The International Legal Environment of Business

Chapter 21
International Issues

- International law and business
- U.S. import policy
- Business structures in foreign markets
- Foreign Corrupt Practices Act and its restraints on competitiveness for U.S. firms
- International contracting
- Insuring losses
- Resolution of international disputes
The International Business Environment

- Includes all business transactions that involve 2 or more countries
  - Movement of goods across national boundaries
  - Movement of services across national boundaries
  - Issues regarding capital
  - Issues regarding personnel
Risks of International Business Transactions

- Financial
- Political
- Regulatory
- These stem from differences in:
  - Currencies
  - Language
  - Business customs
  - Legal systems
  - Social philosophies
  - National goals
The Foreign Corrupt Practices Act (FCPA) 1977

- Punishment of payer of bribe to foreign officials
- “Corrupt” person displays reckless or conscious disregard for consequences of one’s actions
- Payer knows payment will go to public official
  - “Any reasonable person would have realized”
  - “Consciously chose not to ask about what he/she had reason to believe would be discovered”
  - “Simple negligence” or “mere foolishness” exception
- Routine governmental action (Grease Payment) exception: “facilitation or expediting payment. . . the purpose of which is to expedite or secure the performance of a routine governmental action.” (i.e. visas, providing basic utilities, transportation services, etc.--small amount and very limited usage).
Punishments Under FCPA

- **Individuals:** Maximum of $100,000 & 5 years in jail
- **Corporation:** Up to $2,000,000/violation
- **Exception:** Dept. of Justice “pre-deal interpretation”
- **Watch:** “Slush funds” or “Salaries, commissions or fees” disproportionate to service provided
International Contracts

- **Cultural Aspects**
  - i.e. Asia, Europe, Latin America all have long-term approach to relationships

- **Payment Clauses & Exchange Rates**

- **Repatriation of Profits**

- **Choice of Language Clause**

- **Force Majeure Clauses**

- **Forum Selection Clause**
  - Selection of Court

- **Choice-of-Law Clauses**
  - Select law that applies

- **Letters of Credit**
  - Assurance by bank of buyer to pay seller upon receipt of documents that prove goods were shipped and contract fulfilled
  - Revocable or Irrevocable
Loss of Investment
(Political Upheavals, Unstable Monetary Systems, Changes in Laws)

• **Nationalization**: Gov’t “nationalizes” foreign investment
  - Gov’t may pay less than value
  - i.e. Iran, Cuba, England

• **Expropriation**: Taking foreign property in accordance with international law

• **Confiscation**: Taking is discriminatory

• **Insuring Against Risk of Loss**
  - Short-term private insurers
  - Major insurers (i.e. Lloyds of London)
  - Gov’t agencies (i.e. Overseas Private Investment Corporation [OPIC]) insures investors who invest in less developed countries
• **Act of State**
  - Court gives up right of jurisdiction over foreign country or representative
  - Court will *bar compensation* because the *acts* were by a foreign government or representative

• **Sovereign Immunity**
  - Bar to compensation by foreign investors
  - Immunity to foreign representative or country
  - One country must respect the independence of other countries and their representatives
International Dispute Resolution

- **International Court of Justice (ICJ)**
  - Only nations have standing—not individuals
  - Nations may make claims on behalf of persons
  - No mandatory compliance requirement
  - UN Security Council must enforce
- **Arbitration:** 3rd neutral party decides outcome, which is binding
- **Mediation:** 3rd neutral party “suggests” outcome, which is *not* binding

- **Litigation**
  - Differs within countries
  - Not enforceable outside of country
  - Treaties/Conventions may assist potential parties
  - Contract clauses assist courts in enforcement of claims
  - Usually need “minimum contacts” for jurisdiction
Letters of Credit/Bill of Lading

- Buyer’s Bank → Seller’s Bank
  1
  2
  2A
  3

- Contract
- Irrevocable
- Letter of Credit
- Third Party Transporter
- Payment
- Goods
- Bill of Lading

