

Using Transactional Skills as a Vehicle for Teaching Comparative Law

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Abstract

One of the major changes in U.S. law school curriculum since 1980 has been the expansion of international law offerings. International law no longer means a survey course on public international law, another survey on international business transactions, comparative law, international organizations and human rights courses. International law now comprises these courses, courses on international criminal law and national security, international environmental law and all of international economic law. International economic law covers international business transactions, international and regional trade, international intellectual property, international tax and finance, international dispute resolution in all of its forms and international transactions skills courses.

Over the past 20 years, I have taught international economic law and over the last six years, I developed a new course in transactional skills built around a problem dealing with foreign direct investment, the licensing of intellectual property rights and the distribution of goods. The goal of the course is to prepare students for transactional practice by having them produce, in collaboration, the major documents needed to create an off-shore investment entity and a regional distributions network. While developing the course, my co-teacher, an intellectual property lawyer, and I determined that it was crucial that students both study, and learn to draft in response to, the laws of at least two different countries. This approach requires students to engage directly in comparative law – to break free from the U.S. “model” and absorb both investment and intellectual property laws through close examination of what developing countries do.

To date, students have in various years had to study both sets of laws from Brazil, Mexico and China and learn to offer legal opinions about which law best meets the needs of the hypothetical transaction. While it has become harder to attract students for the traditional course on comparative law, the South Texas Transactional Skills – International Business Transactions course has always been filled. I believe this is because students quickly come to understand that examining the laws, and the investment and IP climates of both countries, is necessary in order to set the “right” deal and to get the deal done.

International Economic Law and Transactional Skills

During my twenty years in legal education there have been two significant changes in my area of teaching. First, there has been the development of International Economic Law as a field of

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study both in the United States² and other countries³. This field of academic study has come to replace what used to be thought of as “private international law” – the study of the laws of countries and international organizations, both governmental and non-governmental, which impact how individuals and firms conduct transnational and international business and commerce. International economic law as an academic discipline covers international business transactions, international and regional trade, international intellectual property, international tax and finance, international dispute resolution in all of its forms and international transactions skills courses. It is the last item on this list that represents the other major shift in teaching and focus in U.S. law schools over the last twenty years. The development of transactional skills courses grew out of, was a response to, the acceptance of law schools of the MacCrate Report.⁴ In that report, commissioned by the American Bar Association, The MacCrate Commission focused upon identifying the “necessary professional skills” for lawyers.⁵ The report also encouraged law schools to create courses and programs of study that would assist U.S. law students in developing these skills. In my field the impact of the report came from law professors and law schools deciding that skills courses could and should be offered in transactional skills⁶ in addition to the traditional litigation training exemplified by advocacy training as well as moot court and mock trial courses and competitions. Transactional skills courses typically focus upon teaching all of the skills needed for assisting clients in the conduct of business activities -- contract analysis and document drafting, negotiations, advising -- and are designed as problem-based courses built around a typical business transaction.

² “International economic law is not derived from a single source or even several sources of law; it has its genesis in many. National, regional, and international law (public and private), policy and customary practices are all components of international economic law. International economic law encompasses a wide spectrum of subjects including trade in goods and services, financial law, economic integration, development law, business regulation and intellectual property.” Definition of International Economic Law, Electronic Resource Guide, American Society of International Law, www.asil.org/iel1.cfm. The largest interest group in the American Society of International Law (ASIL) is the International Economic Law Group. Since the 1990s the IELG has sponsored a biennial academic conference in the field. All of the proceedings from these conferences are published in law reviews as symposium issues or in volumes of ASIL’s International Legal Theory series.

³ In 2008 academics and practitioners in the field established a Society of International Economic Law (SIEL) which has a world-wide membership. See www.sielnet.org. The SIEL also sponsors biennial conferences in the field with conferences in Geneva (2008), Barcelona (2010) and Singapore (2012).

⁴ American Bar Association, Section of Legal Education and Admissions to the Bar, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM (1992) [hereafter MacCrate Report].

