TT TEXTBOOK TESTBANKS

Test Bank for International Business Law and the Legal Environment 4th DiMatteo

TEST BANK SAMPLE PREVIEW

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INSTRUCTOR'S MANUAL
WITH TEST BANK

Prepared by Larry A. DiMatteo

INTERNATIONAL BUSINESS LAW & THE LEGAL ENVIRONMENT
A TRANSACTIONAL APPROACH
(4th Edition)

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Test Bank for International Business Law and the Legal Environment 4th DiMatteo

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Note

The Chapter Outlines can be used to assist the instructor's preparation or handed out as Student Worksheets to encourage notetaking.

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SAMPLE SYLLABUS 1
International Business Law

NOTE: This syllabus (course) <u>focuses on international business transactions</u>, concentrating on sale of goods, licensing, and foreign direct investment. This is an ambitious class covering 13 Chapters allocated over 28 1-hour class sessions.

Office Hours: TBA or by appointment

Faculty Biography:

Special Needs: Students requesting classroom accommodation must first register with the Dean of Students Office. The Dean of Students Office will provide documentation to the student who must then provide this documentation to the Instructor when requesting accommodation.

Laptop Policy

Experience has taught me that students who use their laptops during class to multitask (e-mail, work on projects, and less desirable pursuits) get less out of the class, are more dissatisfied with it, and perform less well than students who devote their full attention to the classroom experience. Therefore, in the interest of the greater good, **please do not use your laptops or other electronic devices during class**.

Required Readings:

DiMatteo, Larry A., *International Business Law and the Legal Environment: A Transactional Approach* (4th ed. Routledge 2021).

CLASS HANDOUTS (See Course website).

Course Objectives: Students will be exposed to the legal implications of transacting business across national borders. The focus will be on transactional international business law, including the legal and ethical environment of international business, international contracting, importing-exporting, trade finance and international intellectual property law and licensing. The student will gain an appreciation of the special risks of conducting business internationally and the legal pitfalls associated with those risks. The course aims at exposing the business student to the legal implications of transacting business across national borders. The focus will be on transactional international business law. The course's subject matter can be roughly divided into four segments: (1) Legal Environment of International Business, (2) Strategies of Doing Business, (3) International Dispute Resolution, (4) International Sales and Transport Law, (5) Exporting (Documentary and Documentary Credit Transactions), (6) Hiring Agents and Distributors (7) Intellectual Property Law & Licensing, (8) Foreign Direct Investment, and (9) European Union and China. The student should gain

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an appreciation of the special risks of conducting business internationally and the legal pitfalls associated with those risks. Ultimately, the goal of the course is to investigate ways of minimizing the legal risks in international business transactions.

Attendance and Preparation: All assignments are to be read prior to class! Students should be prepared to answer questions on the assigned materials and to contribute to the class discussions.

<u>SCHEDULE OF ASSIGNMENTS</u>

Introduction: Syllabus; Text; Supplement; Course Coverage; Introduction (1 Class)

The Risks of International Business (2 Classes) (Chapter 1)

Strategies for Doing Business Internationally (2 Classes) (Chapter 3)

International Dispute Resolution (2 Classes) (Chapter 4)

International Sales Law (Sales) (3 Classes) (Chapter 10)

Transport of Goods (2 Classes) (Chapter 11)

Documentary Transactions (2 Classes) (Chapter 12)

International Trade Finance (2 Classes) (Chapter 13)

Agency and Distribution (2 Classes) (Second part Chapter 14)

Intellectual Property Law & Licensing (4) Classes) (Chapter 15)

Foreign Direct Investment (2 Classes) (Chapter 16)

Case Studies:

The European Union (2 Classes) (Chapter 6)

EU Institutions & Law Making; Sales and the Use of EU Representatives

Establishing a Permanent Presence in the EU

China (2 Classes) (Chapter 7)

Chinese Legal & Political System

Chinese Substantive Law

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Doing Business in Hong Kong

Final Exam

SAMPLE SYLLABUS 2
International Business Law

NOTE: This syllabus (course) focuses on the legal environment of doing business internationally, focusing on the macro environment, such as the world trading system, and not on the specifics of international sale of goods or licensing. This is an ambitious class covering 13 Chapters allocated over 27 1-hour class sessions.

Office Hours: TBA or by appointment

Faculty Biography:

Special Needs: Students requesting classroom accommodation must first register with the Dean of Students Office. The Dean of Students Office will provide documentation to the student who must then provide this documentation to the Instructor when requesting accommodation.

Laptop Policy

Experience has taught me that students who use their laptops during class to multitask (e-mail, work on projects, and less desirable pursuits) get less out of the class, are more dissatisfied with it, and perform less well than students who devote their full attention to the classroom experience. Therefore, in the interest of the greater good, **please do not use your laptops or other electronic devices during class**.

Required Readings:

DiMatteo, Larry A., *International Business Law and the Legal Environment: A Transactional Approach* (4th ed. Routledge 2021).

CLASS HANDOUTS (See Course website).

Course Objectives: Students will be exposed to the legal implications of transacting business across national borders. The focus will be on transactional international business law, including the legal and ethical environment of international business, international contracting, importing-exporting, trade finance and international intellectual property law and licensing. The student will gain an appreciation of the special risks of conducting business internationally and the legal pitfalls associated with those risks. The course aims at exposing the business student to the legal implications of transacting business across national borders. The focus will be on transactional international business law. The course's subject matter can be roughly divided into four segments: (1) Legal Environment of International Business, (2) Ethics of Doing Business Internationally, (3) Strategies of Doing Business, (4) International Dispute Resolution, (5) International and National Trading Systems, (5) Comparative Legal Systems, (6) European Union and China, (7) Sale of Services, (8) Foreign Direct Investment, and (9) International E-Commerce. The student should gain an appreciation of the special risks of conducting business internationally and the legal pitfalls associated with those risks. Ultimately, the goal of the course is to investigate ways of minimizing the legal risks in international business transactions.

Attendance and Preparation: All assignments are to be read prior to class! Students should be prepared to answer questions on the assigned materials and to contribute to the class discussions.

SCHEDULE OF ASSIGNMENTS

Introduction: Syllabus; Text; Supplement; Course Coverage; Introduction (1 Class)

The Risks of International Business (2 Classes) (Chapter 1)

Ethics of International Business (2 classes) (Chapter 2)

Strategies for Doing Business Internationally (2 Classes) (Chapter 3)

International Dispute Resolution (2 Classes) (Chapter 4)

International Trade Regulation (5 Classes) (Chapter 5)

Comparative Legal Systems (2 Classes) (Chapter 8)

European Union (2 Classes) (Chapter 6)

China (2 Classes) (Chapter 7)

Employment and Sale of Services (2 Classes) (first part of Chapter 14)

Foreign Direct Investment (2 Classes) (Chapter 16)

International E-Commerce (2 Classes) (Chapter 17)

Final Exam

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Importance of Student Notetaking

<u>Personal Experience of Author</u>: A while back I made two strategic changes to my pedagogy. First, I eliminated all use of all electronic devices (of course, I allow use of computers for e-based courses or in-class exercises) in the classroom. Second, I forced my students to take notes. I did this by doing less PowerPoint presentations and by providing my students with worksheets (some of the chapters in this Manual provide examples of the worksheets). I promote copious notetaking as the key to success on the exams and/or quizzes. I can't say that student performance on said exams greatly improved (Other factors include quality of notetaking, actually studying the notes or using them to prepare study outlines, and the all-important issue spotting ad application of acquired "knowledge" to the exam!). With the two above changes, the classroom experience for me and the students improved four-fold. The students were less distracted, more engaged, and student interaction and discussion increased appreciably.

Jun 3, 2014 |By Cindi May

A Learning Secret: Don't Take Notes with a Laptop
Students who used longhand remembered more and had a deeper understanding of the material

"More is better." From the number of gigs in a cellular data plan to the horsepower in a pickup truck, this mantra is ubiquitous in American culture. When it comes to college students, the belief that more is better may underlie their widely-held view that laptops in the classroom enhance their academic performance. Laptops do in fact allow students to do more, like engage in online activities and demonstrations, collaborate more easily on papers and projects, access information from the internet, and take more notes. Indeed, because students can type significantly faster than they can write, those who use laptops in the classroom tend to take more notes than those who write out their notes by hand. Moreover, when students take notes using a laptop, they take notes verbatim, writing down every last word uttered by their professor.

