activities reserved for Mexican Nationals
        iii. Categories of Activities that are amenable to FDI—which place restrictions—typically percentage wise
2. Articles
    a. **Article 1**: Purpose of the Act:
        i. To channel foreign investment into Mexico and to ensure that said investment contributes to the National development
    b. **Article 4**: Foreign investment may participate in any proportion in the capital of Mexican corporations
        i. The rules for the participation of FDI shall be applied w/o prejudice
    c. **Article 5**: Areas still reserved to the state:
        i. Petroleum, nuclear energy, electricity, telegraph services, postal service, issuing money, satellite communications, control of airports
            1. Very familiar to an American lawyer for some categories: nuclear, us postal service
            2. Unfamiliar to American lawyer: ports, electricity

3. So it's a mix of what we're used to seeing from American perspective

d. **Article 6**: Areas still reserved to Mexican Nationals/Corporations
   i. National land transport for passengers, retail gasoline sales, credit unions, development of banking institutions
e. **Article 7**: Percentages in which foreign investment may participate
   i. Segment different areas of the economy—so most restrictive—10% cooperatives.
   ii. Highest amount of ownership interest—49%
   iii. If you want to have more than 49%-- go administrative agency—ask to waive rule: "administrative forbearance": ok under Article 8 + Article 9

d. Protection of Foreign Investment

i. **Generally**:

1. US and Treaty Protection
   a. Treaty protection for US investors first developed in the context of **Friendship, Commerce, and Navigation Treaties** (FCN's)
   b. The US' first FCN treaty was with France in 1978→ MFN principle included
   c. 19th Century: protections began to appear in FCN's w/ Latin American states
   d. 1920s/30s: a standard set of protections emerged that included national treatment, most favored nation treatment, protection as required by international law, and just compensation in the event expropriation
   e. 1946-1966: US negotiated modern FCN's w/ more developed countries
   f. How to protect investors—in context of US and Mexico—we have NAFTA

2. Europe and Treaty Protection
   a. European countries were negotiating **Bilateral Investment Treaties** (BITs).
   b. BITs differed from FCNs in that they were focused exclusively on investment and were mostly entered into with less developed countries.
      i. FCNs were not focused on investment protections
   c. BITs have taken off—by the end of 2005: 2,495 BITs had been concluded
      i. Notably because we've been stuck at the Doha Round with GATT/WTO

ii. NAFTA Chapter 11

1. Generally:
   a. NAFTA: although it bears similarities to BITs, the character of the parties to this agreement makes it unusual.
   b. A typical BIT is bw a capital-exporting country and a capital-importing country
   c. What makes NAFTA Ch. 11 different is that 2/3 parties are capital-exporting countries, and both Canada and the US have, essentially for the first time, found themselves on the receiving end of treaty claims by foreign investments
   d. Chapter 11: protects investors of one party who make investments in another

2. Chapter 11 is divided into 2 parts:
   a. **Section A**: lays out substantive protections of agreement:
      - Article 1101—chapter applies to measures applied by investors of one party to investors of another party—(capital from A to B)
        - 1139—defines investment
      - Article 1102—National Treatment
      - Article 1103—Most Favored National Treatment

- Article 1106—Protection from performance requirements (i.e. investment export a certain percentage of its product)
    - Don't want host countries to place restrictions on the investment
- Article 1107—The freedom to appoint senior management w/o respect to nationality
- Article 1108—Reservations and exceptions says that a country can give a list of industries where national treatment does not apply.
- Article 1109—The freedom freely to transfer the profits and proceeds of an investment—can repatriate profits
- Article 1105(1)—"minimum standard" of treatment:
    - "Each party shall accord to investments of investors of another party treatment in accordance w/ international law, including fair and equitable treatment and full protection and security."
        - NAFTA Tribunal says that NAFTA treaty counts as part of international law (overturned in second Metalclad case—only customary international law)
        - So root of the problem in Metalclad: whether NAFTA counts "in accordance w/ international law" and what does that mean
- Article 1110—Expropriation and Compensation
    - A party may not directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory unless:
        a) For a public purpose,
        b) On a non-discriminatory basis,
        c) In accordance w/ due process of law, and
        d) On payment of compensation
            i. Compensation shall be equivalent to the FMV of the expropriated investment immediately before the expropriation took place and shall not reflect any change in value occurring bc the intended expropriation had become known earlier.
- Article 1114—Environmental Measures
    - If its otherwise consistent with the chapter, then its appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns

b. **Section B:** lays out procedures for resolving investment disputes
    i. Generally:
        1. Procedurally—in terms of formation of NAFTA law and dispute resolution—what NATA has done is quite innovative
        2. An investor of one NAFTA party may bring a claim for breach of the substantive obligations contained in Section A directly against another NAFTA party
            a) The investor may bring the claim on its own behalf for damages it has sustained, on behalf of an enterprise that it owns or controls for damages to the enterprise as a result of the alleged breach, or both.
        3. Chapter 11 awards are enforceable under the NY Convention

- Article 1116: Investors/private parties can bring claims directly against governments.
  - Normally only countries have standing in treaties
- Article 1118: disputing parties should first try to settle a claim through consultation or negotiation
  - Similar to GATT/WTO
  - Need 90 days notice
- Article 1120: choice of arbitral format:
  - ICSID Convention
    - Only US was party to this until recently
    - Brought under auspices of World Bank
    - 6 mo. Period of lapse bw claim and arbitration—cool off
  - ICSID Additional Facility Rules
  - UNCITRAL arbitration rules
- Article 1121: By bringing claim to NAFTA, you waive your right to bring it to another forum. Also, here you can choose exhaustion of local remedies or come straight to NAFTA
  - For so many other treaties, usually you need to exhaust local remedies
- Article 1123: Panel of 3 arbitrators
- Article 1128: Even if not party to dispute, you can submit a question of interpretation to the tribunal—not a traditional—case and controversy type of an Article III thing.
- Article 1131(2): tribunal can issue binding interpretations of NAFTA's text
  - Basically setting NAFTA precedence
  - Creating NAFTA common law that becomes binding on this web of tribunals.
- Article 1139: includes all of the definitions

3. Metalclad Cases:
   a. **Case: Metalclad Corporation v. United Mexican States**

      Facts: Metalclad based in OC—have a landfill in Mexico and progress was slow and fast. Mexico is responsible for actions of municipality and its consistent w/ customary international law.
      Held: Under Article 1105: Transparency is key – and Metalclad as not told about the correct permits and pushed around. Under 1114: Mexico makes an ecological argument, and loses.
      1. 1105 (Metalclad) is in direct opposition to 1114 (Mexico's argument) (in what they state)—about who wins
      2. 1110 (FMV) and 1135 (damages) are about remedies
         a) But Mexico wins on lower damages—bc no profits—so hard to predict future profits.

   b. **Case: United Mexican States v. Metalclad Corporation** (SC British Columbia 2001)

      Generally: Mexico is appealing bc this is about shaping NAFTA common law. Appeal NAFTA to British Columbia. Mexico won on 1105
      Held: The tribunal's decision under 1105 was outside of the scope of NAFTA's power—bc they misinterpreted "transparency": there is no underlying concept of transparency in customary international law. In 1105 when it says treatment in accordance w/ international law, it means customary international law, and transparency is not part of customary international law. In terms

of Ecological Decree—they reduce the damages by a couple years of interest.

1. 2/3 issues Mexico wins

c. NAFTA Commission POST the second case

i. Ironically agreed with court in BC and not with the Tribunal and said that the standard we're talking about is customary international law

ii. Breaching some other provision of NAFTA will not trigger violation of 1105, only breaching another NAFTA provision will trigger a violation of 1105.

iii. NAFTA violations—try to make it sound like there's a violation of customary international law to bring it under 1105.

