

TOPIC 25: INTERNATIONAL LAW

Overview

International law concerns the laws agreed to and observed by nations and its citizens. More specifically, international law may include the rules applicable to dealings between two countries. It may also include the laws applicable to a transaction between individuals from separate countries. This chapter introduces the concept of international law and the categories of public and private international law before providing context for its application. This includes international relations and private international transactions. It identifies the primary international organizations charged with promulgating international legal standards. It then identifies the body primarily charged with resolving disputes that arise pursuant to those standards. It reviews the primary methods for transacting business in foreign markets and the legal risks inherent in each. It then reviews the primary US laws that affect international business practice, such as the import and export of goods. Lastly, it reviews the primary methods for resolving disputes in private international transactions.

VIDEO LESSON - INTRODUCTION



VOCABULARY & CONCEPTS

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TOPIC 25: INTERNATIONAL LAW - QUESTIONS & ANSWERS

1. What is “international law”?

International law includes all of the generally accepted rules that govern the relations between nations or countries and their citizens. The concept of international law is much broader than domestic law, which is generally attributed to statutory authority vested by a federal, state, or local governmental body. In many ways, international law is an agreement upon common understanding between two or more separate nations. International law may include a particular country’s law applied internationally or in an international setting. For example, international law may subject the citizens of one nation to the jurisdiction of international courts or tribunals. The US Supreme Court addressed the United State’s view of international law as “a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.” In any event, international law establishes standards or expectations for conduct between nations and between or by the citizens (including businesses) of other nations. Developing and employing an international legal framework in this manner provides additional certainty and stability between nations and between individuals. More specifically, international organizations and agreements facilitate trade and minimize the risk for businesses.

- *Note:* International law is generally binding upon a nation pursuant to that state’s voluntary agreement to be subject to that law. A business operating internationally may be subject to both international law and the law of the nation in which it is doing business. This is collectively referred to as international law throughout this chapter.
- **Discussion:** What do you think about the definition attributable to international law? Is the definition broader or narrower than you expected? Why do you think nations seek commonality of law in certain circumstances? In what way does it affect commerce between nations?
- **Practice Question:** What are the differences between domestic laws in the United States and international laws? How do international laws come into existence? Who do they control?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-international-law/>

2. What are the types of international law?

International law is commonly divided into two categories:

- **Public International Law** - Public international law examines relationships between nations and the rules that are binding upon countries in the international community. It also governs the relationship between states and international entities. Public international law originates largely from the direct agreements or treaties between nations. In some cases, an agreement among some nations may involuntarily subject other nations to that law. Such is the case with certain criminal laws. Fields of international law include criminal law, maritime law, the law of war, human rights law, refugee law, and the law established by treaties between nations. When conflicts exist between nations, these sources of international law (as applied within the substantive field) generally guide those nations in resolving the conflict. In some instances, nations will empower a common court or tribunal to resolve international disputes. These nations agree to submit disputes to these courts or tribunals, which are charged with applying the sources of international law (along with any codifications or common law derived by those courts or

tribunals) in resolving the conflict. Resolution of conflicts between nations necessarily entails disparity in laws and ethical or moral principles. Therefore, public international law may employ principles present in international conventions, customs of the disputing nations, generally accepted community norms, principles of law recognized by civilized nations, and judicial philosophies or theories of jurisprudence in addressing conflicts between nations.

- *Private International Law* - Private international law primarily concerns disputes between individuals or businesses (not nations) in situations where the law of more than one nation may apply. This is often referred to as international conflict of law. These situations commonly arise through commercial transactions undertaken by parties from separate nations. Private international law addresses the questions of (1) which jurisdiction may hear a case, and (2) the law concerning which jurisdiction applies to the issues in the case. Parties typically utilize contracts to provide mutual understanding and some degree of continuity to international business transactions. In the event of conflict, in hopes of resolving the dispute, the parties may voluntarily or involuntarily submit the dispute to a legal system to interpret the agreement in accordance with the laws of either or both nations.
 - *Note:* When disputes arise as to the law that will apply to a specific transaction or situation, “conflict of law” rules are used to determine which country’s law will apply.