Obviously,
it is advantageous to draft more complete notes that precisely capture the course content and allow for a verbatim review of the material at a later date. Only it isn't. New research by Pam Mueller and Daniel Oppenheimer demonstrates that students who write out their notes on paper actually learn more. Across three experiments, Mueller and Oppenheimer had students take notes in a classroom setting and then tested students on their memory for factual detail, their conceptual understanding of the material, and their ability to synthesize and generalize the information. Half of the students were instructed to take notes with a laptop, and the other half were instructed to write the notes out by hand. As in other studies, students who used laptops took more notes. In each study, however, those who wrote out their notes by hand had a stronger conceptual understanding and were more successful in applying and integrating the material than those who used took notes with their laptops.

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What drives this paradoxical finding? Mueller and Oppenheimer postulate that taking notes by hand requires different types of cognitive processing than taking notes on a laptop, and these different processes have consequences for learning. Writing by hand is slower and more cumbersome than typing, and students cannot possibly write down every word in a lecture. Instead, they listen, digest, and summarize so that they can succinctly capture the essence of the information. Thus, taking notes by hand forces the brain to engage in some heavy "mental lifting," and these efforts foster comprehension and retention. By contrast, when typing students can easily produce a written record of the lecture without processing its meaning, as faster typing speeds allow students to transcribe a lecture word for word without devoting much thought to the content.
To evaluate this theory, Mueller and Oppenheimer assessed the content of notes taken by hand versus laptop. Their studies included hundreds of students from Princeton and UCLA, and the lecture topics ranged from bats, bread, and algorithms to faith, respiration, and economics. Content analysis of the notes consistently showed that students who used laptops had more verbatim transcription of the lecture material than those who wrote notes by hand. Moreover, high verbatim note content was associated with *lower* retention of the lecture material. It appears that students who use laptops can take notes in a fairly mindless, rote fashion, with little analysis or synthesis by the brain. This kind of shallow transcription fails to promote a meaningful understanding or application of the information.

If the source of the advantage for longhand notes derives from the conceptual processes they evoke, perhaps instructing laptop users to draft summative rather than verbatim notes will boost performance. Mueller and Oppenheimer explored this idea by warning laptop note takers against the tendency to transcribe information without thinking, and explicitly instructed them to think about the information and type notes in their own words. Despite these instructions, students using laptops showed the same level of verbatim content and were no better in synthesizing material than students who received no such warning. It is possible these direct instructions to improve the quality of laptop notes failed because it is so easy to rely on less demanding, mindless processes when typing.

It's important to note that most of the studies that have compared note taking by hand versus laptop have used immediate memory tests administered very shortly (typically less than an hour) after the learning session. In real classroom settings, however, students are often assessed days if not weeks after learning new material. Thus, although laptop users may not encode as much during the lecture and thus may be disadvantaged on immediate assessments, it seems reasonable to expect that the additional information they record will give them an advantage when reviewing material after a long delay.

Wrong again. Mueller and Oppenheimer included a study in which participants were asked to take notes by hand or by laptop and were told they would be tested on the material in a week. When participants were given an opportunity to study with their notes before the final assessment, once again those who took longhand notes outperformed laptop participants. Because longhand notes contain students' own words and handwriting, they may serve as more effective memory cues by recreating the context

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(e.g., thought processes, emotions, conclusions) as well as content (e.g., individual facts) from the original learning session.

These findings hold important implications for students who use their laptops to access lecture outlines and notes that have been posted by professors before class. Because students can use these posted materials to access lecture content with a mere click, there is no need to organize, synthesize or summarize in their own words. Indeed, students may take very minimal notes or not take notes at all and may consequently forego the opportunity to engage in the mental work that supports learning.

Beyond altering students' cognitive processes and thereby reducing learning, laptops pose other threats in the classroom. In the Mueller and Oppenheimer studies, all laptops were disconnected from the internet, thus eliminating any disruption from email, instant messaging, surfing, or other online distractions. In most typical college settings, however, internet access is available, and evidence suggests that when college students use laptops, they spend 40% of class time using applications unrelated to coursework, are more likely to fall off task, and are less satisfied with their education. In one study with law school students, nearly 90% of laptop users engaged in online activities unrelated to coursework for at least five minutes, and roughly 60% were distracted for half the class.

Technology offers innovative tools that are shaping educational experiences for students, often in positive and dynamic ways. The research by Mueller and Oppenheimer serves as a reminder, however, that even when technology allows us to do more in less time, it does not always foster learning. Learning involves more than the receipt and the regurgitation of information. If we want students to synthesize material, draw inferences, see new connections, evaluate evidence, and apply concepts in novel situations, we need to encourage the deep, effortful cognitive processes that underlie these abilities. When it comes to taking notes, students need fewer gigs, more brain power.

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Part I: Legal Environment of International Business

Chapter 1
Introduction to International Business Transactions

Chapter 1 as Framework for Textbook

Chapter 1 lays the foundation for the rest of the textbook. It laws out the different ways of conducting business internationally and the related risks. The rest of the book delves more deeply into the nature of the risks and the legal-business mechanisms developed to mitigate each of these risks. It is interesting to point out that for each risk unique to international business transactions there is a legal device that has been developed to eliminate or minimize such risks. Examples include:

- Anti-corruption compliance programs (Chapter 2)
- Joint venturing and franchising (Chapter 3)
- Mediation-Arbitration dispute resolution; choice of law; forum selection clauses (Chapter 4)
- WTO dispute resolution (Chapter 5)
- Unilateral enforcement action to block importation of illegal counterfeited, dumped, and subsidized goods (Chapter 5)
- Preferential tariff rates (Chapter 5)
- Single entry to EU allows transhipment to other 27 countries tariff free (Chapter 6)
- Joint venturing; IPR protection (Chapter 7)
- Understanding other legal traditions (Chapter 8)
- Commonality of contract law across national legal systems; knowledge of key differences, such as pre-contractual liability (Chapter 9)
- Harmonization of international sales law (Chapter 10)
- Use of freight forwarders, common carriers, and marine-cargo insurance (Chapter 11)
- Documentary collections transactions; minimizing delivery and payment risks; universal trade terms (*Incoterms*) (Chapter 12)
- Payment guarantees (letter of credit; bank guarantees, insurance); performance guarantees (standby letter of credit, performance bond) (Chapter 13)
- Use of foreign sale representatives and independent contractors (Chapter 14)
- Hiring commercial agents and foreign distributors (Chapter 14)
- Protecting intellectual property rights and trade secrets (Chapter 15)
- Licensing of IPR and protective contract clauses (Chapter 15)
- Investing in foreign countries; Bilateral Investment Treaties; concession agreement (Chapter 16)
- E-commerce, E-payment, and E-security (Chapter 17)

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Chapter Outline

(1) Methods of Doing Business

- (a) Exporting-Importing: Direct vs. Indirect Exporting
- (b) Licensing
- (c) Foreign Direct Investment: acquisitions; joint venture
- (d) Hybrid: Franchising

(2) Risks of Doing Business (See Table 1.1)

- (a) Generic Risks
  - (i) Method of Doing Business
  - (ii) Host Country
  - (iii) Seller's Risk of Non-payment
  - (iv) Buyer's Risk of Non-delivery

- (b) Specific Risks
  - (i) Language & Cultural Risks
  - (ii) Currency Risks
  - (iii) Political Risks
  - (iv) Legal Risks
  - (v) Transportation Risks

(3) Mitigating Risks

- (a) Countertrade
- (b) Insurance: Marine, Commercial Risk, Expropriation
- (c) Use of Intermediaries: Commercial Banks, Insurance Companies, Freight Forwarders, Custom Brokers, Foreign Lawyers

"Basket of Risks"

EXPORTING>>>>>>>>>>LICENSING>>>>>>>>>DIRECT INVESTMENT

Direct Exporting　　Franchising　　Manufacturing

Indirect Exporting (ETCs)　　Intellectual Property　　Assembly

Countertrade　　Transfer　　Subsidiary

Merger/Acquisitions

General Factors:

Type of Transaction: Licensing, Sale of Goods, Foreign Investment
Countries of Transacting Parties

Specific Risks

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Cultural/Language Risks

- Contract interpretation/language translation
- Cultural/Ethical Relativism
- Business Etiquette

Distance/Travel/Transportation

- Risk of Loss (Ocean Carriage)
- Government Export & Customs Regulations
- Delivery Risk
- Payment Risk

Political Risks

- Expropriation/Nationalization
- Creeping Expropriation
- Civil Unrest/Regime Change

Currency Risks

- Currency Rate Fluctuation
- Inconvertibility
- Repatriation Restrictions

Legal Risks

- Cost/Inconvenience of International Litigation
- Enforceability of Judgments
- Divergence in National Laws
- Procedural and Remedial Differences
- Enforcement of Laws
- Laws Specific to International Trade
  - Local Participation Requirements
  - Local Content & Standards Requirements
  - Intellectual Property Licensing Restrictions
  - Repatriation Restrictions
  - foreign Termination Laws ("Evergreen Statutes)
  - Taxation