1. Try to argue 1110 and link it with 1110

iv. Could create a central body to interpret these treaties—but we don't have that (i.e. to determine meaning of expropriation and compensation)

iii. Political Risk Insurance

1. Generally

a. A prospective investor would be foolish to look solely or even primarily to an estimate of the strength of the rules against expropriation and the like found in investment treaties and customary international law in order to judge the level of risk associated with an investment

b. It is also possible to purchase insurance against political risk.

i. The Overseas Private Investment Corporation (OPIC), a US government agency

2. Options: OPIC and World Bank

a. **Problems**:

(1) Premiums are high

1. 1-2% of amount you're investing, insurance proceeds are limited to lower than book value—

(2) Book Value

1. Book value is much lower in a firm than regular market value—so gives you your accounting value and not economic value.

(3) Doesn't fall under policy

1. Insurance company will try any argument that will show that event didn't fall under the policy

a) If provocation—argument that company provoked the government

b. Three kinds of political risk OPIC insurance sells:

1) Expropriation
2) Political Violence
3) Currency Inconvertibility

c. OPIC Insurance Available to:

1) Available only to US citizens
2) Corporations organized under US law and more than 50% owned by US citizens and foreign corporations at least 95% owned by US citizens
3) Foreign corporations at least 95% owned by US citizens, and only to insure investments in countries that have signed an

investment guarantee agreement w/ the US (150 countries currently)

X. Problem 5: Mergers and Acquisitions

a. Introduction

i. Generally:

1. M&A: Term is used very loosely
    a. Mergers: fusion of two companies
        i. Acquiring an interest in a foreign company
    b. Asset and Stock Acquisitions: Acquiring assets and stock
        i. Acquiring an interest in a foreign company
2. Mergers and Acquisitions are: alternatives to establishing a new branch or subsidiary abroad is to acquire an existing foreign company.
3. Waves of the most recent M&As: 1999-2001 and 2005-2007—due in large part to greater involvement of European firms.
    a. M&As are cyclical with the economy—when economy picks up, M&As pick up again.

ii. Difference between M&As and Greenfield Investments

1. Mergers and acquisitions have historically been a more important vehicle for investment in developed economies.
2. In developing economies **greenfield investments** has dominated, in part because of the relative lack of companies that are potential candidates for takeovers.

iii. Advantages of M&As

1. Speed: it is much faster for a company wishing to enter a foreign market to purchase an existing operation than to build one from scratch
2. Efficiency: by achieving synergies or by eliminating redundancies

b. Stock Acquisition Example: Share Purchase Agreement

i. Generally:

1. Is a contract embodying the terms for the M&A.
2. Has Seller's warranties, Buyer's warranties, Seller's Obligations prior to the closing, Conditions to Buyer's Obligation, Conditions to Seller's Obligations, Termination, Restrictive covenants, Costs, Resolution of disputes, and Applicable law.
3. Buying stock and having full equity ownership.

ii. Basic idea:

1. Standard contract for a merger and acquisition one would have domestically is not the same as one would have internationally.

c. Securities and Corporations Law

i. Note on Securities Aspects of Transnational Acquisitions

1. Generally:
    a. M&As involve the sale of stock and thus implicate US or foreign laws regulating the sale of securities.
    b. The American securities lawyer is accustomed to operating in the environment set by the securities legislation that began in 1930s
    c. Claims that can be brought against investors: common law claims and 10b-5 claims.
    d. Today: intersection of securities law and corporate law and international transactions.

2. Extraterritoriality and 10b-5 Application
    a. **Generally:**
        i. First thing you will argue as a defense lawyer: it does not apply to this transaction because this transaction was carried out outside the territory of US (extraterritoriality)

    b. **Analysis: "conducts and effects"**
        i. Conduct: was there conduct in the US that caused the losses?
        ii. Effects: were there misrepresentations abroad or whatnot that had some effect in the US? If yes—then effects met.

3. 10b-5
    a. **Generally**:
        i. Securities Legislation usually implicate Rule 10b-5It usually implicates Rule 10b-5
        ii. Essentially: Rule 10b-5 outlaws insider trading
        iii. It has now been imitated in the EU
        iv. Application of Rule 10b-5 to a transnational purchase/sale raises jxal questions like those raised by the extraterritorial application of the Sherman Act.

    b. **Statute**
        i. 10b-5: makes it unlawful for any person (by the use of any means or instrumentality of interstate commerce) to employ any device, scheme, or artifice to defraud, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

    c. **Extraterritoriality and 10b 5**
        i. Case: Morrison (recent SC—Scalia Majority)
            Facts: Foreign πs, foreign company, foreign stock exchange. This case is a precursor of our current financial crisis. Australian company, with Australian investors, trading on an Australian exchange and Australian SHs allege that FL company had manipulated their financial models to make FL company look more valuable than they were. So after they were acquired by Australian company, their assets were lower than what they actually were like. (Solicitor general agreed with πs in this case)
            Held (Scalia): presumption against extraterritoriality unless Congress has said otherwise, conducts and effects is too fuzzy. Instead—presume no extraterritoriality, and see if it's overcome. Π (1) Purpose of SEC "the statute itself is to maintain price integrity"—and Scalia says not sufficient to overcome presumption, π (2) 30(b) SEC—statute says no extraterritorial application unless there is some violation of SEC violations—Scalia says provision is directed at actions that might conceal domestic violations than acts abroad. (Scalia wants to stop extraterritoriality and class action lawsuits)
                a) New Scalia test: breach of 10b: hook: **purchase and sale of security has to be in the US** (can be on domestic or foreign exchanges)

i. Transactional test for 10b5: really a conducts test within the United States w/ extraterritoriality.

Concurrence/Dissent (Stevens): the idea of extraterritoriality has had serious development in jurisprudence, evidence encompasses more than Scalia's textualist interpretation. The Conduct + Effect is good. Says majority is making 10b5 go away

ii. Note on Tender Offers and Takeover Defenses

1. Generally:
   a. The securities aspects of a takeover are much more complex if the stock that is sought is owned by a wide spectrum of public shareholders rather than a small group of individuals.
   b. In US: combination of state law (always) and federal law (sometimes—only to public companies)

2. The Williams Act
   a. Generally/Provisions
      i. US Federal Law
         1. The Williams Act governs the making of public tender offers
         2. It requires that the party making the offer give the offerees elaborately specified information that would be useful to them in deciding whether or not to sell.
         3. Can set conditions on offer: i.e. I offer to buy 10 million shares, etc.
         4. Essentially creates 4 week auction period—bc ppl can step in and bid
         5. Also makes it expensive—bc you're offering everyone the same price.
         6. Regulation 14E contains an antifraud provision similar to 10b-5
            a) 14E is the insider trading rule for tender offers
         7. Imposes duties on buyers of public companies in the US
         8. Williams Act: Also the statute that imposes disclosure requirements on any one that purchases 5% increments of a company—key for takeovers—is a key that someone is trying to takeover the company.
         9. Buyer's Duties Governed by Federal Law

      ii. Key Components:
         1. Under the Williams Act, a tender offer must be held open for a minimum of **20** business days, and if offer is changed—**10** more days.
         2. Offer everyone the same price: The Williams Act also requires that all offerees be treated equally during the course.

   b. US State Law: Defenses against Tender Offer Bids
      i. Generally:
         1. State corporate law is very permissive towards the defendants putting up takeover defenses
         2. Pretty much can much up any takeover defense you want.
         3. One Catch: Once there will be a change of control→ If you are going to sell over the company, under *Revlon* you have

to sell your company to the party that is offering the higher value or higher price.
4. We live in a world in US corporate law bc Delaware corporate law gives wide discretion to management.
5. Seller's Duties governed by State law

ii. Delaware's Defenses to Resist Hostile Bids:

1. Poison Pill

a) Gives existing shareholders the right to large amounts of stock, debt securities, or cash if the hostile bidder gains control.
b) A company can institute a poison pill, which makes the company essentially an unattractive target to any possible acquirer bc if they purchase a certain percent of shares—then everyone other than purchaser gets to purchase shares at a discount—so purchaser is diluted

2. Golden Parachutes

a) Granting large severance payments to existing managers in the event of a change in control

3. Selling "Crown Jewels"

a) Selling the company's most valuable assets to another company.

