

INTEGRATING TRANSNATIONAL LEGAL PERSPECTIVES INTO THE FIRST YEAR CURRICULUM

By:

Carlos M. Vázquez
Georgetown University

Georgetown's Week One: Law in a Global Context

Georgetown University Law Center will be initiating this year a one-week course at the beginning of the second semester for first year students, which will explore the role of law in a global context. Its principal purpose is to introduce students to a complex problem that involves not only U.S. law, but also international and/or foreign law in a transnational setting so they can begin to understand that problems increasingly transcend national boundaries and involve more than one legal system. In the course of doing so, the week will also introduce students to at least one formal decision-making process in addition to U.S. courts – e.g., international arbitration and/or foreign courts. The problems have been designed, as well, to provide an opportunity for students to be introduced to the importance of the careful analysis of statutes, regulations, or international agreements, as distinct from analysis of common law cases.

During the week, students will be offered opportunities to experience different lawyering roles in order to capture the intellectual benefits of the engaged learning made possible by a continuous project for the entire week. Week One will have the added benefit of introducing students to the fact that legal problems occur in categories not neatly captured by traditional course divisions, since the problems involve cross-cutting issues.

Conceptual Parameters

The goal of the intensive week is not to teach thoroughly any particular doctrine or problem, or to be a prerequisite to anything else. Rather the goal is to introduce students to learning and working with international and/or foreign legal materials in conjunction with materials that relate to their first year courses, in a simplified but realistic legal setting, with limited (but not comprehensive) materials supplied by faculty, that permit the students to learn some basic concepts of international and/or foreign law that are in some respects different from the U.S. law.

This week will include about 15 hours in various settings, including large class lectures, outside speakers, and small group meetings during which the students would engage in more interactive learning. The limited time available is an obvious constraint on what can be done. Some tentative conclusions flow from this.

1. Most of the U.S. aspects of the problem will be rooted in something that the students have already covered in their other classes, rather than expecting students also to learn much new U.S. law. Hence, the problems will involve contracts, torts, property, civil procedure, constitutional law, and/or criminal procedure if it were offered in the fall. The new materials will focus on international and/or foreign law, some non-U.S. formal dispute resolution, and the differing roles a lawyer might play.

2. Formal dispute resolution will include, at least in part, the possibility of resort to international arbitration and/or a foreign court. Since foreign courts vary considerably, there is a good argument for using this opportunity to introduce students to international arbitration, which is frequently and increasingly used and which has many common characteristics wherever it might occur. Alternatively, for some problems, there will be more focus on international or multinational tribunals, such as the European Court of Human Rights, than on foreign national courts.

3. Because of time limitations, Week One will not contain a research component. Instead, students and faculty will work with a “closed packet” of materials.

Technical Parameters

1. Week One will be a required, one-credit course for first year students.

2. The week will be graded on a pass/fail basis and students will be required to attend, prepare and participate (except for excused absences). Their grade for the week (pass or fail) would be recorded on their transcript. Faculty members will be encouraged to let their students know if they intend to use Week One material in their first year spring examinations.

3. A faculty coordinator for Week One for each first year section will be recruited. The coordinator will be responsible for grading, based on reports by other faculty who will observe, participate and/or teach in the various portions of the week’s curriculum. The coordinator will work with the Dean’s Office to recruit colleagues. The coordinator will be granted one bankable teaching credit, which could be used in the next year or after two or three years in order to reduce the faculty member’s course load up to three credits.

4. All members of the faculty, including both first year and upperclass teachers, will have the opportunity to participate and, over the course of time, the responsibility to help out with portions of Week One. Participation might take the form of lecturing in a large class session or moderating/observing small break out

sections. Other resources include distinguished alumni knowledgeable in the field and international LL.M. students.

5. The development of the problem(s) might involve several first year faculty during the summer plus additional faculty with relevant expertise. The additional faculty that would be required during the summer and during Week One might be drawn from our full time faculty with expertise in relevant subjects, or from our adjunct faculty. The Dean will provide appropriate grants to faculty for summer development of problems of up to \$5,000, independent of summer writer's grants.

Possible Problems and Teaching Plans

The problems set forth below are illustrative only and in some cases identify more issues than can be addressed in one week. A range of issues has been included in the sample problems to reflect that the problem could be narrowed in any one of a range of directions. They are designed to flesh out what Week One might look like and to facilitate and provoke faculty discussion. It may be that the faculty involved would develop Week One based on entirely different problems. These examples are only intended to give some ideas of what such problems might look like.