RISK INSURANCE

Overseas Private Investment Corp. (OPIC)

*Expropriation

*Inconvertibility

*Business Interruption

Multilateral Investment Guarantee Agency (MIGA)

*Investment in Developing Countries

Eximbank Export Credit Insurance Program (ECIP)

*U.S. Exporting

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Lloyd's of London

International Chamber of Commerce (ICC)

International Court of Arbitration

Rules of Arbitration & Conciliation

Manuals & Model Forms

*Model Sales Contract

*Model Agency Contract

*Model Distribution Contract

Uniform Customs & Practices for Documentary Credits (UCP 600)

INCOTERMS (Trade Terms)

KEY PLAYERS

Exporter (Seller)**-Importer** (Purchaser): enter a sales contract

Common Carrier (shipping company): issues the bill of lading

Carrier Conventions: Ocean Carriage: Hague, Hague-Visby, or Hamburg Rules (domestic version called Carriage of Goods by Sea Act or COGSA); Warsaw Convention (airfreight)

Carrier Conventions (Purposes): Carrier issues and guarantees description on bill of lading; liable for damages limited to per package amount or declared higher value; unless within one of exemptions (perils).

Freight Forwarded: may arrange shipment from inland location in one country to the port or inland location in another country (may issue a multi-modal bill of lading).

Customs Brokers: arrange for import into a foreign country and deal with government authorities

Commercial Banks: transmit documents; issue letters of credit, standby letters of credit, & bank guarantees, create banker's acceptance.

Insurance Companies: Issue cargo insurance, performance bonds.

The Three Scenarios

The three scenarios found in Chapter 1 of the Textbook provides a way of analyzing all the risks and risk-mitigation methods reviewed in the Chapter. The three scenarios cover the three main ways of doing international business—sale of goods; licensing; and foreign direct investment. Each scenario asks for a comparative analysis between a developed and a lesser or developing

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country.

<u>Scenario 1</u>

Sale of Goods

Canada vs. Nigeria

Sale of goods is the least risky of the ways of doing business, but the threshold of acceptable risk depends on the size of the exporting company and the value of the goods. If that threshold I not meant the exporter has to two ways forward: indirect exporting or receiving a documentary letter of credit confirmed by a bank near the exporter. The confirmation of the letter of credit is especially important in case it is dishonored by the Nigerian bank. In the confirmed letter of credit payment is collected at the confirming bank where the exporter is locates so there isn't a need to pursue any legal action in Nigeria.

<u>Relevant concepts: Sale of Goods</u>

Corruption Index (Transparency International)
Foreign Corrupt Practices Act
Political Risks
Ethics compliance program.
Convertibility of Currency
Repatriation of Currency
Currency Fluctuations (*hedging* techniques)
Confirmed letter of credit
Countertrade
Export trading company (indirect exporting)
Overseas Private Investment Corporation (OPIC)
Eximbank
Multilateral Guarantee Agency (MIGA)

<u>Scenario 2</u>

Licensing of Technology

France vs. China

China has improved, in recent years, its record on the protection of intellectual property rights, but still has a long way to go. It most recently, in 2015, announced the establishment of new IPR courts that would be better equipped to enforce China's intellectual property laws. Nevertheless, counterfeiting and pirating of trademarked goods remains a serious problem. Joint venturing with a reliable Chinese company remains the best security against IPR infringement.

Relevant concepts: Licensing of IPR or Technology

Transfer or Licensing of intellectual property rights (national & international law protections)

Berne Convention,

Gray market problems

Licensing agreement and clauses: royalty, *confidentiality, termination, and grant back clauses*

European Union Regulations

Competition (antitrust) *law*

Scenario 3

Foreign Direct Investment (FDI) (Purchasing a Company)

Germany vs. Russia

Prior to 2014, this problem could be viewed as simply comparing one of the most stable, developed, democracies against a BRIC or emerging economy. However, the political and economic stability of Russia has been seriously shaken after it invaded and annexed Crimea, as well as supporting separatists in the Eastern Ukraine. This led to Western sanctions, along with a drastic fall in oil prices and the failure of the Russian government to diversify the economy, resulted in rampant inflation, the crash of the ruble, and investment inflows has made FDI a more difficult decision. See Chapter 16 on FDI for more on the Russian crisis.

Relevant concepts: Purchasing a Company

Foreign direct investment

Host country laws.

Joint ventures

Expropriation or *nationalization*

German Employment or Labor Laws

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Lecture Notes

Risks & Techniques for Minimizing Risks

1. Cultural/Language Risks

- The problem of writing contracts in two languages.
- The risk of cultural and religious differences. Example: an employee of an American company doing business in Saudi Arabia was discharged because he would not convert to the Islamic faith as required by Saudi Arabia. The court held that being of the Islamic faith was a bona fide occupational qualification (BFOQ). Therefore, the American company was held not to be in violation of Title VII of the discrimination laws.
- Cultural or ethical relativism. Exams, anti-bribery laws.
- The ***Frigaliment Importing*** case (Chapter 10) is another example of cultural and language risks in international transactions. In that case, the Swiss importer and the American exporter attached different meanings to the word "chicken."

  Techniques to Minimize Risks: (1) language translation (2) use of customary standards and forms

2. Payment and Delivery Risks

- The two major risks of international trade are the sellers "payment risk" and the buyer's "delivery risk."

Techniques to Minimize Risks: The documentary transaction is the technique used to diminish these risks. To further eliminate the seller's payment risk, the buyer can be required to provide a letter of credit from a commercial bank. To ensure the sellers performance the buyer can require the seller to provide a performance bond or a standby

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letter of credit.

3. Political Risks

Different types of political risks:

- Expropriation of foreign investments
- Increased regulations or taxation ("creeping expropriation")
- Changes in laws such as an increase in local participation and local content requirements

Techniques to Minimize Risks: (1) Political Risk Assessment (2) Political Risk Insurance

4. Currency Risks

There are three basic currency risks:

i. currency rate fluctuations

ii. Inconvertibility of local currency into hard currency

iii. Repatriation or transfer restrictions

Bernina Distribution v. Bernina Sewing Machine: This case highlights how a devaluation of the buyer's currency (currency rate fluctuation) versus that of the currency of payment can have a catastrophic on the profitability of an international supply contract.

Techniques to minimize risks: (1) Payment in US dollars (2) hedging (3) countertrade.

The *McVey Article* (Chapter 1) on "Countertrade" provides an excellent description of the different types of countertrade and their associated terminology.

5. Legal Risks

Legal risks are varied. They include:

- Cost of foreign litigation
- Substantive differences in the laws of foreign countries

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- Changes in host country laws subsequent to entering into a contract, such as local participation and content requirements, increase in tariff rates, import restrictions, increase in taxation, changes in repatriation limitations, enactment of evergreen statutes, or intellectual; property transfer restrictions.
- Procedural differences including lax enforcement of laws, such as the non-enforcement of intellectual property laws.

***Union Carbide* (Bhopal Disaster)** (Chapter 2): Risk of loss of control.

Finnish Fur Sales v. Juliette Shulof Sales Co. (Chapter 3) case illustrate how foreign corporation laws may not prevent the same liability protection as provided under American law. In *Finish Fur Sales* a corporate officer was held personally liable on an alleged company contract to purchase furs.

Dayan v. McDonald Corp. case (Chapter 3) coverage of international franchising illustrates the associated risk of losing control over a foreign franchise operation. The legal dispute included a number of separate lawsuits and numerous appeals lasting over a decade.

Techniques for Minimizing Risks: (1) Choice of law clause, (2) forum selection or arbitration clauses, and (3) use of foreign legal counsel.

6. Transportation Risks

One of the unique risks of international trade is the transportation risk (Chapter 11). Unlike domestic sales, the international shipment of goods almost always entails ocean carriage.

Techniques for minimizing Risks: (1) use of experts (customs brokers and freight forwarders international conventions that place minimum responsibilities on common carriers (Hague Rules, Hague-Visby Rules, and Hamburg Rules) (3) use of standard trade terms to allocate the risks between the seller and buyer (Incoterms 2020) (Chapter 12) (4) marine insurance (Chapter 11).