4. Lock up

a) A lock up involves granting preferential options on assets or stock to a company other than the hostile bidder.

5. Seeking a "White Knight"

a) Seeking a competing bid for the corporation from a company more friendly to the corporation's existing management

6. Greenmail

a) Paying "greenmail" to a hostile bidder by acquiring its stock in the corporation at a premium

7. Pac Man Defense:

a) The target launches its own hostile bid for control of the bidder.

c. Foreign Issuers and Williams Act

i. There are concerns that compliance with the Williams Act was causing foreign issuers to exclude US investors from tender offers
ii. As a result, the SEC has issued rules exempting tender offers for foreign securities from the Williams Act if US investors hold 10% or less of these securities and exempting tender offers for foreign securities from some (but not all) of the Act if US investors hold more than 10% but less than 40%.

d. Obligations of Target Company's Board of Directors

i. Generally
   1. Public tender offers raise questions regarding the obligations of the target company's board of directors and in particular—whether the target company may respond to a hostile tender offer with defensive measures designed to thwart the bid
   2. In the US, these are questions of state corporations law, which under the so-called "**internal affairs**" doctrine are governed by the laws of the state of incorporation

e. European Takeover Directive: Problems and Solutions of Public Tender Offers

i. Generally:
   1. It's a directive, so states don't have to follow and they can set their own standards.
   2. Through Articles 5 and 15—Europeans want to protect minority shareholders
      a) In the US, we protect majority shareholders.

ii. Problem:
   1. They don't impinge on regulator's awareness until much later

iii. Solution:
   1. Article 5 of 2004 Takeover Directive
      a) Requires any bidder passing a threshold set by each member state to make a mandatory bid for all the remaining voting securities of the company at the highest price the bidder paid for the securities in the run-up to the takeover

   2. Article 15 of the Takeover Directive
      a) Allows a bidder passing a threshold of 90-95% to "squeeze out" minority shareholders at a fair price

   3. Article 16 of the Takeover Directive
      a) Allows minority shareholders a corresponding right of "sell out" under Article 15 circumstances.

   4. Article 9 of the Takeover Directive
      a) Establishes a rule of board neutrality—
         i. A board has to get SH approval before implementing any of these defenses.
      b) Optional—not many European countries have adopted
         i. I.e. Germany opted out

   5. Article 11 of the Takeover Directive
      a) Any defenses you had prior to the bid are not applicable during the bid, and once the bidder crosses 75% threshold.
      b) Optional—not many European countries have adopted
         i. I.e. Germany opted out

iv. German Takeover Directive

1. Similarities to Williams Act

a) Regulates public tender offers, requiring the bidder to disclose a variety of information to German securities officials and to the public

2. Differences from US Law:

a) Must stay open at least 4 weeks—up to ten weeks
b) However, unlike US Williams Act, it does not allow partial tender offers
    i. Thus a bidder must offer to acquire all of the target's shares, although the bidder may be allowed to exclude shareholders residing outside the European Economic Area.
c) Germans impose a consideration requirement
    i. (1) The average price of the target's shares within the three months prior to the publication of the decision to launch the tender offer or
    ii. (2) The highest price paid by the bidder to acquire the target's shares within the six months prior to publication of the offering documents
d) Requires a bidder who obtains at least 30% of the target company's voting rights to make a mandatory bid for all outstanding voting securities of the company
    i. So a bidder who passes that threshold may "squeeze out" the remaining minority shareholders but may also be requires to =accept their offer to "sell out" their holdings.
e) Germans have opted out of Articles 9 and 11 of the European Takeover Directive.
f) More protection for SHs under German law than under US law, but not at the level of the EU Takeover Directive.
    i. POLICY for US law favoring board over shareholders: market efficiency, board knows best about the state of corp.

3. Note on Accounting and the Sarbanes-Oxley Act

Domestic Accounting Standards	Foreign Accounting Standards
FASB	IASB
GAAP	IFRS

a. **Generally**

i. Accounting aspects are crucial to any domestic purchase and sale of a business

ii. In the typical agreement, the seller will warrant that the financial statements delivered by the accountants at the closing are accurate.
iii. In the US, companies prepare their accounts under a detailed set of rules called "General Accepted Accounting Principles" (GAAP).
iv. Companies that offer securities to the public in the United States are required by the SEC to prepare their financial statements in accordance with GAAP.
v. Outside the US, accounting rules have seen a remarkable convergence in recent years as more and more jurisdictions have adopted the International Financial Reporting Standards (IFRS) (what Europeans love) promulgated by the International Accounting Standards Board (IASB).
    1. The US has effectively allowed foreign private issuers to use the IFRS standards without needing

b. The Sarbanes Oxley Act

i. Accounting scandals such as Enron and Worldcom led to Congress's enactment of the Sarbanes-Oxley Act in 2002.
    1. American capital markets are less attractive to foreign companies bc of Sarbanes Oxley.
ii. The act imposes a series of corporate governance reforms on companies—including foreign companies that are listed or registered on American exchange.
iii. Section 404 is the most controversial—it requires the company's management and auditors to report annually on the adequacy of its internal financial controls
    1. Compliance has been expensive
iv. Section 302 of the act requires a company's chief executive officer and chief financial officer to certify its periodic reports.
v. Other provisions of Sarbanes-Oxley are designed to reform the accounting process.
    1. I.e. a company must have an audit committee composed entirely of independent directors.
    2. Audit committee has to be independent auditors—cannot do anything but audit
vi. Criticism: Blamed for the relative decline of initial public offerings in the United States, but other factors have certainly contributed.
    1. I.e. rise of highly liquid markets outside the US

d. <u>Antitrust Law</u>

i. Introduction:

1. <u>Generally:</u>
    a. The acquisition of one significant competitor in one country by another in a second country may have implications for the antitrust policy for each of the two states.
    b. Possibility of antitrust issues in M&A especially if they are of a certain scale ($200 million requires certain disclosures with US Hart Scot Rodino Act)

2. <u>US has been the most concerned about antitrust</u>
    a. In the US Sec 1 and 2 of Sherman Act govern antitrust as well as sec. 7 of Clayton Act
        i. Clayton Act: tends to substantially lessen competition, prevent monopolizing behavior
        ii. Similar to sec. 2 of Sherman Act.