- **Discussion:** What do you think about the concept of international law? Does the voluntary nature of most international law affect your opinion? Can you think of situations in which the ethics and social norms adopted in one country’s law could conflict with those of another country? Why do you think that there is a distinction between public and private international law?
- **Practice Question:** What is the difference between public and private international law? Can individuals ever be the subject of public international law? Can governments ever be subject to private international law?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-public-and-private-international-law/>

3. What are the major international inter-governmental organizations?

Much public international law derives from treaty or agreement between individual nations and the law elected by private parties to govern their agreements. Other sources of international law are the numerous international organizations which develop standards for conduct among member nations or private parties. The most well-known international organizations contributing to international law include:

- *United Nations (UN)* - The UN formed after World War II “to save succeeding generations from the scourge of war”. The UN has a representative from nearly every commonly recognized country in the world. This structure provides all member nations a forum to voice concerns about threats to peace and stability. Collectively, the UN focuses on measures and collaborative efforts to identify threats to peace among member nations. A select group of 15 nations make up the UN Security Council. This body analyzes potential threats to world peace and has the authority to intervene through diplomatic efforts and recommend military action. The council may also undertake investigations of situations that could potentially affect world peace. Five countries hold permanent seats on the council (United States, Russia, China, France, and the United Kingdom), where other members rotate on and off. Each of the permanent council countries has the power to veto any council proposal made to the greater UN body.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-united-nations-and-how-does-it-affect-international-law/>

- *United Nations Commission on International Trade Law (UNCITRAL)* - UNCITRAL is a affiliate organization to the UN made up of business and legal professionals. This group develops model standards and procedures for dealing with issues affecting international business. Perhaps most notably, UNCITRAL promulgated the Convention on International Sale of Goods (CISG). The CISG is a model law commonly used as the governing provisions in contracts between parties from different nations.

- *Note:* You can think of the CISG as similar to the Uniform Commercial Code and Restatement of Contracts, which are model laws commonly adopted within the US.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-united-nations-commission-on-international-trade-law/>

- *United Nations Conference on Trade and Development (UNCTD)* - UNCTD is another UN affiliate organization that addresses matters of international trade reform. More specifically, it seeks to foster international trade globally with the purpose of providing trade benefits among developing countries.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-united-nations-conference-on-trade-and-development/>

- *The North Atlantic Treaty Organization (NATO)* - NATO is a military alliance among 28 member countries. Numerous other countries also participate in NATO programs to promote peace and international dialogue. Member nations agree to provide collective support to member nations in the event of attack by non-member nations. NATO also provides a judicial system for adjudicating breaches of international peace, known as the International Court of Justice.

- *Note:* Member nations must be accepted by the NATO body and meet certain defense spending and capability requirements.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-north-atlantic-treaty-organization-nato/>

- *Organization for Economic Cooperation and Development (OECD)* - The OECD is an international organization of 35 countries with the propose of fostering economic development and international trade. The objective of the organization is to develop common policies and understanding with regard to international trade practices. It provides model policies for countries to implement and facilitates the negotiation of treaties among participant

countries.

- *Note:* The Nuclear Energy Agency is a sub-organization of the OECD. It focuses on promoting the development, advancement, and use of nuclear power for peaceful purposes.
- *World Customs Organization (WCO)* - The WCO is an international organization of member governments focused on the development of international model rules and instruments to facilitate international trade. It focuses on the aspects of international trade commonly enforced through a country's customs agency.
 - *Note:* The WCO administers the international harmonized system and WTO customs valuation and rules of origin procedures.
- *Organization of Petroleum Exporting Countries (OPEC)* - OPEC is an intergovernmental organization of 14 oil-producing nations. It negotiates oil production policies among member nations with the purpose of stabilizing oil markets, including the supply, demand, and prices stabilization.
- *International Monetary Fund (IMF)* - The IMF is similar to an international bank with the underlying purpose of fostering global monetary policy, commerce, and trade. The intended result is to increase employment levels, drive economic growth, and reduce poverty. The IMF makes loans to developing countries, provides stable exchange rates between currencies, establishes policies for currency exchange among commercial banks, conducts statistical and economic analysis of economies, and monitors economies while encouraging sound economic policies. Notably, the IMF makes loans to developing countries under the condition that borrowing countries make efforts to improve or correct internal systems causing economic imbalances. Structural and policy improvements may include: reduced governmental spending, import and export policy (such as tariffs), currency valuation, security market regulation, price controls, privatization, foreign investment provisions, and anti-corruption measures.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-international-monetary-fund/>

- *World Bank* - The World Bank is a financial institution that promotes economic development in developing countries with the purpose of fostering economic strength and reducing poverty through increased foreign investment and international trade. The World Bank is a division of the World Bank Group, which is an affiliate of the United Nations. The World Bank Group is made up of 5 international organizations that collectively make loans to developing countries to finance necessary development projects and programs. Loans or grants are generally issued for infrastructure, health, or education purposes.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-world-bank/>