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Student Worksheet

I. Sources of International Law

1. Conventions & Treaties
2. Customary international law (Custom/Trade Usage) (lex mercatoria)
3. General principles
4. Law cases, arbitration awards, and scholarly writings

II. Examples of Conventions

1. CISG
2. Hague Conventions
3. New York Convention

III. Methods of International Business

1. Export-Import
2. Licensing
3. Foreign Direct Investment

IV Methods of International Business—Hybrids

1. Franchising
2. Joint Venture
3. Distribution Agreement

V. Major International Organizations

1. WTO
    a. WTO Agreements
    b. Dispute Resolution
    c. TRIPS

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2. ICC

    a. INCOTERMS

    b. UCP 600

    c. Arbitration

3. OECD

4. United Nations

VI. Risks of Doing International Business

1. Generic Risk Factors

    a. Type of transaction

    b. Type of good or service

    c. Host country

    d. Home Country (extraterritorial laws)

    e. Three Scenarios: Exporting, Licensing, and Foreign Direct Investment

2. Language & Cultural Risk

    a. Negotiating

    b. BFOQ: *Kern v. Dynalectron* Corp.

    c. Bribing

    FCPA

    OECD Bribery Convention

    d. Ethics (Host-Home Country Standards

3. Currency Risks

    a. Convertibility

    b. Repatriation

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c. Fluctuation

d. *Bernina* Case

Fluctuation

Doctrine of Impracticability (UCC § 2-615)

Factors:

i. Foreseeability vs. allocation of risk

ii. Outside of control

iii. Undue Burden

Price Escalation Clause

Force Majeure Clause

e. Mitigating the Risk

4. Legal Risks

a. Substantive Law

b. Procedure & Enforcement

c. Remedies

5. Political Risks

a. "creeping" expropriation

VII. Risk Management

1. Foreign Attorneys

2. Bilateral Investment Treaties (BITS) & Concession Agreements

3. Contracts

4. Insurance

5. Intermediaries

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    a. Custom Brokers & Freight Forwarders

    b. Banks

    c. Government Agencies

6. Countertrade

    a. Barter

    b. Buy-Back

    c. Counter-purchase (switching companies)

7. Joint Venture

8. Franchising (see, *Dayan v. McDonald's*)

9. Export Plan

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Student-Generated Notes

CHAPTER 1

International Law Regulates Three Primary Relationships

1) The relationship between two nations
2) The relationship between a nation and an individual
3) The relationship between persons or entities from different countries

Sources of International Business Law (in order of importance taken from Article 38 of the Statute of the International Court of Justice):

1) Private contract between two business parties
2) International conventions and treaties
   Example: USMCA and EU
   OECD (Organization for Economic Cooperation and Development)
   The Hague rules on liability of international carriers of goods by sea
   Trade-Related Aspects of Intellectual Property Rights (TRIPS) w/in GATT
3) International custom or practice ("lex mercatoria")
   UN Convention on Contracts for the International Sale of Goods (CISG)
   International Chamber of Commerce, Paris, created 1919
   *International Court of Arbitration (Paris)
   *Centre for Maritime Cooperation (London)
   *Counterfeiting Intelligence Bureau (London)
   *Institute of International Business Law and Practice (Paris)
   *UCP 600 (Uniform Customs and Practices for Documentary Credits)
   *INCOTERMS 2020 (manual of trade terms)
   *ICC Model Forms
4) General principles of law recognized by civilized nations (e.g., human rights)
5) Judicial decisions and scholarly writings (e.g., precedents or law reviews)

Six types of Business Risks

1) Transaction Risks – e.g., capital restrictions, employment, liability, antitrust, tax, packaging, and environmental laws (solution: bilateral investment treaties)
2) Language/Cultural Risks – customs, time perception, gift-giving, superstitions, and religious differences, cultural and ethical relativism, (solution: language translation, use of customary standards and forms, education on cultural/linguistic differences and be familiar with the foreign business style)
3) Currency Risks – convertibility (solution: countertrade), fluctuation (solution: hedging in forward contracts, future, or option contracts, or require payment in dollars, or seek insurance provided by international banks), and repatriation (solution: countertrade)
4) Legal Risk – ambiguity in contracts, conflicting interpretations, conflicting clauses, differing national laws governing transactions, enforcement and procedural differences (solution: be familiar with host country laws, use standardized forms, and use an lawyer familiar with international law in crafting contracts to avoid ambiguity and conflicts)

5) Political Risk – trade barriers, intellectual property protection (TRIMS, TRIPS, and GATS)- occasionally registration and approval, investment barriers, frequent regime or policy changes, "creeping expropriation" (regulation out of business or excessive tinkering with regulations), full-out expropriation/nationalization (solution: bilateral investment treaties and insurance from government agencies or World Bank)
6) Payment and Delivery Risk – seller's payment risk and buyer's delivery risk (risk of goods lost or damaged in shipment). (solution: lay out risk allocation in contract, letter of credit from a commercial bank)
7) Transportation Risk – (solution: use of exports (customs brokers or freight forwarders), international conventions, use of standard trade terms (ICOTERMS 2000), marine insurance

FCPA – 1977, applies extraterritorially so that accepting bribes overseas is punishable in the U.S.

Taxes related to trade: VAT, sales tax, excise tax, and tariffs
Transfer tax policies designed to deal with companies who transfer assets to subsidiaries where taxes are low, and transfer costs to subsidiaries where taxes are high

Terms

Lex Mercatoria – "law of merchants"; customary business procedures or trade customs developed across the world to facilitate business transactions.
Evergreen Provisions – Limit the ability of an employer to terminate an employee; found primarily in the EU.
Bilateral Investment Treaties – Provide a basic legal framework to reduce the uncertainty of a company investing in a given country (principally, intellectual property, currency conversion, repatriation of profits, and non-discriminatory treatment of foreigners).
Clawback Statute – English Co. can sue back in U.K. to get back 2/3 of treble damages awarded in an antitrust case
Blocking Statute – English courts won't grant discovery in U.S. antitrust cases

Indirect Exporting

Export Management Company (EMC) – Solicits and transacts export business for a producer or on its own for commission or salary. They arrange for the sale of a producer's exported products by either finding distributors to buy the exported products from the producer or by buying the products directly for resale themselves.

Commission/buying agent – hiring to go out and sell goods for your company
Export Trading Company (ETC) – Takes title to a product and exports for itself. This essentially means a domestic sale for the producer.
Export Agent/Remarketer – Purchase products from producer and then package, mark, and promote products according to their own specifications and sell in their own names.

Direct Exporting

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Foreign sales rep. - represents the producer and works under contract to sell producer's products. Foreign Agent - can additionally make commitments on behalf of the producer. A foreign distributor buys products from an exporter, resells them and provides service and sales support.

Managing Risk

Customs Brokers – Assist importers with the admissibility of goods
Freight Forwarders – Arrange documentation needed for export
Open Price Term/Escalation Price – Formula for revising price if there is an increase in the producer's fixed cost, then can pass that on to buyer.

Falcoal Inc. v. Kurumu Case (pp. 23-26)
Issue: Drawing up a contract in two languages may fail to overcome inconsistencies that can result from translation.
Background: Two contracts, one in Turkish and one in English with conflicting forum selection clauses.
Verdict: Texas court doesn't have jurisdiction, since the Kurumu is an entity of the Turkish government and has immunity under the Foreign Sovereign Immunities Act.
Implications: Important to select the languages than dominates. Important to have forum selection clause. Use of letter of credit and performance bonds. Importance of determining law to be applied. Determining if court has personal jurisdiction through minimum contacts.

Kern v. Dynalectron Case (pp. 28-29)
Issue: Religious and cultural differences affect not only the negotiation, but also the performance of the contract.
Background: An American company operating in Saudi Arabia discharged an employee because he wouldn't convert to the Islamic faith, as required by Saudi law flying into the holy area, Mecca. The employee sued citing employment discrimination.
Verdict: Court sided with the company, finding that being of the Islamic faith was a BFOQ.
Implications: written contract to limit employer's liabilities. Extraterritorial application of U.S. employment discrimination laws. The Bona Fide Occupational Qualification Defense (BFOQ) to an employment discrimination claim. Religion as a BFOQ in some international business situations.

Bernina Distribution v. Bernina Sewing Machine Case (pp. 30-31)
Issue: A poorly written open price term resulted in significant monetary losses due to an unanticipated currency fluctuation.
Background: Dollar depreciated against Swiss franc, and there was a long-term contract with an open price term. Buyer wouldn't pay extra price, and so seller stopped supplying. Then buyer sues seller for breach of contract to pay difference in price of machines. Seller claimed that costs increased, so they should be passed on to distributor, and cited 2.615 of UCC "doctrine of impracticability" and claimed that seller had a reason beyond his control to breach contract. The buyer claimed that fixed costs didn't increase due to any of reasons laid out in contract.
Verdict: Risk was "foreseeable" and contract was silent, so risk lies with whomever gets it (in this case, the seller). Buyer (plaintiff) won.