3. POV of Lawyer
    i. From POV of lawyer, what should we be thinking about before we even get started on the deal? The FTC puts out guidelines that are pretty lenient, lawyers just need to make sure they file the notification within the guidelines (make sure that the lawyers carefully define the market of the merger and carefully show pre-competitive effects)
        1. Pre-merger notification: is it necessary?
            a) If the acquisition of stock results in (a) one party holding $200 million of securities, (b) the acquirer has $66 million of voting stock and acquirer has sales of $113 million and the acquiree has $13 million, need to file pre-merger notification (adjusted for inflation, now its $262 million)
                i. Hart Scot Rodino requirement (don't worry about the details of Hart Scot Rodino)
            b) Non-cash deal—wait 30 days post notification
            c) Cash deal—wait 10 days

ii. International Issues Involved in Antitrust From US Perspective

1. Do you need to worry about Hart Scot Rodino?
    a. Only if a US person is acquiring a foreign company that has more than $66 million of sales in the US
    b. Foreign purchasers are exempt if the acquiree is foreign and the aggregate sales of both companies in the US are less than $145 million

2. Extraterritoriality?
    a. Congress has explicitly said they want this law to apply extraterritorially, and also these dollar amounts serve as measurements of conduct and effect

iii. International Issues Involved in Antitrust from EU Perspective

1. "Merger Regulation"
    a. In 2004, EU came out with new "Merger Regulation"
        i. This is similar to US law—Hart Scot Rodino
    b. Key language:
        i. "Significantly impeding competition," "Creates or strengthens a dominant position"
            1. No one really knows what this means
        ii. EU has a compressed time frame for reviewing per-merger notifications

2. Lawyer's Note:
    a. You can get through merger regulation more quickly than joint venture regulation, so if you have a choice, go with merger
    b. EU provides- one-stop shopping—don't need to get approval in different EU States

3. Merger Regulation Provisions
    Art. 1: Scope of the antitrust regulations
    Art. 2: Evaluating the concentration of the market
    Art. 3: More about what makes a dominant firm
    Art. 4: Notify the commission
    Art. 6: Procedural—how the commission will examine it
    Art. 7: Cannot consummate transaction until you get approval

Art. 8: Gives powers of decision to commission
Art. 10: More time limits

4. Practical Effects:
    a. Business people do NOT like these regulatory delays because during the delay, lots can happen—i.e. other bidders, change of heart, price goes up

5. Cases:
    a. **Generally**
        i. Europe is historically more worried about dominant position and high market share, though moving to the "substantially lessening competition" standard (similar to the US)
        ii. Political imperatives often drive these antitrust positions
        iii. In US—get an injunction from court to stop merger
        iv. In Europe—court can stop merger directly
        v. There is no international antitrust authority; the national systems all have to work together—there has been more cooperation over time.

    b. **Case: Boeing Mc Donnell** (US and EU Decisions)
        US Held: Pitofsky's statement: the merger (both commercial and defense aspects) is approved, even though on its face there are some concerns (Boeing has 60% of market share and they're buying a competitor, Boeing has long term contracts). However, McDonnell Douglas was never a real source of competition and innovation, so the merger doesn't really make a difference to the market.
        EU Held: They allow the merger but they are concerned about the commercial airline merger. They impose conditions for the commercial aspect of the merger: separate legal entities for 10 years, no exclusive Ks, don't exert undue influence on R&D projects. EU concerned about R&D bc it thinks that Boeing is funded by the defense department to create better technology. US response: Airbus is subsidized by the European governments. The cynical view: EU wants to protect Airbus.

    c. **Case: GE v. Honeywell**
        US Held: US approves the merger. Thinks bundling (providing many products at once) is good for consumers.
        EU Held: EU prohibits the merger. Thinks bundling will lessen competition over the long-term.

e. Exon-Florio

i. Generally:
1. Act of Congress that allows the President to prohibit M&A involving a foreign control of a domestic corporation if there is an impairment of national security
2. Came about during a period of history where US was worried about Japanese takeover
3. Very rarely used, though there has been an uptake in investigations since 2005 bc:
    a. (a) Attempted Chinese takeover of Unocal (oil company) and
    b. (b) Dubai attempted to buy foreign ports in US
4. Congress has expanded the investigatory practices of CFIUS: examine more closely critical infrastructure, critical technology, mandatory 45-day investigation period, increased reporting to Congress.
    a. CFIUS: Committee on Foreign Investment in the US (chaired by Treasury Department) that looks over these matters.

ii. "Control"

1. Very broad definition for control—broader than simply foreign company or foreign person

iii. Procedure

1. Committee on foreign investment has 30 days to investigate the merger
2. Committee on foreign investment has 45 days to make recommendation to the President
3. President has 15 days to make a decision

f. <u>Privatization</u>

i. Generally:

1. We're talking about a takeover of a government owned organization
    a. Occurs often in Latin American and Eastern European countries
2. Countries move to privatization for many reasons:
    a. Get money to the government
    b. Government services may be inefficient, improve performance and efficiency
    c. Ideological reasons: don't want to be communist

ii. Upside to people buying

1. Opportunity to make a lot of wealth, often the government is selling cheaply

iii. Downsides to people buying

1. Buying an outdated organization
2. Risky because there is no regulatory structure for this industry (since it was previously government owned)
3. Shoddy accounting, perhaps disgruntles employees
4. Possibility of claims from foreign owners (if the state took it over from a previous owner i.e. Cuban banks)

iv. Case: Venezuelan Telephone Company

1. Structure:
    a. 1991: 40% to GTE, 11% to employees and 49% to govt, GTE had effective control
    b. 1998: Goes entirely private, IPOed
    c. 2007: renationalized

XI. Problem 6: International Joint Venture

a. **Introduction**

i. Definition:

1. Joint Venture: investment tool by companies who need each other, often a successful company wanting to expand into a foreign market, and need someone local to help them out
2. Equity Joint Venture: two parties form a new corporation (must share profits and risks according to equity ownership, typically 50-50
3. Contractual Joint Venture: two parties function as a partnership (more flexibility in profit and risk sharing)

ii. Why they fail?

1. Trouble with control
2. Sharing technology—the foreign party may want to use cheap old technology, the local party may want the newest technology – Also who owns the technology
3. Valuation—how do you value the joint venture, and how do you value each contribution
4. Dispute resolution—typically by arbitration
5. Exit—how to wind down the Joint Venture—can it be done unilaterally? Who can buy you out?
6. In developing countries, laws often require joint ventures so some of the control of the company is local

b. Chinese Regulation of Foreign Investment

i. Generally:

1. Historically
   a. Joint venture has been the only mechanism by which foreign companies could invest in China
   b. However, now they are opening up.

2. Sino-Foreign Equity Joint Ventures
   a. Generally:
      i. It seems like China is very worried about foreigners taking advantage of the local Chinese party with regards to technology, control, and money.
      ii. This law is very detailed
      iii. CANNOT contract out of these obligations

   b. Sections:

      Art. 2 issues: Mandatory choice of law, and State may expropriate (with only limited compensation)
      Art. 4 issues: Local ownership must be at least 25%
      Art. 5 issues: No outdated technology, valuation of each contribution shall be decided together
      Art. 6 issues: Each party must have a representative in the director position
      Art. 11 & 12 issues: Keep money in China
      Art. 15 issues: Arbitration must take place in China
      Art. 43 issues: No exorbitant licensing fees for Intellectual Property

c. Resolving Differences: Arbitration

i. Differences/Sources of Tension
1. Technology—local wants good technology, foreign wants cheap technology
2. Procurement—local wants to source locally, foreign wants to source from itself
3. Personnel—foreign skeptical of family connections in local business
4. Expansion—local wants to export, foreign wants to expand there
5. Dividends—foreign wants to reinvest, local wants money
6. Cultural—foreign perceived as arrogant, local perceived as backward

ii. Arbitration
1. Generally:
a. Most conflicts with Joint Ventures will be arbitrated
b. Some issues with partiality and worries about not having independent contracts
c. May choose a CIETAC arbitrator or Chinese arbitrator, usually Chinese arbitrator is picked
i. Arbitration under CIETAC
1. **Rules**—(pretty standard)
a) Art. 21 &22: selection of arbitrator
b) Art. 31: agree on location
c) Art. 45: CIETAC will evaluate the award
d) Art. 67: default language is Chinese

2. **Generally**:
a) CIETAC awards are rendered in China, so NY Convention does not apply
b) If the issue is arbitrated outside China (this is allowed so long as both parties agree), the NY Convention would apply, but the truth is, most local parties don't have resources to arbitrate outside of China
c) If the parties don't arbitrate in China, they often go to Stockholm.