- Buyer
- Seller

- Revocable only for Fraud.
- Not revocable for mere Breach of Contract
End of Chapter 21
Sources of International Law

- Individual countries create their own laws
- Trade agreements between countries (NAFTA)
- Worldwide/regional organizations, i.e.
  - United Nations
  - European Union (EU)
- No universal international court system, although attempts made through
  - International Court of Justice
  - International arbitration attempts
  - Courts of individual countries
- Difficult to enforce decisions and contracts
International Trade Agreements

- Improve economic relations of countries
- Cover variety of commercial issues
- Tax agreements prevent double taxation
- Examples:
  - General Agreement on Tariffs & Trade (GATT) replaced in 1995 by World Trade Organization (WTO)
Taxes on Imports

- **Tariffs**--Taxes levied by government on imported goods
  - *specific tariffs*: fixed duties on products
  - *ad valorem tariffs*: % of price of product
    - See *Heartland By-Products, Inc. v. U.S.*

- **Harmonized Tariff Schedules**--worldwide classification of goods for customs officials

- **Bans on Certain Products**--i.e. weapons, illegal products, narcotics, national security concerns
Heartland By-Products v. U.S.

Imported sugar is controlled by Tariff Rate Quota (TRQ) as a product that produces more than 6% non-sugar solids.

• Heartland sought reclassification which Customs ruled on favorably under the U.S. Harmonized Tariff Schedule. Import is described as having a manufacturing process and composition of the syrup resulting in “less than 5%” of “soluble non-sugar solids.” Relying on the reclassification, Heartland began importing sugar syrup in 1997.

• Competitors complained that the classification was in violation of the TRQ for sugar. They filed a petition to have Heartland’s syrup reclassified. Customs reclassified; Heartland was then subject to the TRQ for sugar.

• Heartland sued in Court of International Trade. The court ruled for Heartland. Customs & U.S. Beet Sugar Assn. appealed.

• **HELD:** Reversed. Custom’s revocation of its classification was “logical and well-reasoned”. Even though Customs was a little inconsistent, the tariff statute allows revocation of prior classification.
Import Price Controls

- In U.S.--Dept. of Commerce through International Trade Administration (ITA) & International Trade Commission (ITC)
- **Antidumping Orders**: When there is charging a lower price in an export market than in a home market. Duty is determined by comparing market price in home market vs. price charge in U.S. When item is imported, then duty is applied to product.
  - See *Pesquera Mares Australes Ltda. v. United States*
- **Countervailing Duties**: Tariff applied to offset subsidies provided by foreign governments to their industries that lower prices of products imported into the U.S. Duty applied is = to foreign governmental subsidy. (Purpose: To assist U.S. products to be competitive in the U.S. market)
- **Foreign Trade Zones**: Goods processed. Duties assessed upon leaving zone.
- **Duty Free Ports**: No duties or tariffs assessed on products, i.e. Hong Kong
Pesquera Mares Australes Ltda. v. U.S.

- Coalition for Fair Atlantic Salmon Trade complained exporters of Atlantic fresh, farmed salmon in Chile were selling salmon in the U.S. at less than fair value.
- Commerce determined that prices were less in U.S. than in Japan & imposed a 2.23% antidumping duty.
- Exporters appealed, which was affirmed by Court of International Trade. Exporters appealed again.
- **HELD**: Affirmed. In looking at the “dumping margin” Commerce will look at the value, making a “fair comparison” between amounts charged for the product in the U.S. and other markets.
- Commerce looked at product characteristics and different classifications in countries & industry. Any differing classifications of items sold in U.S. & Japan were “minor”.
Export Regulation and Promotion
(To Reduce U.S. Trade Deficit)

• Federal/State governments
  – Commerce Department helps promote exports through ITA activities
  – States help develop export promotion programs

• Export Restrictions, if goods, for instance:
  – Injure domestic industry
  – Jeopardize national security