Possible Problem 1: International Tort

A U.S. news company (Financial Network News or FNN), based in New York, puts a story on its FNN website, which is hosted by Mindspring Inc., an internet service provider (ISP) in California. The story is highly critical of the business practices of an Australian businessman. He downloads the story in his state in Australia. He believes that his reputation has been unfairly impugned and that his business interests have been substantially injured.

Variation A: Hearing from a neighbor that there might be an online story about him, the Australian checks the news website while in his office in Australia. He immediately demands a retraction, which the news company refuses to do. He directs his lawyer to sue both FNN and Mindspring Inc., the ISP, in his state in Australia, which has libel laws that are more protective of individuals than those in the relevant U.S. state(s). FNN and the ISP each considers whether only to respond to the suit in Australia, or possibly also to initiate a declaratory action in the United States.

Variation B (both variations might be addressed by students): The businessman is a paid subscriber to FNN's service. The subscription agreement between FNN and its subscribers provides that any disputes with its subscribers will be resolved through international arbitration under the aegis and rules of the

International Chamber of Commerce (ICC). The agreement does not specify the applicable substantive law, however.

In either variation (a court case or the arbitration): Assume that, if the Australian were to win, both FNN and the ISP would seek to avoid paying. Assume that the U.S. companies do not have assets in Australia, but have substantial assets in the United States (and possibly some other countries).

On a policy level, ask the students what might be done to protect news companies and ISPs from suits around the world? A treaty or other international agreement about which country has jurisdiction in internet matters?

An interesting alternative would be to locate the problem in a civil law country (e.g., Spain) instead of a common law country like Australia.

Possible Issues:

1. What is the law in the United States and in the Australian state regarding libel and also the liability of ISPs? How do they differ? (Consideration should be given to choosing the jurisdictions involved based on the relevant statutory law on libel, as well as case law and constitutional law. Note that ISP civil liability is treated in the United States under Section 230 of the Communication Decency Act of 1996, but U.S. courts are now split on its interpretation.)
2. Which country's law should apply? In Variation A, there is the question of applicable conflict of law rules. In Variation B, the ICC rules allow the arbitrator to decide as appropriate.
3. How can a foreign court civil judgment or an arbitral decision be enforced in the United States or elsewhere where the U.S. company might have assets? (The question regarding the arbitral award involves a treaty--the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.)
4. How does one develop internationally accepted rules regarding jurisdiction over the internet, or at least rules that are accepted by several countries? (This would involve discussion of some form of international agreement.)

Possible Roles/Perspectives:

Students could adopt the roles of the lawyers for the Australian businessman, FNN, and Mindspring. Other possible roles include an Australian judge, possibly a U.S. judge, and several arbitrators. In addition, there could be negotiators representing the U.S. Department of State (and/or USTR), the Australian government, and selected other governments, if faculty thought it manageable. There could also be company and industry lobbyists regarding the possible international treaty or other agreement.

Possible Problem 2: Criminal Justice/Constitutional Law/European Union Law/International Law

The U.S. makes a request to Spain to extradite a Pakistani citizen, resident in Spain, who is accused of threatening to blow up a specific Russian airliner flight (one carrying six U.S. passengers) and of planting a bomb on that airliner in violation of 18 U.S.C. §32(b)(3 (c)).¹ Virginia makes a request to extradite the same person, because a U.S. citizen on the plane was from Virginia and Virginia law (hypothetically) prohibits threats against the lives of Virginia citizens anywhere in the world.

If students have had criminal procedure, both extradition requests could be based in part on police discovery of a cache of diaries in Virginia in a search that is questionable under U.S. Fourth amendment standards. (Possible illegality would need to be fleshed out.) After the initial extradition request is denied, the President of the United States directs some federal agency to consider using covert operation to remove the Pakistani citizen from Spain by force.

Possible Issues:

1. Are there any limits on the extraterritorial reach of the federal criminal statute derived from the due process clause? How does the idea of universal jurisdiction in international law affect this analysis?