d. Antitrust

i. Generally:
1. Don't need to worry about antitrust
2. Do get an antitrust lawyer to look at it
3. Do look to see if you need to file Hart-Scot Rodino
4. FTAIA: extraterritoriality—see the *Ampigram case*

ii. US Antitrust Law and Joint Ventures
1. Joint ventures are typically not seen as dangerous as mergers
2. Same basic analysis (market power, etc)
3. *Texaco*: if two joint ventures are not competing with each other, there isn't even a per se rule against price fixing
4. *Tobacco, Timkin, 3M*: pretty aggressive Supreme Court cases against joint ventures
a. The basic point: these cases are old, and the landscape has shifted to be more favorable to joint ventures (though those cases are still good law)
5. Congress has allowed for certain exemptions from antitrust laws:
a. Research exemptions for research joint ventures
b. Can go to the Department of Commerce and get an Exemption—Export Trading Company Act
c. If the joint venture has less than 20% of market share, exempt

iii. Foreign Antitrust Law and Joint Ventures

1. Just because you are exempt under US law doesn't mean you are exempt under EU law
2. Argue 101 and 102 of the EU Directive, and you may argue legality under those articles
3. Want to try to classify it as a merger because the merger guidelines are clearer and the regulation is faster
4. Chinese antitrust law is very new, and it is very similar to European law (more similar to that than US Law)
5. Venezuela: antitrust law has historically been aggressive toward joint ventures.

XII. Problem 7: A Developing Agreement

a. Introduction

i. Generally:

1. Historical term: concession agreement
2. Purpose: contract bw state and foreign private party, typically for the exploitation of natural resources (oil, mineral)
    a. So it's a production-sharing agreement, in which the foreign investor and the host state work as partners in which the foreign investor is not granted mineral rights but simply provides services for the host state
3. Controversial: because inherently political when a state is involved, worried about exploiting the country, short-term interests trumping long-term concerns, draining money and resources out of the country

ii. Issues:

1. How do you split up control?
2. How do you split up money? (Royalties? How is it taxed?)
3. How do you wind down the deal?
4. What happens when country offers more favorable terms to a different party?
5. One party to the K is the lawmaker

b. Drafting Problems in Development Agreements

i. Generally:

1. Over the life of a particular agreement, relations bw the parties are likely to follow a predictable trajectory:
    a. At the beginning: state officials are pleased that somebody wishes to explore for minerals within their realm
    b. 10 years later: perceptions have changed
2. The problems start with the question of control. A concession agreement tends to give much power to the foreign party since it generally carries ownership rights along with it
3. There are questions about revenue assigned to each party—i.e. "bottom lime"

ii. Example Agreement:

Art. 1: Definitions
Art. 2: Granting of exclusive rights
Art. 4: Length of rights, typically lengthy contracts
Art. 5: Government has right to look for other resources in the same area
Art. 6: Timetable and money limit—analogous to the percentage ownership under the Chinese joint venture—government wants the party to stay for awhile and spend lots of money.
Art. 7: Development and production guidelines—setting up production in a way that meet world demands
Art. 8: New resources belong to government—have to tell govt if find new natural resources
Art. 9: Foreign party should be diligent, lip service to environment.
Art. 10: Host govt is paid: 4-6$ mil bonuses paid within thirty days after finding crude oil
Art. 11: Annual rentals fee paid
Art. 12: ¼ of land goes back to government over period of time.
Art. 13: Royalty Payments – anywhere from 12.5-20% of oil price is paid in royalties

a. Posted price: the higher the oil moves in the global market, the higher the royalties that need to be paid.

Art. 15: Govt. has to have access to company's accounting

b. Company may play games and downplay the amount of oil they're producing/money they're making

Art. 17: Taxation—anywhere from 55-85% of income taxation for host country

c. But depending on how much oil is found, this is all up for power play and bargaining power—i.e. what if way more oil is found than was originally expected.

d. Can company deduct this as domestic tax? As tax paid to a foreign government?

Art. 18: except for 55-85% of income taxation, this company will be treated like any other company in Abu Dhabi.

Art. 19-20: about the actual mechanics

e. Worried that companies will spend money through imports and exports—says you can move your mechanisms without paying for imports and exports of your mechanisms

Art. 24: First priority to employees: (1) Abu Dhabi, (2) Arab states, (3) others

Art. 25: Can use transportation facilities subject to limitations—i.e. ports

Art. 21: Environmental article—you can use our soil and water

Art. 26: Must train employees

f. Eventually they will be able to do this themselves and wont need the foreign company

Art. 32: Force majeure: if act of war/act of God, can be realized from obligations

Art. 33: Damages

Art. 36: Termination by the Government

Art. 37: Assignment—company cannot assign its obligations unless govt consents

Art. 38: Govt reserves right to better its terms

Art. 45: Investment—similar to Chinese Joint Venture law—if oil production ramps up, company has to look for more projects and ramp up its investment 10%.

Art. 46: English takes precedence over Arabic if there's conflict

c. Some Legal Aspects of Development Agreements

i. Introduction

1. Distinctive principles apply to Ks bw a government and private party under many systems of municipal law
    a. They include different rules as to apparent authority, impossibility of performance, assignment of contracts, or remedies for breach of contract
2. Issue:
    a. A party to the K that is also a sovereign—so sovereign is contractual party and lawmaker
    b. These are long-term contracts and things evolve over time.
    c. Different countries have different philosophies so this poses a problem
3. Tension between these philosophies that drive a lot of legal problems:
    a. Pacta Sunt Servanda
        i. About stability
    b. Rebus Sec Stantitbus
        i. Need to be able to able
4. Problems arise from the fact that the government is not only a contracting party but also a lawmaker
    a. I.e. it may enact new environmental laws, change K law, change tax rates.
    b. These problems are compounded by the length of time for which development agreements run.

ii. Dispute Resolution: Choice of Dispute Resolution Mechanisms in Development Agreements

1. Generally:
    a. With dispute resolution clauses, international arbitration is frequently used to shield the foreign investor (at least partially) from the domestic courts of the host country.
    b. If the K says "host state's court" yet there is a BIT and the BIT says arbitration, what do you do?
        i. Depends on the contract, depends on the arbitrator.
        ii. Can go through both really
        iii. Typically you'd expect the company to want arbitration under BIT.
        iv. Tribunal usually says try contractual provisions: i.e. domestic courts first, and then apply for annulment and go to arbitration.
        v. We are in a state of confusion here: As a host state—go to court, as a foreign investor: go to arbitration—result will depend on the particular K and the particular court.

2. Number of Choices in Selecting Mechanisms for Dispute Resolution:

(1) Domestic Courts

i. Parties may opt for domestic courts
ii. It is very rare for the courts of the foreign investor's home country to be chosen, bc this would be insulting to the host state
iii. But Domestic courts of host country may work for resolution of contractual issues
iv. In the era of Bilateral Investment Treaties, the choice of the host state's courts may seem less dangerous bc of a relatively consistent line of authority holding that such clauses, even if exclusive, do not deprive international arbitral tribunals of authority to decide BIT claims.