- *World Trade Organization (WTO)* - At the end of WWII, a large block of countries signed a treaty known as the General Agreement on Tariffs and Trade (GATT). The purpose of the treaty was to demonstrate an intent to foster trade among the countries of the world. In 1995, 123 countries signed the Marrakesh Agreement, which replaced the GATT and formed the WTO. The WTO provides a framework for developing trade agreements between

countries. The purpose of this organization is to foster trade and competition while avoiding trade practices that detriment society at large. The WTO also provides a forum and procedure for resolving trade disputes between its member countries. Member nations agree to adhere to WTO policies and to any result from the dispute resolution process. This includes honoring sanctions levied by the WTO against a nation that fails to adhere to WTO policies or decisions. A notable contribution of the WTO to trade policy is the development of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). TRIPS is a model agreement that deals with recognition and enforcement of intellectual property rights among signatory nations. Specifically, it seeks to curb the theft or misuse of intellectual property through the international sale of counterfeit goods or copyrighted property. TRIPS also provides a dispute resolution system for disagreements regarding intellectual property rights and enforcement among nations.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-world-trade-organization/>

- *The European Union (EU)* - The EU is a group of 27 European countries banded together the promote economic and social prosperity among the nations. Most notably, the EU has a pseudo-governmental body made up of representatives of member countries. The EU provides a standardized legal system governing trade and commerce among the nations that allows for the movement persons, goods, capital and the provision of services across borders. Perhaps most notably, most countries use a single currency known as the EURO.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-european-union/>

- **Discussion:** How do you feel about the genesis and continued purpose of the above-listed international organizations? Do you think recognizing this mix of authoritative bodies is an effective method of administering international law?

4. What international courts exist and what are their functions?

International courts exist as a result of agreement between nations as to their formation and authority. The authority of the court over a country or its citizens may result from that country becoming a member of an international organization or signatory to an international agreement. Courts that exercise global jurisdiction over the actions by or among countries include:

- *UN Security Council* - While not technically a court, the United Nations Security Council claims jurisdiction over all countries with regard to activities potentially disturbing or jeopardizing world peace. This group may investigate and make determinations regarding activity potentially jeopardizing world peace. These investigations may end in a recommendation for action by the UN (or its member nations) to address the threatening activity through sanctions or military intervention.
- *UN International Court of Justice (ICJ)* - The ICJ is the judicial branch of the United Nations. It provides advisory opinions to international agencies concerning international law. Further, it adjudicates matters or disputes submitted to the court by the party countries or nations. In this way, the ICJ has very broad jurisdiction to

hear any type of dispute. Judges from developed legal systems throughout the world are elected by the UN General Assembly to sit on the court.

- *International Criminal Court (ICC)* - The ICC was formed pursuant to a multilateral treaty, known as the Rome Statute. The ICC, as the name implies, adjudicates criminal matters in the international context. The court will only hear a criminal matter when national courts will not or cannot prosecute individuals for the alleged criminal conduct. In this way, the ICC complements the criminal law system present in any country. Individual states may defer to the ICC and request that the ICC prosecute a case. This may occur when the country believes that this is the only manner or method of holding a fair trial. Common examples of ICC cases include acts of genocide or crimes against humanity.
- *WTO Appellate Body (Appellate Body)* - The Appellate Body hears appeals from disputes addressed by WTO panels. These panels often serve as arbitrator for disputes submitted to the panel by WTO members. The Appellate Body consists of seven individuals from WTO countries who act as appellate judges in reviewing panel decisions. These individuals may uphold, modify, or reverse a panel's decision in a dispute. The Appellate Body issues a report that affirmatively settles a dispute. The parties to the dispute must accept the Appellate Body's report as the final adjudication of the matter. The WTO may levy sanctions or offer other procedural methods for enforcing the Appellate Body's report.
- *International Tribunal for the Law of the Sea (ITLOS)* - The ITLOS is a UN sanctioned court that provides a system for adjudicating the law as it applies to the ocean and its resources. 167 countries are signatories to the agreement establishing this court. Notably, the court hears matters of mining on sea floors that are outside of a nation's geographic boundaries, territorial seas, the contiguous zone, and the continental shelf.

Numerous international courts or tribunals exist in specific regions or areas of the world. These courts or tribunals will hear diverse matters involving signatory nations within their subject matter and geographic jurisdictions.

- **Discussion:** How do you feel about the authority vested in these courts? Should the US government and its citizens be subjected to international law? What are the arguments for and against this? Does it matter whether the subject-matter is civil or criminal in nature? Does the mandatory or voluntary nature of some of the courts affect your opinion?
- **Resource Video:** <http://thebusinessprofessor.com/what-are-there-international-courts-and-their-function/>

INTERNATIONAL BUSINESS AND THE LAW

5. What are the methods of carrying on international business?

US companies intending to carry on international business can do so in three separate manners:

- *International Sales* - A US company can carry out international sales by either selling directly to customers, selling to retailers, or selling to distributors (who then sell to retailers). Each of the methods of international selling requires different processes or procedures.
 - *Direct Sales* - Direct sales to customers may be achieved through foreign-listed websites, catalogs, and

international mail. Payment from the customers is often facilitated through third-party payment websites, such as PayPal or Apple Pay. The main issues with direct sales are the cost of shipment can be high, and customer service and returns can be difficult.