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Implications: Use of open price clauses to adjust the contract prices. Risk allocation in contract defeats a demand for a contract adjustment. An excuse for commercial impracticability will not be granted if risk was "foreseeable" or where burden is not unduly severe. Currency fluctuations are "foreseeable" and so not allocated risks. Importance of details in clauses.

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Answer to Chapter Problems

1. You are a manager at a U.S. company that manufactures moderately priced personal computers. The company is contemplating expanding overseas with an initial emphasis on exporting to Latin America. You have been assigned the task of preparing a preliminary market analysis for the country of Brazil. Using the sources found in the Chapter conduct some market research. Prepare a report that focuses on the opportunities and pitfalls of exporting to Brazil and offer recommendations.

   Figure 1.2 and 1.3 (page 15) provides the steps and sources needed to do a basic market research for a country

2. As Vice President for Foreign Operations of a U.S. multinational corporation you have been asked to prepare a report for the Board of Directors regarding "doing business" in Germany and Nigeria. Please discuss the following in your report: (1) the different ways of " doing business" in foreign countries, (2) the way you would recommend for each of the two countries mentioned, (3) the risks of doing business in these countries, and (4) ways of minimizing those risks.

   This question is a combination of the "Three Scenarios" set out on pages 17-19 of the textbook. It is a combination since this question uses the term "doing business," so the student should consider all three of the major ways of doing business internationally—exporting-importing; licensing; and Foreign Direct Investment—for both Germany and Nigeria, which is what the <u>first question</u> in the problem asks the student to do. The <u>second question</u> asks for the student's recommended way of would be doing business in each country. This is not an either-or proposition—the more creative student may look for a phased entry into each market. For Germany, direct exporting, followed by licensing or FDI. For Nigeria, indirect exporting, then direct exporting, and after gaining experience and contacts consider licensing or FDI. No matter which method is chosen there are risks particular to each method. The "matrix of risks" shown in Table 1.4 and elsewhere in the Chapter should be discussed. The <u>third question</u> asks the student to assess the basket of risks that are particular to each country. The <u>fourth question</u> asks the students to discuss devices and strategies to minimize the risks.

3. Your company is contemplating exporting goods to the following countries: France, Hungary, and Nigeria. Research the following: (1) the currency of each country and the current conversion rate into U.S. dollars and (2) restrictions in each country pertaining to the conversion of the national currency into U.S. dollars and any repatriation limitations. Check the U.S. Department of State Country Commercial Guides for each of these countries for relevant information. If the currency risks are severe for any of these countries, what alternatives should you explore in order to do business in these countries?

   Students need only go to <u>http://www.export.gov/ccg</u> and "click the country on the drop-down menu," where they will find information to answer this problem.

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"FUN WITH CLIP ART"

Name Some of the Risks of International Business Transactions for the Following Methods of Doing Business:

Exporting-Importing:

____ (Risk of Non-Payment, Seller)
____ (Risk of Non-Delivery, Buyer)
____ (Risk of government intervention, custom laws, Quotas, change in Standards & regulations)
____ (Currency Risks: fluctuation, convertibility, repatriation
____ (Goods damaged. lost, or stolen while in transit)
____ (Warranty liability and after sale services)

Licensing/Franchising

____ (Lose control of IPR, trade secrets & know-how)
____ (Costs of Foreign Litigation)
____ (Differences in IPR laws, enforcement & remedies)

Foreign Direct Investment

____ (Foreign laws & courts)
____ (Taxation)
____ (Expropriation & Creeping Expropriations)
____ (Repatriation of Profits)
____ (Foreign employment law; Evergreen laws)

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Name 3 Risks Relating to Being Paid in a Foreign Currency:

1. ____________________ Exchange Rate Fluctuations

2. ____________________ Convertibility (Hard to Soft currency)

3. ____________________ Repatriation

Name Methods of Avoiding Currency Risks

______________; ______________ ; ______________
Being paid in own currency; Countertrade; Hedging

Name 3 Types of Hedging? Option; Future Contract; Forward Contract
Why are "currency options" the preferred means to deal with currency rate fluctuations? Since "option" no obligation to actually purchase currency at future date; future contracts may be sold before obligation is due through the futures secondary market, but will have to discount; forward contract must buy the currency at future date.

What should be in the sophisticated exporter and importer toolkit? Name important third-parties that should be used by exporters-importers to lower the risks of a transaction:

1. ______________________ Commercial Banks
2. ______________________ Insurance Companies
3. ______________________ Freight Forwarders
4. ______________________ Customs Brokers
5. ______________________ Common Carriers
6. ______________________ Foreign Legal Counsel
7. ______________________ U.S. Government Agencies

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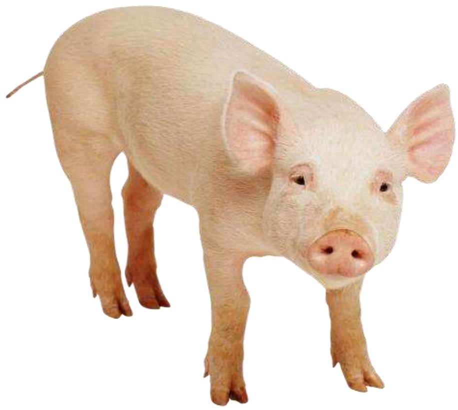
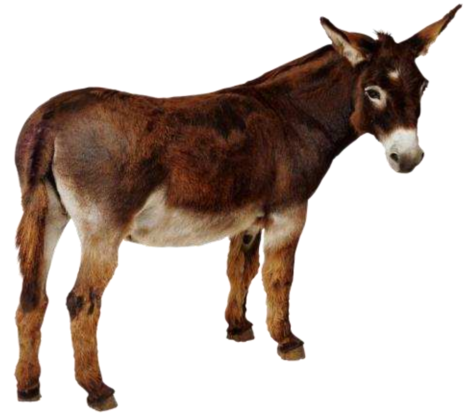


5 pigs for 2 Donkeys



Due to lack of the availability of hard currencies, lack of funding, and government restrictions, parties often engage in what is called "Countertrade." (See McVey article at end of Chapter 1)

Name the 3 Major types of Countertrade and explain how they work?

1. ______________________________ Barter

2. ______________________________ Counterpurchase

3. ______________________________ Compensation or Buy-Back

What is a "disagio"? Discount on contract price given by exporter to a "switching company" to take over the exporter's obligations under a counterpurchase transaction. For example, exporter is obligated to buy $1 million in goods from the country of import; instead it assigns that obligation to a switching company and pays a $100,000 disagio, meaning that the switching company needs to use only $900,000 of its own money to honor the counterpurchase obligation. Therefore, any resale above $900,000 would be the switching company's profit.

In order to avoid a migraine headache and the ability to sleep at night, what type of insurances should you consider protecting your international business transactions? Name some and explain how they would protect you?

1.______________________________ Freight, Marine, or Cargo Insurance

2.______________________________ Commercial Risk Insurance

3.______________________________ Political Risk Insurance

4.______________________________ Export Credit Insurance (Eximbank)

5.______________________________ Bank Guarantee-Insurance (OPIC)

Additional Readings

Grabow, *Negotiating and Drafting Contracts in International Barter and Countertrade Transactions*, 9 No. Carolina Journal of Int'l Law & Commercial Regulation 255 (1984).

Randall, Kenneth C. & John E. Norris, *New Paradigm for International Business Transactions*, 71 Washington University Law Quarterly 599, 624 (1993).

Williams, S. Linn, *Political and Other Risk Insurance: OPIC, MIGA, EXIMBANK, and Other Providers*, 5 Pace Int'l Law Rev. 59, 106-112 (1993).

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Chapter 2
Ethics of International Business

An Integrative Approach to Ethical Decision-Making
(Ethical Analysis Toolkit)

This segment surveys some of the legal and ethical issues that face a company when transacting business across national borders. The focus will be on the ethical obligations of an American-based multinational corporation.

Chapter Objectives

- Explain and discuss the ethical and legal problems facing companies doing business in a global environment.
- Examine the ethical obligations of an American company doing business in a developing country.
- Discuss strategies for improving global ethics.

Basic Concepts & Terminology

<u>Moral Standards</u> are *norms* we have about the kinds of actions we believe are morally right as well as *values* we place on the kinds of objects, we believe are morally good.

<u>Business ethics</u> is not aimed at persuading people to act in moral ways—it provides knowledge of the nature of ethical concepts and their application. It helps overcome the problem that managers often do not know the ethical course of action or are unable to spot ethical issues.