• Export Licenses (types depend on goods exported)
  – Reexported Goods--Goods exported into country #1; then reexported into country #2 (May violate U.S. licensing regulations)

- Include criminal and civil penalties
- Can also have administrative sanctions
- If an exporter “knowingly” violates the Export Administration Act, there can be fines up to $50,000 or 5 times the value of exports and receipt of up to 5 years in prison
- Person who “willfully” violates the Act, can be fined more and receive up to 10 years in prison, with a possible suspension or revocation of a business’s authority to export
- Example: McDonnell Douglas paid $2.1 million fine for improper sale of equipment to China.
Exporting Manufactured Products

• **Indirect Exporting**
  – Using exporter who sells product in a foreign market for U.S. manufacturer

• **Direct Exporting**
  – Developing an organization within the business that is responsible for exporting products
Foreign Manufacturing

- **Wholly Owned Subsidiary**
  - Business owns the facilities—some countries limit % of ownership

- **Joint Venture**
  - Sharing ownership with foreign partners

- **Licensing Agreement**
  - *Licensor* grants *licensee* access to patents and technologies

- **Franchise Agreement**
  - *Franchisor* grants *franchisee* rights to sell products or services, i.e. McDonald’s, Hertz

- **Contract Manufacturing**
  - Contract made for production of products

- **Issues to Consider**
  - Labor expenses
  - Shipping costs
  - Raw material costs
  - Avoid restrictions/tariffs
Keller v. Central Bank of Nigeria

Keller sells mobile hospitals. Was contacted by Prince Arthur Ossai, who said he was a member of the royal family of Nigeria and a government official.

- Ossai wanted to buy $4.1 million worth of mobile hospital equipment. He said there was $25.5 million in an account with Central Bank of Nigeria (CBN). Keller would be given funds to make payments: $4.1 million for the equipment; $2.52 million for profit for Ossai; $7.65 million for “licensing fee” for himself; $9.945 million to Ossai as commission; etc.
- Keller was to pay $28,950 in bank fees & then get $25.5 million to distribute. He pays, flies to London to meet the Nigerians. The joke is on him.
- Keller sues CBN employees & CBN for fraud and violating RICO.
- 4 people didn’t respond & default judgment was entered against them. Ct. dismissed claim vs. 3 others saying Keller had “unclean hands,” but allowed RICO claim. CBN appealed that suit should be dismissed under FSIA because the illegality of the deal precludes finding that this is a commercial activity.

**HELD:** The “commercial activity” exception of the FSIA will allow the RICO claims to go forward and there will be no immunity.

- Illegality does not destroy the “commercial activity” exception under the FSIA which can apply to this case.
“Disputes With Chinese Companies or Individuals”

Negotiation:
- Simple negotiation is the best method of dispute resolution in China.
- If a firm experiences difficulty in negotiation, it can seek assistance from Chinese officials to honor terms of contract.

- Arbitration
  - Arbitration is preferred next to negotiation.
  - Two Chinese government-sponsored arbitration bodies used when transaction involves a foreign party: China International Economic and Trade Arbitration Commission (CIETAC); China Maritime Arbitration Commission (CMAC)

- Litigation
  - Foreign individuals and companies have same ability to sue as Chinese citizens and companies.
  - The Chinese courts are not always up to international standards.
  - Judges have minimal training. There are also corruption problems.
  - (Arbitration has advantage of a panel of experts.)

- Enforcement of litigation and arbitral awards is difficult. China’s Supreme People’s Court is trying to address this issue.
Origins of International Law

- Commercial codes date back to Egypt in 1400 B.C.
- Early trade centered around law of the sea
- 700 B.C.--Isle of Rhodes develops International Code
- Greek and Roman Empires had codes of trade
- Middle Ages: Lex Mercatoria (Merchant Law) Governed trading customs in Europe
- Today’s codes partially derived from early efforts