- *Example:* Doug is in the United States. He creates a website specifically targeting Brazilian customers. When someone from Brazil purchases a product, he undertakes international shipping to deliver the product. Doug also uses [Ebay.com](https://www.ebay.com) and [Amazon.com](https://www.amazon.com) to reach customers in these locations.

- *Sales to Retailers and Distributors* - The export of goods to retailers is generally carried out through a complicated payment process using “letters of credit”. A letter of credit is a payment device issued by a bank. The buyer of goods works with a commercial bank to acquire a letter of credit. This buyer’s bank is the issuing bank. The letter of credit, like a certified check, says that the bank will make payment to a financial institution presenting the letter of credit for payment. The buyer will post money with the issuing bank in an amount sufficient to pay the letter of credit. The buyer then provides a bank in the seller’s location (the confirming bank) with the letter of credit. The letter of credit ensures a confirming bank that the issuing bank will release funds to the confirming bank upon receipt of a “bill of lading”. A bill of lading is a document identifying the goods for sale under the contract and stating that goods have been shipped. Once the seller ships the conforming goods, he gets the bill of lading from the carrier. The seller takes the bill of lading to the confirming bank to get paid. The confirming bank forwards the letter of credit to the issuing bank to recover its money. Now the buyer pays the issuing bank and gets the bill of lading. The buyer then presents the bill of lading to the carrier to receive the goods. Needless to say, the bill of lading must comply strictly with the letter of credit for the transaction to be consummated.

- *Example:* Evan agrees to sell his product wholesale to distributors in Spain. As such, he needs to arrange to ship \$50,000 in goods to Spain and receive payment from the distributor. He agrees to a letter of credit situation. The distributor will deposit funds in an acceptable bank and acquire a letter of credit. The letter of credit is sent to Evan’s bank. Evan ships the goods and receives a bill of lading, which he provides to his bank. His bank sends the bill of lading to the distributor’s bank. The distributor’s bank pays Evan’s bank once the bill of lading arrives and is used to acquire the shipped goods.

- *Licenses or Franchises* - Licensing a brand or other intellectual property is the process of allowing a third-party to use the licensed subject matter for a fee. This is very similar to franchising, which is a formalized process of licensing a brand, intellectual property, and operational plans to third parties who pay for the privilege. A business that decides to license or franchise can expand the brand, products, or services to international markets without directly performing services or selling goods in that market. While this model is far easier than navigating the legal and competitive environment of a foreign market, the downside of this method is that the licensor and franchisor lose a certain level of control over the license or brand. Further, the financial reward from licensing or franchising may be less than direct sales in the country.

- *Example:* ABC Corp manufactures wood products. ABC wants to sell in Europe but does not want to navigate the various markets. ABC franchises its name and operational plans to European businesses. These businesses purchase and sell ABC’s products and pay a royalty to ABC.

- *Direct Foreign Investment* - US businesses may enter a foreign market by combining in some way with a business

that already carries on business in the foreign market. The US business may choose to simply partner with a foreign business as a joint venture. In other situations, the US business may choose to acquire, merge, or otherwise combine with a foreign entity. In either situation, the US business may continue to carry on business in the US while the foreign entity introduces the US business's product or service into the new market. The decision of whether to enter a joint venture or to acquire a foreign subsidiary business will depend upon competitive factors as well as the legal restrictions on such transactions.

- *Example:* Acquiring a controlling interest in a foreign entity may be prohibited under that country's laws. As such, entering the foreign market through a joint venture may be the only available option.