(2) International Arbitration

i. The neutrality this offers may be viewed as an advantage to the foreign investor over the domestic courts of the host state
ii. It is particularly important that the arbitration clause deal with all essential issues such as the appointment of arbitrators, place of arbitration, and rules of procedure.
iii. You can create your own process—under your own rules or ICJ rules
iv. You can go to an existing arbitration body

(3) International Centre for Settlement of Investment Disputes (ICSID)

v. Generally:
    1. 140 states are parties to this Convention—and to be eligible to hear your case, both the host state and foreign investor's home state must be parties to the convention.
    2. Awards under the ICSID Convention are not subject to review by domestic courts under the framework established by the NY Convention.
        a) Similar to NAFTA
            i. ICSID has its own mechanism for review
    3. The grounds for annulment of an ICSID award are limited like those under the NY Convention.
    4. Done under auspices of World Bank
    5. Specifically designed for disputes between investors and states.

vi. ICSID Additional Facility Rules
1. If either the foreign investor or host state, (but not both), are party to the Convention, the dispute may be decided instead under the ICSID Additional Facility Rules.
a) These rules are subject to the NY Convention (unlike normal ICSID rules)
2. Either option requires the consent of the disputing parties.

iii. Choice of Law in Development Agreements

1. Generally:
a. The foreign investor may resist subjecting the agreement to a law that may be changed unilaterally by the other party (host state)
b. There are several options

(1) No Choice of Law:
c. In the absence of a choice of law, most legal systems would look to the law of the host state, since it is most closely connected to the K – if under ICSID
d. International law would fill gaps in the law of the host state but also limit the application of the host state's law to those rules that are consistent with international law.

(2) Law of the Contract
e. The concession agreement constitutes a self-contained system within which the concessionaire and the government operate—inventing your own law
f. This option leaves the arbitrators without guidance as to how to resolve questions of interpretation, force majeure, remedies for breach, and so on.

(3) The Law of a Single State
g. It is extremely rare to find an agreement with a government that is governed by the law of the foreign investor's home state
h. Except for loan agreements—typically NY—on these kind of concession agreements, we don't have that—typically law of host state.

(4) Principles of Law Common to the Parties' States
i. A possibility is to select those principles of law common to the host state and the investor's home state, since such principles obviously cannot be changed by the host state alone—i.e. law applied in international tribunals.
j. Practical drawback: it may plunge the parties and the arbitrators into complex exercises in comparative law.

(5) General principles of law
k. This option has the advantage of not being subject to change unilaterally by the host government
l. On the other hand, it multiplies the comparative law difficulties for now the arbitrators must consider not just the laws of the parties' states but the laws of *all states* or *all "civilized states"* – a formulation that presents further difficulties in categorization.

(6) International law:
m. From a more practical perspective, the choice of international law to govern a concession agreement may also be inadvisable bc international law generally does not contain rules designed to resolve contractual disputes.

n. Problem here: there's not enough real international law out there to effectively be able to exist as a coherent body of law.
o. Usually what happens—put law of host state, but in stabilization clause, then a clause that says that international law serves as a limit of law of host state.

iv. Stabilization Clauses

1. Another technique for addressing the conflict between government as party and government as regulator is the so-called "**stabilization clause**"
    a. The aim of a stabilization clause is to prevent, limit, or compensate for changes in the regulatory regime that may harm the foreign investor
2. In its classic form, the stabilization clause "freezes" the law applicable to the development agreement.
    a. It gives parties the option of selecting a system of law "as in force on the date on which this agreement is signed"
3. More modern agreements frequently provide for a rebalancing of the parties' rights and obligations in the event of a legislative change in order to reestablish the initial equilibrium of the agreement
4. Critique: Stabilization clauses have been criticized as violations of the host state's sovereignty.
    a. Practically—difficult in a K to order sovereign to freeze the law
        i. People have the rights they had at the time the contract went into effect.

d. <u>International Law on Breach and Repudiation</u>

i. Introduction

1. Trying to understand the circumstances in which breach or repudiation of a development agreement violates the system of laws governing the agreement AND international law.
2. This is a question of customary international law and bilateral investment treaties.
3. Fundamental question: if the host country breaches the agreement,

ii. Custom: Customary International Law

1. <u>Generally</u>:
    a. It has long been recognized that the repudiation or breach of a contract by a state may give rise to liability under customary international law.
    b. Key Distinction: bw commercial activity of sovereign and actual political actions of sovereign themselves—whether government is acting in government capacity or as a commercial party
        i. If state is acting as a commercial party—this is not a violation of international law and stays as a domestic contractual issue
            1. This issue comes up with sovereign immunity
        ii. If state is using governmental power to defeat contract—it could rise to level of violation of international law, which could have repercussions beyond national court system.
    c. Under US' capitulation of custom, it is not a violation of international law if it is due to the state's inability to perform, or if non-performance is motivated by commercial considerations, and the state is prepared to pay damages or to submit to adjudication or arbitration and to abide by the judgment or award (Comment H of Restatement)
        i. If state has some defenses

2. <u>Restatement §712:</u>
    a. The restatement treats breaches of contract separately from expropriations
    b. It also sets forth customary international rules for the taking of property.

iii. Bilateral Investment Treaties

1. Generally:
    a. The protection of state contracts under international law has been affected in recent years by the dramatic increase in the number of bilateral investment treaties.

2. BIT Provisions and Contract Claims
    a. Generally:
        i. BITs may contain provisions of particular relevant to contract claims:
        ii. The proliferation of BITs has opened up possibilities for "BIT shopping"
            1. This is for an investor to seek out favorable provisions in treaties between the host state and states other than its own home state.
            2. Can do this by creating a holding company in a third state with a favorable BIT.

    b. "Fair and Equitable Treatment"
        i. First, BITs frequently provide a provision for "fair and equitable treatment"
        ii. Recent arbitral awards have construed these provisions to protect investors' reasonable expectations that may be created by contract terms
        iii. Argue: country acted a certain way that violated BIT and take country to some arbitral tribunal.

    c. "Umbrella Clauses"
        i. Second, a large number of BITs contain "umbrella clauses"—clauses in which the state-parties agree to observe other obligations they have entered into with respect to investments
        ii. Very vague
            1. Is violation of the K a violation of this clause
            2. This contractual violation is not necessarily a violation of intl law

    d. Arbitral Tribunal to Hear Additional Claims
        i. Third, a number of BITs contain dispute clauses that allow an arbitral tribunal to hear not just claims that the BIT has been violated but other claims related to the investment.
            1. The BIT says we will hear through arbitral tribunal BIT set up for disputes with respect to investment. But question: is this possible
                a) Swiss-Pakistan BIT—says this does not cover K
                b) Swiss-Philippines BIT—says it does cover K

3. Case: Aguas del Tunari v. Bolivia
    Held: Its legitimate to K with a sub of a company you want to work with that you have a BIT with rather than the actual company when you don't have a BIT.
        i. Basic arbitrage: if you are a lawyer for one of these companies, a BIT is to your advantage, so you go sign the agreement using a company which has a BIT.
        ii. Huge tool for the lawyers to ensure that you have the help of the BIT.

e. <u>Renegotiation of Development Agreements</u>

i. The tension bw the need for contractual stability on one hand and the need to adjust to changed circumstances on the other is endemic to development agreements.
ii. Asante argues that renegotiation should be acknowledged as an integral feature of the foreign investment process
iii. Some agreements provide for renegotiation if other companies are granted better terms—a most favored nation clause
iv. Whether or not the K contains a renegotiation clause, bargaining often occurs in the shadow of threats from each side.
    1. The host state may threaten to expropriate the investment entirely if the agreement cannot be renegotiated to its satisfaction.
        a. Renegotiation tends to emerge whenever there is regime change
            i. I.e. Venezuela: Chavez comes to power wants to renegotiate with oil companies, which they don't like.
                1. Very fact specific.
    2. The foreign investor may threaten to pull out, leaving the host state to its own devises or to bring an arbitral claim if the investment is expropriated, or unilaterally modified.
v. Can have a MFN clause from POV of country—country can give better terms to others, we want that as well.