<u>Organizational ethics</u> recognize that even though its activities are carried forth by human actors an organization has moral duties and are morally responsible in a secondary sense.

<u>Subordinate Responsibility</u>: "Just following orders" v. freely & knowingly choosing to follow orders; employee has no duty to obey an immoral order; pressure may mitigate employee responsibility, but it does not eliminate it. Problem of devolution or fragmentation of responsibility: employees in large organizations follow rules and may be unaware of possible outcomes. Thus, the excusing factors of ignorance or inability may absolve them of moral responsibility. For a dramatic and excellent discussion of the problem of subordinate responsibility see, Hannah Arendt, *Eichmann in Jerusalem: The Banality of Evil* (1963).

<u>Ethical Relativism</u> is the theory that because different countries have different ethical belief systems there is no rational way of determining whether an action is right or wrong other than by asking whether the people of a particular society believe it is morally right or wrong. Also, within a society it is whatever the majority believes is morally correct.

<u>Ethical Dilemmas</u> arise in a situation in which one is faced with two equally unacceptable

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alternatives, or in which the situation has no satisfactory solution. In the former case, one attempts to escape the dilemma. Some theorists deny that there is any such thing as an ethical dilemma maintaining instead that in every situation there is a correct way of acting.

Theory of Relative Development: Recognizes a country's level of development, such as an impoverished, less developed country, as a factor in ethical decision making (e.g., causing harm to the environment). Questions raised by this theory include: (1) would you accept a level of environmental pollution in exchange for employment and raising your family's and country's standard of living? (2) At what level of environmental harm should the tradeoff between pollution and economic benefits be terminated? (3) In the era of global warming—where all specific instances of emissions no matter where the facility is located, developed or less developed country—should the global impact of those specific emissions be factored into the decision-making process?

Place of Ethics in Business

("The Amoral Businessperson"

Milton Friedman, "The Social Responsibility of Business is to Increase Profits," *NY Times Magazine* (1970):

(1) "Businessmen who talk [about the public interest or corporate social responsibility] are the unwitting puppets of the intellectual forces that have been undermining the basis of free society."

Do you agree with Friedman that a corporation has no social conscience and should not proactively promote desirable "social ends?"

(2) "A corporate execute is merely an employee whose sole duty is to make as much money as possible while conforming to the basic rules of the society."

What are the "basic rules" of society? Does he mean simply following the law as the "moral minimum"? Is that all that is required is to follow the moral minimum?

(3) The practice of social responsibility only applies to individuals and not to artificial beings like corporations. It is up to the stockholders, customers, or employees to voluntarily spend money on behalf of social ends. The corporation is not like a government that has the political basis for spending the money of others.

How is the corporate executive to know how to spend it on social ends?

Other examples

In a perfectly competitive market, the sole pursuit of profit produces the most efficient results (Adam Smith's capitalistic justice).

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Loyal Agent Argument: duty to serve client loyally, obediently, confidentially (Lawyer's Canons of Ethics).

Determining the Moral Responsibility of Corporations

Case Study: Street Children of Central America

Fuller's Resistol product is shoe glue used by children to get "high." By adding mustard-seed oil makes glue less attractive to sniff. A subsidiary of Fuller lobbied to have appealed law that would have required the use of mustard-seed. After pressure from child advocacy groups, Fuller discontinued selling the glue in small jars and hired some social workers to counsel street children.

Fuller's Arguments:

(1) It was not doing anything illegal.
(2) It was not morally responsible for the misuse of its products.
(3) There were alternative sources for such glues.
(4) Its operations were economically beneficial to the region.
(5) The glue was being sold by a "subsidiary of a subsidiary."

Ethical Approaches to Business Decision-Making

This segment will briefly review the major schools of ethics. It will be done from the perspective that when properly applied each school will in almost all instances produce the same result. It will also provide an exercise in forming an integrative approach to decision-making. Provided within the review of each school of thought will be suggestions on how the schools of thought can be combined or used in conjunction with one another. These suggestions will be flagged by the label *integrative approach*. The segment will conclude with some concluding remarks relating to the integrative approach to ethical decision-making.

Approach #1: Utilitarianism or teleology (consequentialism)

Bentham's Utilitarian Principle: An action is right if the sum total of utilities produced is greater than that of an alternative act. Is the best decision for a company whichever option that most reduces costs per unit?

Point of Emphasis: Utilitarianism is not merely a minimal utility (benefit-cost) calculation of from a company's perspective. A true utilitarian analysis takes the positive and negative production of utility for each stakeholder directly and indirectly affected by the decision.

Point of Emphasis: The utilitarian calculation changes given the term (time) in which utility is calculated. A short-term time frame may produce a lesser net welfare gain than a long-term timeframe.

Point of Emphasis: A true utilitarian analysis seeks out alternatives that have a greater net welfare effect.

Problem #1: How does one value life, freedom, equality, health? Is it morally appropriate to evaluate such things? ["Incommensurability Problem"]

Utilitarian argues: it is not only possible to put a price on health and life but that we do so every day. Let the market make the determination regarding level of safety? What was missing in the Pinto case? Disclosure? Expanded utilitarian analysis?

Problem #2: Utilitarianism fails to take into account how the utility benefits are distributed within society.

Integrative Approach: An integrative approach to ethical decision-making recognizes the limitation that utilitarianism fails to take into account how the utility benefits are distributed within society. How can one utilize utilitarianism given this flaw?

Response: View the utility calculation as the first step in a multiple step process. The next step could look at the distribution of benefits and burdens (distributive justice) or individual entitlements to freedom and well-being (rights).

Applying Utilitarianism

- List all those affected by the decision given the options provided.
- List good and bad consequences.
- Are there any "dominant considerations" or consequences that make a certain option unethical despite it resulting in a positive net benefit? (loss of life, violation of human rights, environmental destruction, breaking the law).
- Develop Alternatives: Is there a more beneficial alternative? Which alternative best promotes the common good? Which alternatives best respects the moral rights of individuals?

Approach # 2: Rights-Duties (Deontology) Approach

Rights Approach
A right is an individual entitlement to something that should not be interfered with. For every right there is a correlative duty vis-a-vis others. As compared to utilitarianism, a rights approach views morality from the perspective of the individual; utilitarianism views from the perspective of society as a whole.

Integrative Approach: Rights generally trump the dictates of a strict utilitarian calculation. Therefore, more is needed then "mere" net benefit to society, such as the protection of minority rights.

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Duties Approach (Kantian Ethics)

Categorical Imperative

- Asserts that the "rightness" of an act depends on its conformity to moral law.
- Kant's test of conformity was that of rational form.
- Moral laws must be *consistent* (they cannot be self-contradictory); *universal* (same for all persons; there is no such thing as relativism); *a priori* (based on reason not experience). Therefore, when contemplating an action ask would you want it to become the basis for a universal law?
- Such moral laws are premised upon respect for all rational beings. Humans may never be used as a means to an end.

The "rightness" of an act depends on its conformity to the moral law. Kant's test of conformity was that of rational form. Moral laws must be *Consistent* (they cannot be self-contradictory); *Universal* (same for all persons, therefore no such thing as relativism); *A priori* (based on reason not experience). In short, all moral laws are *Categorical Imperatives*. Therefore, when contemplating an action ask would you want it to become the basis for a universal law? (Formulation #1) Such laws are premised upon respect for all rational beings. Therefore, humans may never be used as a means to an end (Formulation #2). Moral law stems from within each rational being. Thus, moral law is based upon autonomy, self-imposition and universal acceptability. Rational beings are willing to accept certain restrictions for the privilege of living in a community.

Formulation #1: Never act in such a way that you would not will such an act to become universal law. (Reversibility) ("Golden Rule") (Universalize)
v. Utilitarianism: utilitarianism is consequence-based, looks at benefits or harms of an action; Kant looks at the rightness or motive for the action.

Formulation #2: Never treat a person simply as a means to an end.
All human begins are to be recognized as equal, free rational persons. Therefore, it is wrong to subject anyone to a risk without informed consent.

Problem: What are the limits to these rights? How does one balance conflicting rights?

Approach #3: Ethics of Care

Case: Decision whether to move a plant overseas?

Rights Perspective: Owner had right to move to maintain viability of company; workers did not have a right to work (employment at will doctrine).

Care Perspective: Special obligation to take care of workers and community. Carol Gilligan's, *In a Different Voice*: morality as care; feminine perspective; men approach morality from an individualistic (abstract) focus on rights and justice; women approach moral issues from a

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communitarian focus on caring and relationships.