- **Discussion:** What do you think about the commonly accepted methods of transacting business in foreign countries? Can you think of other models of carrying on business? Hint: Think about services and Internet technology. Can you identify the legal challenges associated with each method of international business?
- **Practice Question:** ABC Corp is considering expanding the sale of its products into the international market. ABC has identified 5 countries where it would like to first sell its goods. Can you describe to ABC the various methods of entering the foreign markets?
- **Resource Video:** <http://thebusinessprofessor.com/methods-of-carrying-on-international-business/>

6. What are the legal risks associated with carrying on international business?

The competitive risks associated with carrying on business in a foreign market are numerous. For example, understanding the foreign market, communicating in a foreign language, and understanding the competitive environment can be extremely difficult. Important for this chapter, the legal risks associated with carrying on international business can be extensive. The following are examples of legal risks businesses commonly encounter:

- *Governing Laws* - What laws control business agreements? Contracts often employ some amalgam of contract laws from each country. Does the foreign country recognize and protect intellectual property rights? What are the legal hurdles in the importation process? What tariffs, duties, customs processes, etc., apply to the importation of goods? What labor laws apply to operations?
- *Enforcing Legal Rights* - How does one enforce legal agreements or one's property rights? Foreign court systems have varying methods of enforcing one's rights. The legal system may be difficult to navigate or unavailable to foreigners. Is there a risk of expropriation or nationalization of business assets?
- *Political Stability* - Is there a risk of political overturn, war, etc., that could disrupt business operations. This includes the potential for expropriation or nationalization of the company's resources.

This list is by no means exhaustive. Operating in a foreign market may give rise to any sort of specific legal barrier or hurdle for foreign entities.

- **Discussion:** Can you think of other legal risks that may present themselves when doing business in a foreign

country? How do these risks compare to other risks, such as the foreign competitive environment?

- **Practice Question:** ABC Corp is considering expanding its US-based operations into China. Can you identify some of the legal risks that ABC Corp will face in its expansion?
- **Resource Video:** <http://thebusinessprofessor.com/legal-risks-and-considerations-in-international-business/>

7. What major international agreements affect international trade?

The United States has entered into two types of treaty with multiple countries regarding the trade and shipment of goods. These treaties allow individuals from the US and the host country to sell and ship goods to the other country without special tariffs or duties. The two types of treaty are as follows:

- *Treaty of Friendship, Commerce, & Navigation* (FCN) - These are commerce agreements that the US maintains with over two-dozen countries. Many of these agreements have been replaced by other specific agreements.
- *Bilateral Investment Treaty* (BIT) - These agreements provide provisions for foreign countries (or its citizens) owning businesses within another country. The US is currently involved in over 40 BIT agreements with foreign nations.

Numerous direct agreements between countries affect the international sale of goods. The most commonly recognized international agreement is the North American Free Trade Agreement (NAFTA). NAFTA is an agreement between the US, Mexico, and Canada to increase trade and foreign investment across the countries. NAFTA allows for trade and shipping among these countries without tariff or duties. It also provides a system of dispute resolution for disagreements among trading parties. The US is a party to similar free-trade agreements with the Dominican Republic, Colombia, South Korea, and Panama, Israel, Jordan, Australia, Chile, Singapore, Bahrain, Morocco, Oman, and Peru.

- **Discussion:** Why do you think the US Government has so many international trade agreements with other countries? How do you think these agreements affect both countries? What are the arguments for and against these types of agreement? Hint: Think in terms of economic productivity and the role that each country plays in these types of relationships.
- **Practice Question:** ABC Corp is considering importing goods made in several Asian, European, and South American Countries. ABC will decide on the importation countries based upon the costs associated with importing. What types of treaties or agreements may aid ABC in its objectives?
- **Resource Video:** <http://thebusinessprofessor.com/types-of-international-agreement-affecting-us-trade/>

8. When is carrying on business in a foreign country prohibited under US Law?

Embargoes are prohibitions against carrying on business transactions with certain countries. The Office of Foreign Assets Control (OFAC), a division of the US Department of Treasury, is charged with carrying out embargoes and “targeted sanctions” against countries. Targeted sanctions are restrictions on business relations with a country that falls short of a total embargo. OFAC may designate persons or companies as “specially designated nationals” (SDNs). These individuals

or companies are treated with the same restrictions as the country to which they are designated. This keeps US citizens or businesses from using intermediaries to carry on business with a company subject to embargo. In order to carry on business with individuals from these countries (or purchase goods or services derived from these countries), the US company must request a license from OFAC.

- *Note:* Many western nations, including the United States, were previously members of the Coordinating Committee for Multilateral Export Controls. This committee sought to control global exports among member countries. It was dissolved in 1994.
- *Example:* The US currently has embargoes against Iran, Cuba, and the Sudan. The long-standing embargo against Cuba is the subject of controversy. The US has targeted sanctions against Syria and North Korea.
- **Discussion:** Why do you think the US issues embargoes against certain countries? Should diplomatic objectives be balanced against economic prosperity? Why or why not?
- **Practice Question:** ABC Corp regularly does business with 123 Corp. ABC recently learned that 123 is categorized by the US government as a specially designated national. What will this mean for ABC?
- **Resource Video:** <http://thebusinessprofessor.com/when-is-foreign-business-prohibited-under-us-law/>

9. What is the significance of boycotts between foreign countries?

The US issues restrictions on international business relationships through embargoes and targeted business sanctions. The US is not currently a part of an official boycott of countries or individuals. In fact, the US recognizes two prohibitions against US companies taking part in unsanctioned boycotts. These prohibitions are issued by the Department of Commerce or the Department of Treasury.