XIII. Problem 8: International Debt Instruments

a. Introduction

i. Generally/Historical Development:

1. We only used to talk about loan agreements
2. However, the world has changed—rather than simply loans, we have countries issuing their own securities and bonds and selling them directly to investors
3. This is not a new phenomenon—this goes back to the 19th century—countries around the world faced debt crises
    a. Drago Doctrine: cannot use force to get a country to pay
        i. I.e. Turn of the 20th century: European countries tried to blockade Venezuela to get them to pay
4. Mid 1980s: Mexico, Brazil, and Argentina had problems with their economies and currencies—in those days—banks lending to those countries and when they weren't paid, there were outcries from banks about how they would collapse if not repaid.
    a. Argument: 2 compounding factors:
        i. (1) in 1980s: in that era there was a lot of money in oil producing countries which started putting their money in banks
        ii. (2) These had cheaper deposits, which started lending to these countries, their countries overheated, inflationary pressures, currencies then dropped—then the debt is denominated in lender's currencies (dollars, pounds, Euros) and when your currency starts collapsing you cannot pay back the debt in the foreign currency.
5. US tried various ways to help out:
    a. (1) Baker plan
        i. In late 1980s- US issued Brady Bonds to the bank and that averted the crisis—put US credit on the line
    b. (2) Countries Defaulting on Loans
        i. In 1990s: 1994 Mexico problem—went to floating currency and currency is severely devalued (happens all over the world)
            1. Fairly sad history of default
            2. Counterargument: IMF creates moral hazard by being a bank of last resort—allows countries to gamble

ii. Pros and Cons to this:

1. Issue here:
    a. Mirror image of developing agreements: countries that are borrowing money and question becomes what happens when country says "I cant, I wont, I don't want to pay"
    b. Concession agreement: things that are going on in the country's territory, on their home turf
        i. Here is country borrowing money
        ii. Choice of law here: is those of the investors

iii. Bank Loan v. Bond

1. Bank Loan
    a. Commercial loan from bank to borrower
    b. Not as difficult to renegotiate a bank loan

2. Bond
    a. A security—there's not necessarily one bond holder- you purchase an investment and you get principal plus interest.

i. Securities—depending on where you issue them—will need some approval from some body of law.

b. Dynamics change—paying back many people—so if something goes wrong, its difficult to renegotiate
   i. Problem—having to deal with different/multiple types of investors.

c. Less of a systemic risk

d. Most bonds are "registered book entry"—registered to an actual owner

b. Drafting International Debt Instruments

i. Introduction:

1. Mexico Agreement:
   a. Key parts for a bond agreement:
      i. There's a borrower and a lender
      ii. Important feature: fixed or floating interest rates, what currency? When to be paid?
      iii. Mexico bears the risk bc they're paying in US dollars
      iv. Here: no requirement on how Mexico has to use the money.

2. Generally:
   a. Historically, sovereign states have issued debt through two principal instruments:
      i. (1) Syndicated bank loans
         1. With a syndicated bank loan, the lead bank sells "participations" to other banks, allowing banks lower their overall risk by diversifying their portfolios of borrowers.

      ii. (2) Bonds
         1. **Generally**
            a) Bonds are securities and are sold to and traded among a broader market of investors.
            b) Sovereign bonds are often listed on an exchange such as the Luxembourg Stock Exchange
            c) The terms of bonds are negotiated with "underwriters," investment banks that buy the bonds initially but sell them on to investors w/in a matter of hours

         2. Bonds sold to Americans
            a) Securities offered to the American public must be registered and so the issuer must comply with two basic requirements:
               i. (1) It must file a registration statement with the SEC in which it sets for the detailed information required by Securities Act
               ii. (2) It must furnish to each purchaser ap art of the statement known as the prospectus that, in somewhat less detail, contains the data that the purchaser supposedly needs to appraise the value of the security.

3. **Types of Bonds**
    a) Bearer bonds:
        i. Entitle whoever physically holds the bonds to receive principal and interest payments by presenting "coupons" attached to the bonds to the paying agent.

    b) Registered bonds:
        i. The paying agent maintains a register of bondholders and makes payments to whoever is listed as the owner on the record date

4. **Forms Bonds are Issued In**
    a) Certificated form:
        i. Holders of certificated bonds receive a form of the bonds themselves

    b) Book-entry form:
        i. These bonds are registered in the name of a company that acts as a depository, with the bondholders owning beneficial interests.

b. Factors in Debt Instruments

i. Currency Clauses
    1. The heart of any debt instrument is constituted by the clauses providing when, where, and in what currency the funds are to be advanced to the debtor and then the terms on which the debtor is to repay what it owes.

ii. Rate of interest:
    1. Fixed rate of interest:
        a) It becomes particularly important with fixed rate obligations to limit the options for early repayment and redemption
        b) If creditors had the option of demanding early repayment and interest rates rose, the borrower could be forced to refinance at a higher rate.
        c) Conversely, if the borrower had the option of redeeming the debt early and rates fell, creditors could be forced refinance at a lower rate.

    2. Floating rate of interest
        a) The interest rate is calculated based on an underlying rate plus a "margin."
        b) The underlying rate most often used is the London Interbank Offered Rate
            i. This is the rate at which major banks on the London market lend to and borrow from one another
        c) The margin is an additional percentage that the borrower agrees to pay in addition to the floating, underlying rate
            i. The margin gives the lender a measure of profit and takes into account the riskiness of the particular borrower.

iii. Legal Limits on Amount of Interest Charged
   1. There may be legal limits and rules providing that it is unlawful to charge the borrower a higher rate of interest after default.
   2. Islamic world: prohibit to charge interest—instead have instruments like *sukuk* that resemble bonds but are structured to pay rents or profits rather than interest.

iv. Additional Amounts or Tax Gross Up Clauses
   1. It is a response to the possibility that the borrower's country might tax the flow of interest payments.
   2. The function of such a provision is to shift the risk of taxation by the borrower's home country to the borrower
   3. It provides that if the borrower is required by law to withhold or deduct taxes, it will pay additional amounts to make up the difference.
   4. Practically: Disincentive to impose any tax

v. Pari Passu Clause
   1. Promises that the notes will rank equally with all other unsecured and unsubordinated indebtedness
   2. When the borrower is a private firm, such clauses serve to prevent the creation of senior claims that would have priority in bankruptcy.
   3. Because sovereign debtors cant go into bankruptcy, the presence of such clauses in their debt obligations is a mystery
   4. Danger with sovereign: you can have an investor/lender who doesn't agree with restructuring and uses this clause to say that their claim is the same and they use the clause to prevent restructuring.

vi. Negative Pledge
   1. Negative pledges prohibit the borrower from creating security interests—defined broadly to include any lien, pledge, mortgage, security interest or other encumbrance—on any of its revenues or assets unless the notes are similarly secured
   2. The purpose of this clause: to make sure that the borrower's assets remain available to satisfy the claims of unsecured creditors like the noteholders.
   3. Only restriction on borrower

vii. Accelerate Payment Clause
   1. Allows noteholders to declare that the notes are immediately due and payable.
   2. Could present a major issue—govt could have to repay all the money that they don't have
   3. Default is the trigger

viii. Default Clause
   1. The failure to make principal or interest payments under the notes and the failure to comply with other terms of the notes (i.e. negative pledge, bk) can result in default
   2. If you default on any other debt, then lender can accelerate payment.

ix. Cross-Acceleration Clause
1. If any other credit agency demands accelerated payment, then they have the right to accelerate payment on their debt.

c. Enforceability of International Debt Instruments

i. **Generally**
1. Here: talking about if a country cannot or will not pay, whether its obligation can be enforced in a court of law.
a. Can you enforce a clause against a country that has violated an agreement
2. Note that in *Sabbatino* the SC held that US Courts would not question the validity of foreign acts of state fully performed within another country's territory.