¹ 18 U.S.C. Section 32: A(b) Whoever willfully--

(1) performs an act of violence against any individual on board any civil aircraft registered in a country other than the United States while such aircraft is in flight, if such act is likely to endanger the safety of that aircraft;

(2) destroys a civil aircraft registered in a country other than the United States while such aircraft is in service or causes damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight;

(3) places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight; or

(4) attempts or conspires to commit an offense described in paragraphs (1) through (3) of this subsection; shall be fined under this title or imprisoned not more than twenty years, or both. There is jurisdiction over an offense under this subsection if a national of the United States was on board, or would have been on board, the aircraft; an offender is a national of the United States; or an offender is afterwards found in the United States. For purposes of this subsection, the term 'national of the United States' has the meaning prescribed in section 101(a)(22) of the Immigration and Nationality Act;

“(c) Whoever willfully imparts or conveys any threat to do an act which would violate any of paragraphs (1) through (5) of subsection (a) or any of paragraphs (1) through (3) of subsection (b) of this section, with an apparent determination and will to carry the threat into execution shall be fined under this title or imprisoned not more than five years, or both. @

2. Does the treaty basis for the statute (The Montreal Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, art. 5) affect interpretation of the statute's reach?

3. May a state in the United States exercise extraterritorial jurisdiction or is it limited by [issues here would depend on what students have had first semester] federal constitutional power or by the preemptive force of federal statutes? (Here students might consider recent federal preemption decisions in the area of foreign affairs, such as *Garimandi* and the *Mass. Burma Trade* case.)

4. Are there Fourth Amendment violations in connection with the search and if so, how if at all do they affect the legality of the indictment or of the extradition requests [again, depending on whether students have had criminal procedure]?

5. The legality of the death penalty and of extradition to face the death penalty pose a number of issues, some of which could be addressed. The issues could include:

- A) the constitutionality of the death penalty under U.S. law;
- B) the legality of extradition under the law of Spain [research must be done on extradition treaties or agreements we might have with Spain];
- C) the legality of extradition under European law in light of *Soering v. United Kingdom*, 11 EHRR 439 (1989 Eur Ct Humrts) (see also new EU Constitution (pending));
- D) the legality under international human rights law: do recent decisions of the U.N. Human Rights Committee interpreting the ICCPR bear on permissibility of the extradition?

6. Does either international law or U.S. law constrain the use of force in removal a suspect from Spain through a covert operation?

Possible Legal Materials:

As indicated in the description of issues, the problem would draw from U.S. constitutional law, which students would have studied, and criminal procedure, as well as from EU law as developed by the European Court of Human Rights. U.S. constitutional law could include the death penalty and the Eighth Amendment; the Fourth Amendment; Due Process, sovereignty and the extraterritorial reach of statutes. In addition, students would need to learn something about statutes and treaties, including U.S. (and possibly Virginia) criminal law, 18 USC 32; treaties to which the U.S. is a party, including the Montreal Convention² and an extradition treaty with Spain (if one exists). There might also be U.S. Department of Justice prosecution or extradition guidelines to consider including. The European Court of Human Rights' decision in *Soering*, involving an extradition request to face a capital crime in the United States, would

² There are other international conventions which may be relevant if US is a party, such as the Tokyo Convention of 1969.

be relevant but is arguably distinguishable. One would need to consider whether Spanish law, including its understanding of any extradition treaties with the U.S. and possibly its domestic constitutional provisions, should be included. Finally, elements of international law might be relevant, including the International Covenant on Civil and Political Rights, the views of the UN Human Rights Committee on extradition to face the death penalty; and possibly the UN Charter (which may bear on legality of the kidnapping as a use of force in the territory of another country without consent, which the UN Charter prohibits unless undertaken in self defense or with Security Council authorization).

Possible Roles/Perspectives:

The problem would lend itself to assigning students roles, for some or all of the week as faculty determine, including some or all of the following: (1) the U.S. Department of Justice; (2) the equivalent office in Spain; (3) possibly in the U.S. State Department and (4) its equivalent in Pakistan; (5) the Virginia Attorney General's office; (6) defense counsel in the U.S.; (7) defense counsel in Spain; (8) Judges in the U.S.; and (9) Judges on the ECHR [or possibly ECJ depending how things stand under new EU Constitution].

Possible Problem 3: Environmental Law/Property/Civil Procedure/Con Law/NAFTA

A California company partners with a Canadian company to develop a new waste water treatment plant in California, on land adjacent to an existing plant. California subsequently enacts a statute imposing additional regulatory conditions on newly constructed waste water treatment plants that would make planned operation of this plant much more expensive; the statute grandfathers existing waste water treatment plants. The companies proceed with their plans, but when they request a permit from California, which is exercising delegated authority from the federal government under the Clean Water Act, the permit is denied. Without the permit the plant cannot be operated. The federal Clean Water Act arguably authorizes the state regulation.