- *Department of Commerce (DOC)* - The DOC prohibits US companies from participating in any unsanctioned boycott of other countries or its citizens. This rule specifically prohibits US companies from maintaining lists of countries with which they will not do business based upon a non-US sanctioned boycott. The DOC also prohibits discrimination in carrying on business based upon an individual's race, religion, sex or national origin.
 - *Note:* Companies who receive specific requests to take action, such as not carrying on business pursuant to a boycott, must report that request to the DOC.
- *Department of Treasury (DOT)* - The DOT prohibits companies from participating in unsanctioned boycotts. Specifically, the DOT requires a US tax-reporting company to report on its income tax return all business activity with or in countries that actively participate in a non-sanctioned boycott of other countries, races, religions, ethnicities, etc. Carrying on business with these countries (or otherwise participating in the boycott activity) can result in the loss of certain foreign tax benefits.
 - *Note:* The DOT publishes a list of countries actively participating in non-sanctioned boycotts.

- **Discussion:** Why do you think the US does not participate in current boycotts? Why do you think the US prohibits US companies from participating in boycotts or, in some cases, doing business with companies that participate in boycotts? Are these restrictions appropriate?
- **Practice Question:** ABC Corp has had very bad experiences in its business dealings in Turkey. ABC puts out a company-wide memo that it will not do business with any Turkish company or any company with direct ties to Turkey. Is there a legal problem with this stance?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-significance-of-boycotts-on-international-law/>

10. What US laws apply to limit specific business practices in all foreign countries?

Numerous US laws limit specific types of conduct or business activity in foreign countries. Major limitations under US law include:

- *Antiterrorism and Effective Death Penalty Act of 1996* - This act prohibits doing business with companies that have been linked to terrorism.
- *USA Patriot Act of 2001 (Patriot Act)* - The Patriot Act prohibits individuals or companies from providing material support to any foreign individual, organization, or company engaging in terrorist activity. “Material support” may include providing money, assets, information, etc.
 - *Note:* The State Department designates certain organizations as providing material support for terrorist activity.
- *Foreign Corrupt Practices Act (FCPA)* - The FCPA was passed to prevent businesses using bribes to gain an unfair business advantage. The FCPA prohibits a business, its employees, or agents from offering or giving anything of value to a foreign official for the purpose of gaining an unfair business advantage. A foreign official includes government officials, candidates for office, political parties, any person who knows the money will be offered, given, or promised to a foreign official for purposes of securing improper advantage. An improper advantage includes securing additional business, permits, special taxation, or favor in judicial or legislative proceedings. This prohibition applies to all businesses. The FCPA also places accounting disclosure requirements on any company subject to SEC regulations. Companies must keep detailed records that reflect transactions and disposition of assets that are sufficient to provide reasonable assurance that transactions are carried out within management’s authorizations. The exception to this rule is that companies may pay officials to perform their routine government tasks. The prohibitive line is that payment cannot go to influence a positive decision for the company from an official empowered to make such decision. Companies may also pay statutory fees to officials or undertake marketing and promotion efforts.

US laws applicable to business operations may apply to the business’s foreign operations as well. The concept of applying US laws to businesses or operations outside of the United States is known as “extraterritoriality”. Example of US laws limiting foreign activity include:

- *Employment laws* - Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967 apply to US companies carrying on business abroad, as well as

companies controlled by a US employer.

- *Environmental Laws* - Environmental laws concerning the handling and disposal of hazardous material may apply to operations abroad.
- *Tax Laws* - US tax laws are extensive and complicated. There is a great deal of interplay between US taxation and foreign business activity.
- *Antitrust Laws* - US antitrust law applies to company activity outside of the United States if such activity has an intended or actual, substantial or foreseeable effect within the United States.
- *Foreign Bank Account Reporting* - The transfer of funds in excess of \$10,000 in or out of the United States must be reported to the US Customs and Board Protection or US Treasury.

The above list of foreign laws limiting specific activities in foreign countries is just a sample of the many laws or regulations that could apply to a company's foreign operations.