<u>Two Moral Demands</u>:

1. Morality is based upon a *web of relationships*: We should preserve and nurture those individual and communal relationships.

2. From a personal perspective we should exercise special care in our *concrete relationships.* Based upon a communal view of the self, the individual cannot prosper in isolation from caring relationships with others (self as community-centered).

Potential Conflicts: demands of a concrete relationship v. institutional obligations

Must balance care for others with personal care.

Corrective: Ethics of care counterbalance to schools that emphasize is on impartiality and universality seen in other ethical approaches. Places focus on partiality and particularity.

A narrow application of utilitarianism would make the correct decision for a company is anyone that produces the most net benefits to the company. However, the selection of a decision is affected by the problem of the timeframe over which the calculation is to be performed. The impact on existing or future employees would not be factored in such a narrow utility calculation. Gilligan challenges how utility is determined, as well as rejecting the utilitarian and Kantian view that all humans are to be treated the same.

<u>Question</u>: How can the ethics of care be used in business decision-making? It can be used within the utilitarian or Kantian approaches as a counterbalance to those approaches singular emphasis on impartiality and universality. It allows for an element of partiality and particularity in calculating the impact of a decision on certain concrete relationships.

In summary, the different schools of ethical thought all offer insights and tools to deal with ethical dilemmas. An integrative approach to decision-making is one in which all the above schools of thought are utilized.

The Integrative Approach

An integrative approach to ethical decision-making uses all four of the above discussed schools of thought.

- In analyzing an ethical dilemma (choosing an option), a company should weigh the benefits and harms to itself, as well as to others that are directly and indirectly affected.
- In order to maximize social utility, the company will need to compare the options and think outside the box for a possible superior alternative.
- The company should take into account whether any of the options infringe on basic human rights, including, workers' rights and environmental harm.

- In weighing the benefits and costs of the different options, the interests of special relationships, such as current employees and communities, should be given added weight.

#1: In analyzing a moral dilemma one should weigh the benefits and harms and compare to alternatives (utilitarian: maximize social utility). #2: One should take into account whether the act in question respects the basic rights of the persons involved (rights: respect moral rights). #3: One should judge the distributive effects, i.e., how the benefits & burdens are distributed (justice: distributive justice). #4: Also, may weigh the impact upon someone you have a concrete relationship with (caring). Note that #1 is a societal utility calculation; it ignores the individual and distributive justice concerns. #2 focuses upon the individual and discounts the importance of #1 & #3. #4 ignores the demands of impartiality.

Motorola' Analytical Approaches for Business Ethics Problems

"Employees of Motorola will respect the laws, customs, and traditions of each country in which they operate, but will, at the same time, engage in no course of conduct which, even if legal, customary, and accepted in any such country, could be deemed to be in violation of the accepted business ethics of Motorola or the laws of the United States relating to business ethics."

Statement of Facts

Ethical issues pervade all functional areas of a corporation: production, marketing, finance, taxation, advertising, and management.

The potential for unethical conduct is especially acute in dealing in less developed countries because of a lack of government regulations or activist groups that exist to protect stakeholders' interest.

Consequences

"Look carefully at all the consequences of the action." There is a difference between consequences and "cost-benefit analysis": (1) *all* parties are considered—not just an individual or a company; (2) includes both monetary and *nonmonetary* variables; and (3) action produces more overall good to compensate for harm done.

Justice and Fairness

"Give each person his due." However, standards of justice may vary from country to country and between cultures.

Rights

These include: (1) human rights, e.g. "right to life"; UN Universal Declaration of Human Rights; (2) civil rights, e.g. "right to vote"; and (3) special rights, e.g., those granted by an organization such as seniority rights.

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Duties

Duties are found in law, contracts, policies, and religions, but they are always subject to interpretation.

Virtues

This approach addresses the influence of admirable behavior in decision-making, e.g., honesty, courage.

Fundamental Questions

Is good ethics good for business? Are ethical practices related to company performance?

A good corporate ethics code should make clear that good ethical practices are also good for business including, long-term profitability and sustainability:

Does a company owe a responsibility to stakeholders other than their shareholders (stakeholder analysis)?

One option here is the development of corporate guidelines relating to the different stakeholder groups and to have corporate executives periodically meet with stakeholder groups.

Does a company have a duty to monitor the conduct of its partners, suppliers and contractors (duty to monitor third parties)?

A good corporate ethics code recognizes the company's responsibility for not only itself, but also for other companies in its supply chain, as well as its partners. Some companies have developed codes of conduct for their suppliers to follow. A good starting point is to require all suppliers and partners to conform to the core tenets of the international conventions produced by the International Labor Organization, as well as the United Nations Universal Declaration of Human Rights.

Is there a practical business reason for monitoring the conduct of other companies (good ethics is good business)?

Yes, violations of human rights by associated companies are likely to harm a company's reputation. It is important to avoid doing business with others who intentionally and continually violate core values.

Should a company provide gifts or bribes to further its business in countries where such giving is expected (ethical relativism)?

Only gifts that are legal, reasonable and approved by management should be permitted. In larger companies, any such gifting should be reviewed by the company's Law Department and the Office of Ethics and Compliance.

Should a company commit itself not to harm the environment and to move towards sustainability (long-term versus short-termism)?

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Visionary companies operate in ways that foster sustainable and clean use of natural resources. They understand that such an approach is both ethical and cost-effective in the long-term. A starting point is to establish an Environmental Management System (EMS) in accordance with International Standards Organization's environmental standards (ISO 14001).

How should a company measure performance (stakeholder analysis)?

Performance should be measured not only by short-term profitability, but also long-term sustainability, as well as the distribution of benefits among the different stakeholders.

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Supplementary Materials

Ethical Impact Statements

Analogies: Social Audit; Environmental Impact Statements

Objectives: (1) monitor compliance with companies' ethics code, (2) terminate relationships with unethical partners and associates.

Ten Fundamental Rights
(Thomas Donaldson)

- Freedom of Physical Movement
- Ownership of Property
- Freedom from Torture
- Right to Fair Trial
- Right to Nondiscriminatory Treatment (example: race and gender)
- Right to Physical Security
- Freedom of Speech and Association
- Minimal Education
- Political Participation
- Right to Subsistence

Seven Moral Guidelines
(Richard DeGeorge)

- Do no Intentional Harm (Kant): Does a company have to meet a higher standard of environmental protection than what is required in a given country? Who has the right to determine the appropriate standards of pollution, health, and safety?

- Produce more good than bad in the Host Country (truncated Utilitarianism): How do we determine the "good" of a country? Good to whom?

- Contribute to Host Country Development. What obligations do MNCs have when transferring knowledge or improve infrastructure? What definition of development should be used (e.g., labor intensive vs. machine intensive technology)?

- Respect Human Rights of Employees (see Donaldson). What is the appropriate wage to be paid in a developing country? Who should determine that wage? Should the level of subsistence override the prevailing wage rate? What do we mean by subsistence?

- Pay Fair Share of Taxes. Should a company be able to reduce its "international" tax liability through price manipulation and transfer payments? Does MNCs have an obligation to do all intra-company transfers at "arms-length"?

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- Respect Local Culture (Relativism). Does placing American values over local values violate the duty not to harm?

Example: Texas Instruments' Global Business Practices Council (managers from different countries) whose mandate is to create "a global ethics strategy, locally deployed."

- Cooperate in the Development of "Background Institutions." How does a company balance the obligation to assist in the development of background institutions and the obligation not to interfere with a country's internal affairs and to respect its culture and values?

Are there any other guidelines that can be suggested?

- Is there a duty to compensate?
- Parent responsibility for acts of a subsidiary?
- Are there special obligations when transferring production hazardous materials or hazardous technology involving?
- Protect the Ecosystem? (vs. different stages of development?)

Competing with Integrity

- Tension between integrity and competition
- Implies self-imposed norms
- Means acting beyond the moral minimum, but how much more? The realm of the aspirational or ideal?
- What is the relationship between integrity and reputation? What is the importance of reputation to the overall well-being of a business?

Techniques for Resolving Ethical Dilemmas

Ethical Displacement: seeks to resolve a dilemma by seeking a solution on a level other than the one in which the dilemma appears.

Individual>>>Departmental>>>Corporate>>>Industry>>>Governmental

Moral Imagination:

Stakeholder Analysis: "walking in someone else's shoes" e.g., plant closing responsibilities of a company?

"T.V. Test": Bribery was considered by the American bribers in the Lockheed scandal as a widely accepted and tolerated practice in Japan. When contemplating such an action ask would you like this to become public knowledge? In the Lockheed example, government ministers were criminally charged, one committed suicide, and the government fell in disgrace. Does this sound like a practice that is accepted in that culture?