The joint commercial venture objects at this point, where the problem might begin with students and faculty exploring options and venues for challenge, with attention not only to prospects for the company but for other participants as well. Possibilities for the company might include (1) seeking review, in state or federal court, of the permit denial as inconsistent with federal environmental law (statutory issue); (2) seeking relief, in state court, on grounds that the course of events was a regulatory taking inconsistent with the *Lucas* and *Dolan* lines of cases; (3) filing a complaint before a NAFTA chapter 11 tribunal against the United States for damages; (4) seeking to negotiate a new solution with other local partners that would enable the new facility to be treated as part of a grandfathered one. Some of these possibilities would make it easier, or harder,

for those with interests in the new plant not going forward (apart from the state or the United States) to participate.

Possible Issues:

1. The constitutionality under U.S. law of the California statute, as either a “taking” or due process violation.
2. The statutory authority of the state under the federal environmental law; what does federal Clean Water Act require or permit; possible issue concerning constitutionality of delegation of authority.
3. The legality of the California law under NAFTA’s prohibitions on discrimination against foreign companies and against takings of property.
4. There may be issues of state constitutional or statutory law that could be developed.
5. There may be issues of the constitutionality, under U.S. law, of NAFTA itself, since it was adopted by a statute rather than through the Senate ratification process.
6. There may be issues of whether NAFTA procedures violate due process standards.
7. Is there judicial review of A NAFTA panel determination
8. What are the relevant legal constraints on a negotiated solution? Would the California Legislature need to approve? EPA?

Possible Roles/Perspectives:

The problem would lend itself to assigning students roles, for part or all of the week, as for example, (1) counsel for the US –Canadian joint venture, (2) the California Attorney General, (3) possibly the Canadian Minister of Justice (or equivalent of our Secretary of State); (4) lawyers for the U.S. Secretary of State, who represent the U.S. in defense of NAFTA chapter 11 claims; (5) U.S. Department of Justice lawyers as intervenors in a case in court on the meaning of the federal environmental statute; (6) judges of federal or state court hearing the case; (7) members of arbitration panel in NAFTA proceeding.

[NB: A variant of this problem might be to locate the plant in Mexico and thus introduce some Mexican law.]

Possible Problem 4: International Contract (more could be added)

A California company sells a sophisticated product (e.g., a Cisco server) to a German company. The sale is reached after one personal meeting in the United Kingdom and then a series of e-mails. The documents do not specify a forum or the applicable substantive law.

The German company believes that the product does not operate as the manufacturer has specified in ways that are important to the German company.

The German company withholds the remaining one-half payment for the product and asks the California company to take back the server, replacing it with one that does meet the specifications. The California company refuses and claims that the product is satisfactory.

The German company sues in the local German court for breach of contract. The U.S. company quickly files a suit in a California court, but also appears in the German suit and asks that the case be heard in California. The Germans similarly ask the California court to defer to the German court.

Assume, in one variant, that the German court proceeds with the case and decides that the German company is entitled to a refund of its payment, plus compensatory damages. The U.S. company refuses to return the German company's payment or pay any damages. The German company seeks enforcement in a California court.

Further complications could be added to this case, such as a German worker being injured by a short circuit in the product. Or, the sale might be from Germany to California. One could also offer the variant (as with the first problem) where there is an agreement to arbitrate, but no agreement on substantive law.

Possible Issues:

1. Which court should have jurisdiction? How can a court in one jurisdiction deal with a court in another jurisdiction hearing the same case?
2. In any case, what substantive law should apply? This could involve questions regarding the U.N. Convention on Contracts for the International Sale of Goods (which does not cover all the issues), as well as German and California law.
3. Can a foreign civil judgment be enforced in the U.S. court (depending on the facts and where suits are brought)? Can a U.S. civil judgment, including possibly one for punitive damages, be enforced in a German court?

Possible Roles/Perspectives:

Students could play the roles of lawyers for Cisco and the German company, German and U.S. judges, possibly arbitrators (depending on the facts), and expert witnesses on the product warranty (and, if an injury is included, on the worker's injury).