- **Discussion:** Do you agree that government efforts to thwart terrorist activity should trump a company's intentions to do business in a foreign country or with a foreign firm? Do you think the US prohibitions against discriminatory practices should also apply in countries that allow such conduct? Why do you think the US government seeks to prohibit bribes and other kickbacks to individuals outside of the US?
- **Practice Question:** ABC Corp imports goods from Country A, that has numerous laws that directly discriminate against individuals. Might ABC run into trouble in doing business with Country A?
- **Resource Video:** <http://thebusinessprofessor.com/what-us-laws-prohibit-business-practices-in-foreign-countries/>

IMPORTING AND EXPORTING GOODS

11. What regulations apply to exports from the United States?

US Export Administrative Regulations (EAR) cover the export and re-export of most commercial items, including some civilian and military grade items. An export includes any item transported outside of the country, whether temporary or permanent and whether sold, gifted, or transferred to a US subsidiary. This includes shipments originating in the US, shipped through the US, or being returned from the US to another country. EARs establish export requirements depending upon the product or service being exported and the destination country. Notably, the EAR places licensing requirements on certain types of exports. The Department of Commerce, Bureau of Industry and Security (BIS) is charged with implementing EARs. EARs also establish requirements for end-user control of licensed exports.

- *Note:* EARs completely ban the export of certain goods and any exports to certain countries (Iran, North Korea, Cuba, Sudan, Syria).
- *Example:* Items connected with nuclear, chemical, biological, or missile proliferation in specific countries would require a license.

EARs also control the sale of US strategic products and technologies abroad. These types of products may also include services or data. The purpose of these provisions is to control the acquisition and use of technologies by combatant nations. These regulations combine with the International Traffic in Arms Regulations (ITAR) that are administered by the State Department, which govern the export of any defense articles or services. Defense services may include design, development, engineering, manufacturing, assembly testing, destruction, etc., of defense items. A license is required to export any of these items.

- *Note:* The US is also signatory to the Wassenaar Arrangement, which is an international agreement among 33 Countries to control the spread of both military and dual-use technology to unstable areas of the world.
- **Discussion:** What do you think are the government interests involved in exporting goods outside of the United States? Do you think these commercial controls are adequate to achieve the objectives behind the regulations?
- **Practice Question:** ABC Corp manufactures a number of types of chemical fertilizer for plants. These fertilizers have properties that make them highly explosive in certain conditions. What laws apply to ABC if it intends to export these products outside of the United States?
- **Resource Video:** <http://thebusinessprofessor.com/what-laws-apply-to-the-export-of-goods-from-the-us/>

12. What are the limitations on importing goods into the United States for sale?

Below are the primary laws governing the importation of commercial goods.

- *The Customs Modernization Act (CMA)* - The CMA, a part of NAFTA, requires importers to declare attributes of imported goods with the Customs and Border Protection Agency (CBP). Typically, when goods are shipped into the US, the importer (or her agent) must complete documents disclosing the nature, value, origin, and other information about the goods. The CBP will inspect the goods and charge estimated duties on the value of the goods. The inspection generally seeks to ascertain the value of the goods, that the markings and labeling are accurate, that there are no prohibited items, and that the goods are correctly documented. The CBP may also assess additional duties on goods imported for sale at abnormally low prices. This is known as “anti-dumping” and “countervailing duties”. The purpose of this authority is to protect markets from the effect of selling products at a loss or at a lower price than in the foreign market simply to reduce inventory or push other merchants out of business. Importers can appeal or request administrative review of the assessed duties. Goods subject to countervailing duties must demonstrate that the pricing practice does not hurt a consumer market.
- *The Trademark Act of 1946 (Trademark Act)* - The Trademark Act prohibits the importation of products that mislead the public as to the point or origin, manufacturer, or brand. This includes importing items under a protected trademark that does not belong to the importer or purchaser of imported goods. Any such goods are subject to forfeiture or may be released to the importer upon adequate assurance of removing the deceptive markings or destroying the items.
- *Regulations of Various Products* - The US places restrictions on the importation of specific types of products. These products may require permits, licenses, inspections, labeling, etc. Restrictions for failure to meet specific requirements may include prohibitions on sale, limited ports of entry, restricted routing, storage, use, etc. The

purpose of these restrictions is to protect the US economy and the health and well being of US citizens.