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“Either/or” situations are less likely to occur than one would think.

Willingness to act ethically means a willingness to terminate a business enterprise.

If using a utilitarian analysis be sure to seek and weigh alternatives and to expand the analysis to include indirect harms and benefits.

Recognize that the proper approach to international ethics is somewhere between the extremes of cultural relativism or “anything goes” and absolutism. Ethical decisions are contextually dependent. However, once corporate values are set, they should be treated as absolutes.

THE MERCK EXAMPLE

Merck Pharmaceuticals spent hundreds of millions in R & D to develop a cure for “river blindness,” which is a horrible disease, found in tropical environments, that leads to a long, painful death. Given the nature of the disease and the fact that it impacted the poorest areas of the world, Merck decided to mass produce the medicine and give it away. It was the right thing to do ethically, but it was also a good business move since Merck benefited from a public relations coup and goodwill.

“We try never to forget that medicine is for the people. It is not for the profits. The profits follow, and if we have remembered that, they have never failed to appear. The better we have remembered that, the larger they have been.”

George Merck, 1950

“We also have significantly increased our *global* sales force and marketing capabilities over the past few years. Our high standards of *ethical marketing* help us create strong relationships with patients, governments, and regulators—long-term relationships based on trust and credibility.”

Raymond Gilmartin, March 1, 2000
1999 Annual Report

“Translating an Ethical Code into Practice”

Most multinational companies talk about doing business ethically regardless of local custom and behavior. Not all back up the talk with action. Merck senior management insists that all employees, regardless where they work, uphold its corporate code. To achieve that goal, employees take an interactive ethical business practices program that exposes them to real-life situations that may face. “Merck’s ethics and values will be the sustainable competitive advantage that ensure it builds on the trust the Company is known for.” (Vice-president of U.S. Sales)

“Corporate Responsibility”

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Our commitment to scientific innovation and breakthrough medicines helps advance health, technology and the economies where we do business.

Philanthropic Mission

Merck is funding “Enhancing Care Initiative” aimed at improving the care of people with HIV/AIDS in the developing world.

River Blindness Program: The Merck Mectizan Donation Program-Each year 25 million people in 31 countries receive treatment.

Fostering Codes of Business Conduct: Example: funding of Gulf Centre for Excellence in Ethics in the United Arab Emirates

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Review of Foreign Corrupt Practices Act (FCPA)

(Originally enacted in 1977, amended in 1988)

Ultimate objective: corporate disclosure

Problem # 1: Who does FCPA apply?

*Applicable to all companies under SEC jurisdiction.

*Universal requirements...not just for foreign activities. It applies to any company controlled by a US company. **1988 Amendment:** If own less than 50% only need to make good faith effort to have subsidiary to comply with Act.

I. Accounting Provisions

Section 102: "make and keep records in **reasonable** detail that accurately and fairly reflect the transactions and dispositions of assets."

Problem #2: What is meant be reasonable? No materiality standard was incorporated into the accounting provisions.

1988 Amendment: defined reasonableness as that exhibited by the "prudent person." Therefore, not expected to shoe an unrealistic degree of exactitude. Implied is the use of a benefit-cost approach.

Must devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that:

1. Transactions are executed in accordance with management's specific authorizations.

2. Transactions are recorded to permit preparation of financial statements in conformity with generally accepted accounting principles.

3. Access to assets is permitted only with specific management authorization.

4. Accountability for assets is reviewed at reasonable intervals.

Problem #3: Under original act could technically be held criminally liable for inadvertent errors.

1988 Amendment: Limited ability to be held criminally liable under accounting provisions unless knowingly falsifies records.

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II. Bribery Provisions

*Prohibits the bribing a "foreign official" (includes candidates and political) parties with "anything of value" for purpose of influencing a decision or for obtaining business.

*Third-party bribery is permitted if firm "knew" or had "reason to know" that a portion of money would be used to bribe.

Problem #4: How can one determine if she should have "reason to know" of a bribe made by a third party?

Amendment: "Reason to Know" standard eliminated. "Knowing" defined as the substantial certainty or conscious disregard of a high probability that the third-party payment will become a bribe.

SEC v. Tesoro Petroleum Corp., 2 FCPA Rep. 63F (1980)

Third Party Bribery: Factors: (1) size of payment (2) disproportionate relation between payment and contract price (3) secrecy: Swiss accounts, no written contract.

U.S. v. Liebo (1991). Liebo gave airline tickets to a foreign official as a wedding gift. He argued that the gift was not given in order to obtain business.

Held: That there was sufficient evidence to support a jury verdict that it was a bribe.

Reasons: Liebo had previously promised to make "gesture" if government contracts were approved. Jury could infer that the gift was made to get government contracts.

Exceptions to Liability under FCPA:

(1) Excludes minor payments to officials whose "duties are essentially ministerial or clerical."

Problem #5: How does one determine if a duty is ministerial or clerical?
Decisions involving official discretion are not ministerial.

(2) Minor Payments

Problem #6: What are considered minor payments?

Payments that are legal under the foreign country's laws and are reasonable & bona fide expenses such as "traveling, lodging, meals related to promoting products or executing contracts.

Amendment: Clarifies acceptable "grease payments" as payments made for expediting or securing "routine governmental action" such as documentation, processing, police protection, inspections, and services (water, telephone, electricity)

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III. Enforcement

Penalties: Criminal penalties enforced by Justice Department. $2 million per violation/$100,000 for individuals & 5 years imprisonment.

Civil penalties enforced by SEC includes a $10,000 individual penalty not payable by the company.

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Student Exercise
Foreign Corrupt Practices Act (FCPA)

Students are provided the operative provisions of the FCPA (see below) and a fill in the blank worksheet (see below). An answer key is also provided below. This Exercise is excellent for two reasons: (1) learning the rules of the FCPA and (2) it is an exercise in statutory interpretation.

Arguments against Bribery

- Bribes are inherently wrong (universal moral principle or absolutism)
- Those receiving bribes are the only ones benefiting.
- Bribes deceive stockholders and increase costs to customers.
- Corruption hams society because government funds are not used efficiently origin ways that bets benefit the country (often resulting in buying shoddy products and waste)

Anti-Bribery Provisions of the FCPA
(15 U.S.C. § 78dd-1)

(a) Prohibition

It shall be unlawful for any issuer [corporation registered under the Securities and Exchange Act of 1934] or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to offer, pay, promise to pay, or authorize the payment of any money, or offer, give, promise to give, or authorize the giving of anything of value to—

(1) any foreign official or political party or official thereof, any candidate for foreign political office, or any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office for purposes of—
(A) (i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or
(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsection (a) of this section will not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

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(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's political party's, party official's, or candidate's country; or
(2) the payment, gift, offer, or promise of anything of value that was made was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—
    (A) the promotion, demonstration, or explanation of products or services; or
    (B) the execution or performance of a contract with a foreign government or agency thereof.

(f) Definitions

(1) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.
(2) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—
    (i) such person is aware that such person is engaging in such conduct, or such circumstance exists, or that such result is substantially certain to occur; or
    (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
    (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(3) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—
    (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
    (ii) processing governmental papers, such as visas and work orders;
    (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
    (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
    (v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(4) [15 U.S.C. § 78dd-2(h)(1)] The term "domestic concern" means—
   (A) any individual who is a citizen, national, or resident of the United States; and
   (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principle place of business in the United States, or which is organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States.

"Accounting Provisions"

The FCPA requires corporations to keep financial records "which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets" of the business, and to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that transactions are being carried out according to management authorization.

1998 Amendments

- New Civil Fine of $10,000
- Criminal Fines--$100,000 (Individual) and $2 million (Business)
- Individuals can be jailed for up to 5 years

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Statutory Interpretation Exercise: "Elements of the Crime under the FCPA"

I. **Who** can be found guilty of violating the FCPA?
  A.____
    1. Defined: ______________________________________
    2. Citation: ______________________________________
  B.____
    1. Including:
      a ____

(1) Citation: ________________________________

      b____

(1) Citation: ________________________________

II. **What** activities are made unlawful?
  A.____
  B.____
  C.____
  D.____
  E. of any_____________ or ____
    1. Citation: ____________________________

III. **To whom** must the valuable thing be extended?
  A.____
    1. defined: ____
    2. Citation: ______________________________
  B.____
  C.____
  D.____
  E.____

IV. For what **desired response** by the recipient identified in III?
  A.____
    1. Citation: ____
  B.____
    1. Citation: ____
  C.____
    1. Citation: ____

V. For what **overall objective** of the defendant?
  A.____
  B.____
  C.____
    1. Citation: ____

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