ii. Arguments from Defense Attorney
1. (a) My client, being a sovereign is immune from suit (Foreign sovereign immunity)
2. (b) Non justiciable bc of act of state
3. (c) Article 8 argument/Bretton Woods

iii. Case: Allied Bank International v. Banco Credito Agricola

Facts: Costa Rica: not abiding by provisions in loan agreement.
Issue 1: Does Article 8 argument apply?
Held 1: No: (1) In Bretton woods: it was about one currency against another—not bank loans like we have here, and (2) the actions of Costa Rica are against Bretton Woods—Costa Rica's attempt to put in controls is contrary to the spirit of Bretton Woods
a. Article 8: exchange contracts (i.e. loan agreement) which involves the currency of any member (of Bretton Woods) and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. Court rejected Article 8
Issue 2: Does act of state doctrine apply? If yes, it precludes judicial examination of the Costa Rican decrees.
Held 2: the act of state doctrine is applicable to this dispute only if, when the decrees were promulgated, the situs of the debts was in Costa Rica. Because the court concludes that the situs of the property was in the US, the doctrine is not applicable
b. Act of state is limited in virtually all situations depending on the territory in which it happened
c. Also, what Costa Rica did was inconsistent with US policy
d. Costa Rica also acted unilaterally—not multilaterally
i. (Think Shrimp Turtle case)

iv. Note on Foreign Sovereign Immunity
1. Generally:
a. Historically, governments were considered immune from suit in the courts of another state.
i. The sovereign is immune from suit
b. During the 20th century, a number of countries moved from an absolute to a restrictive theory of immunity
i. Under a restrictive theory, foreign states continued to enjoy immunity from claims arising out of its governmental activities but were not immune from claims arising out of its non-governmental activities (i.e. commercial activity).
1. The US adopted this theory in 1952 and codified in FSIA

a) Section 1330 of Title 28 of US Code gives the district courts personal and subject matter jx over claims against a foreign state from which it is not entitled to immunity.
b) Section 1604: foreign states are immune from jx of both state and federal courts except in Section 1605
c) Section 1605: Exceptions from immunity to suit.
    i. (a) Foreign state waived its immunity
    ii. (b) Foreign state conducted commercial activity that causes a direct effect in the US
    iii. (c) Property taken in violation of intl law
    iv. (d) Suit brought to enforce an agreement made by foreign state with a private party to do arbitration.

2. Case: Republic of Argentina v. Weltover, Inc

Facts: Argentina issued obligations called "Bonods" that provided for the payment of principal and interest in US dollars in London, Frankfurt, Zurich, or NY at the election of the creditor. When Argentina ran into problems in 1986, it unilaterally extended the time of payment on the Bonods, and offered creditors the right to exchange their Bonods for other securities. Plaintiffs refused and sued.
Held: Here talking about "commercial exception" to FSIA, which provides that a foreign state is not immune from suit. *Something is commercial if its something a private citizen can do*. Here, it also causes a direct effect in the US bc NY is place of payment.

v. Enforcement of Judgment

1. If there is a judgment—how to actually enforce it—very, very difficult to do
2. Issue here:
    a. Prejudgment attachment—
        i. For both Foreign state and foreign agency/ instrumentality—must be commercial activity in the US with an explicit waiver
        ii. Very difficult, has to be commercial activity within the US with an explicit waiver (on all accounts—needs commercial activity and a waiver)
    b. Post-judgment attachment:
        i. Foreign state—still very, very difficult
            1. Post judgment isn't as difficult, but there are subtleties; if trying to enforce against a foreign state—only property of commercial activity and only if there is a waiver.
        ii. Foreign Agency/Instrumentality—if you are trying to enforce against a foreign agency/instrumentality—can attach the property.

d. Restructuring Sovereign Debt

i. Introduction:

1. Generally
    a. Sovereign borrowers have sometimes been unable or unwilling to repay their debts as promised and have sought to restructure in various ways
    b. These restructurings have involved a number of institutions of varying levels of formality.

2. The Paris Club
    a. The Paris Club is the forum through which creditor countries negotiate to restructure their bilateral loans to debtor countries
    b. Currently there are 19 permanent members of the Paris Club.
    c. It has a secretariat
    d. While each Paris Club negotiation is different, the institution has developed a set of rules and principles to guide it
        i. I.e. it requires "conditionality"

3. The London Club
    a. The London Club is a forum for the restructuring of commercial bank loans.
    b. The London Club (unlike Paris Club) has no secretariat and no formal procedures.
    c. It has been common practice to organize a Bank Advisory Committee of the 12-15 banks with the largest exposure to negotiate an agreement in principal with the sovereign debtor.
    d. Shift from commercial bank lending to bonds has led to a shift in the way in which debts to private creditors are restructured:
        i. Today, such restructuring typically occurs through exchange offers developed by debtor countries
        ii. Bondholders are offered the opportunity to exchange their existing bonds for new bonds that may differ in maturity, principal amount, interest rate, or some combination of the three.

4. International Monetary Fund
    a. The IMF has evolved over its history from the guardian of the Bretton Woods exchange rate system to a provider of economy advice and a manger of economic crises, particularly with respect to the developing world.
    b. In the context of sovereign debt restructuring, the IMF has played a number of important roles:
        (1) It has served as an honest broker among lenders encouraging restructuring and arranging new lending from private and official sources
        (2) It has itself extended credit to countries in financial crises
            1. As a condition of extending credit, the IMF has required debtor countries to adopt reforms of their domestic economies, a policy known as "conditionality"
        (3) It has provided a seal of approval for the economic policies of developing countries.
    c. Critique:
        i. Creates a moral hazard problem—they can spend lavishly knowing that they will be bailed out

5. Case: Pravin Banker Associates, Ltd. v. Banco Popular Del Peru
    Facts: Peru runs into a financial crisis and says they wont pay their debts. They restructure with a bank called Mellon. Fujimori, president of Peru submits to IMF. Most Creditors suspend their lawsuits. Except for Pravin and refuses to go along with everyone else—is a holdout. Pravin is told to wait 6 months. After 6 months, they re-sue. Peruvians appeal to second circuit
    Held: Just as a matter of international comity, the US court should back off and defer to Peru. Says international comity is a rule of convenience. Then looks to see if its in US interests. To some extent, Peru is encouraging restructuring that is positive here. And we recognize what Peru is doing,

part of what they're doing is consistent with US interests, however, Peru had 6 months, they don't get more time.

ii. International Bankruptcy

1. Generally:
    a. There's really no such thing as international bankruptcy—bc instead we have national bankruptcy laws.
        i. The mechanisms for bankruptcy are national
    b. In the case of private debtors, national bankruptcy laws are used to solve the collective action problem.
    c. Under Chapter 11 of BK code—a bk petition results in an automatic stay of litigation against the debtor
        i. In US bk code—in chapter 15: a representative appointed by the court in a foreign bankruptcy proceeding may petition for recognition of the foreign proceeding, which results in an automatic stay with respect to the debtor's property in the US.
        ii. Chapter 15: a way to recognize foreign bankruptcy proceedings.

2. IMF Proposal that went nowhere: Sovereign Debt Restructuring Mechanism
    a. Basic Idea: the IMF wanted to create a quasi-supranational body that would be a super-national bankruptcy resolution mechanism.
        i. This may encourage through the IMF more capital to flow in (that could be good or bad)
    b. This got voted down because the US vetoed it.

iii. Collective Action Clauses

1. Generally:
    a. Short of a collective action clause, in order to restructure or modify—you would need unanimity/everyone to participate
    b. In the US, for private loans/corporate bonds, we have a statute that prohibits these collective action clauses.
    c. Other countries—i.e. UK—has had collective action clauses for centuries
    d. Basic Idea: can set a threshold for modification with collective action clauses.

2. Case: Mexico Bond Case:
    a. Need only a supermajority to modify
    b. There are mechanisms that create a structure where you don't need unanimity
    c. The argument is: that in a world where the IMF restructuring mechanism has been shot down, the collective action clause has at least some private contractual way to respond to these problems.