- **Discussion:** Why do you think the government takes an interest in regulating the importation of goods? What are the primary interests? Do you think charging the Customs and Border Protection Agency with regulating imports is adequate to achieve these objectives?
- **Practice Question:** Arnold is going to import goods into the United States. What information is required to provide to the government before the goods may enter?
- **Resource Video:** <http://thebusinessprofessor.com/what-are-limitations-on-importing-goods-into-the-us-for-resale/>

13. How are private international business agreements generally enforced?

The first method of enforcing one's rights pursuant to an international agreement is through a lawsuit or judicial action. When a dispute involves multiple parties from multiple countries, it becomes an issue as to how and where to handle the dispute. In the United States, the Alien Tort Claims Act grants jurisdiction to US federal district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The following limitations apply to bringing a civil action against a foreigner party in US Courts:

- *Suing Foreign Firms in the US* - Plaintiffs may bring a legal action in federal court (the US District Court) against a foreign individual or business if the requirements for personal and subject-matter jurisdiction are met. That is, the Plaintiff must show that the foreign defendant has "minimum contacts" with the United States. In some cases, having significant assets in the United States will be sufficient to exercise jurisdiction over the foreign party. Service of process must be completed in accordance with the Hague Service Convention.
 - *Note:* Under the Foreign Sovereign Immunities Act, a foreign government is immune from suit in the United States for public acts, but may be subject to suit for private or commercial activity.
- *Arbitration* - Enforcing one's rights in a foreign court is often difficult. It may be difficult to access the court because of procedural rules; the court may not be independent and fair to foreign plaintiffs; and accessing the court could be prohibitively expensive. Aware of these concerns, parties frequently seek alternative methods of settling disputes or dictate the specific rules and procedures that will be applicable to the interpretation and resolution of the international business agreement. Two major international agreements with this purpose are:
 - *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)* - Parties to an international business agreement often employ alternative dispute resolution (ADR) clauses in their agreements. The most common ADR clause is an arbitration clause directing that any unresolved dispute be submitted to arbitration for resolution. The New York Convention is a treaty between many signatory countries (approximately 50 in total) that agree to recognize and enforce arbitration awards. Within the US, the recognition and collection of arbitration awards are carried out by filing the arbitration award with the country's judicial system.
 - *Note:* Other notable international arbitration bodies include, the China International Economic and Trade Arbitration Commission, which arbitrates trade disputes arising in China that are

voluntarily submitted to Commission. The World Intellectual Property Organization sponsors a voluntary arbitration and mediation center for disputes involving intellectual property. The international Centre for Settlement of Investment Disputes is an international arbitration body frequently used in disputes regarding international investment under Bilateral Investment Treaties.

- *Convention on the International Sale of Goods (CISG)* - As previously discussed, UNCITRAL promulgates the CISG. Most member countries of the UN have adopted the terms of the CISG. Further, individuals (even in non-CISG countries) regularly agree to abide by the terms outlined in this agreement. In CISG-signatory countries, the CISG is the default rule when an international agreement fails to indicate a different controlling law. Parties to an agreement, however, may opt out of the provisions of the CISG. The CISG specifically provides methods and procedures for dispute resolution.

It is important to remember that arbitration of most international disputes is voluntary. There may, however, be limited situations in which foreign activity becomes subject to mandatory arbitration provisions of a party's home country.

- **Discussion:** Why do you think dispute resolution is difficult for parties to international agreements? What do you think are the advantages and disadvantages of each method of enforcement?
- **Practice Question:** Jane enters into an agreement to sell goods to Will. Jane is in the United States, Will is in Sweden. When a dispute arises between Will and Jane, what are some of the methods that each party could pursue in resolving the dispute?
- **Resource Video:** <http://thebusinessprofessor.com/how-are-private-international-agreements-enforced/>

14. How do parties determine the rules, location, and method of resolving a dispute under an international agreement?

Parties to an international agreement generally employ various provisions to reduce uncertainty in the relationship and add a degree of confidence that a party will be able to enforce her rights. Below are three common clauses:

- *Choice-of-Law Clause* - A choice-of-law clause indicates the law that will govern the contractual relationship and any disputes arising thereunder. These clauses may identify the substantive and procedural law of a particular country, international treaty, or model law.
- *Forum Selection Clause* - These clauses indicate the appropriate venue for adjudicating disputes arising under the contract or business arrangement. It may also indicate a particular judicial body or geographic location.
- *Arbitration Clauses* - These clauses are extremely common in international agreements. They will generally require arbitration, indicate the rules that will apply, and designate the individuals or body to decide the dispute. Most countries in the world recognize and enforce arbitrations carried out in accordance with the requirements of the New York Convention. Numerous nations are members of treaties with other countries that provide further recognition and enforcement procedures for arbitration awards.

- **Discussion:** Why do you think the resolution of these terms of an international agreement are particularly important? If you were entering into an international agreement with a foreign party, how would you seek to address these provisions? Can you think of any other aspects of the agreement that should be fully addressed?
- **Practice Question:** Derek and Damien are negotiating a contract to export textiles from Haiti for sale in the United States. Explain the primary dispute resolution clauses that the parties should consider in their negotiations.
- **Resource Video:** <http://thebusinessprofessor.com/key-considerations-for-terms-of-private-international-agreements/>