⁵ According to the MacCrate Report those skills are:

Skill One: Problem Solving
Skill Two: Legal Analysis and Reasoning
Skill Three: Legal Research
Skill Four: Factual Investigation
Skill Five: Communication
Skill Six: Counseling
Skill Seven: Negotiation
Skill Eight: Litigation and Alternative Dispute-Resolution Procedures
Skill Nine: Organization & Management of Legal Work
Skill Ten: Recognizing & Resolving Ethical Dilemmas

⁶ See Tina L. Stark, Conference Introduction: My Fantasy Curriculum and Other Almost Random Thoughts, 9 Transactions: Tenn. J. Business L. 3.4 (Special Report 2009) (According to Prof. Stark, the Executive Director of Emory Law School’s Center for Transactional Law and Practice the skills needed by the transactional attorney are: the ability to think like a deal lawyer, to have a deal sense, the ability to analyze, draft and negotiate a contract, to work collaboratively, the know the basics of interviewing and counseling, the ability to communicate effectively, to solve problems, to look at a contract from a client’s perspective and to be proficient in risk analysis).

Each U.S. law school has taken its own approach to teaching transactional skills. Some focus upon teaching these skills as part of the first year curriculum, other have built transactional skills courses into upper level courses, and still others have created in recent years transactional skills courses and labs⁷. My first efforts came when I was hired in 1990 to develop the private international law curriculum at South Texas. I decided that the traditional survey course on International Business Transactions could only be taught through the extensive use of documents, both for review of underlying legal issues implicit in them and for training drafting skills. To that end I supplemented every course book I ever used with additional documents and questions adapted from other texts, ABA and Practising Law Institute (PLI) and materials and when they were on offer from attorneys. When I developed a course on the North American Free Trade Agreement I called it “NAFTA: Trade and Transactions” to signal that students would be exposed not only to the breakthrough trade and investment issues represented by the treaty but also to how to navigate through the treaty for the benefit of clients planning to alter sourcing and investment decisions to take advantage of a North American market. Even when I adopted a course book⁸ built around a problems model, I continued to supplement it with document drafting and analysis with regard to the international distribution of goods, the licensing of intellectual property rights and foreign direct investment.

Developing a Transactional Skills course

South Texas made a major commitment to transactional skills in 2004 when it opened the Transactional Practice Center. The goal of the Center was to provide a home for what had become an extensive set of course offerings and a certificate program. The most innovative part of the certificate program is the series of capstone courses designed to be the final step for students who have focused upon developing transactional skills.⁹ One of the capstone courses is built around an international business transaction. In this case study/ problem¹⁰ a U.S. party invests as a joint venturer in another country in order to license the joint venture entity to use its high technology patents, copyrights, and trade secrets to produce a product with plans to purchase all of the entity’ production and arrange for yet another party to distribute its trademarked product throughout Europe, the Middle East and Asia. The Transactional Skills—International Business Transactions course was developed and has always been taught by myself and an adjunct law professor, an intellectual property attorney.¹¹ When we began planning for the course we worked off of the the template for all South Texas transactional capstone courses; a complex problem, a series of documents necessary to make the deal happen that the

⁷For a review of the different approaches see 9 Transactions: Tenn. J. Business L. (Special Report 2009)(the volume contains the proceedings of the first Transactional Skills conference held at Emory law School in 2008 and contains articles discussing each approach).

⁸Folsom, Gordon & Gantz, NAFTA AND FREE TRADE IN THE AMERICAS (2d ed. West 2005)[hereinafter Folsom, Gordon & Gantz]

⁹ The capstone courses currently offered under the aegis of the Transactional Practice Center involve a corporate problem (a leveraged buy-out transaction), a real estate transaction, an energy-based transaction, and one focusing on an international business transaction. The capstone courses were designed to be taught by a full time professor at the law school and an adjunct professor who specializes in the field.

¹⁰ The capstone courses borrow from the business school model of using a case study/ real transaction approach for the problem used in the course.

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students would have to draft, an ethics component to the course and a financing component to the course.¹² As international attorneys we had the greatest experience with foreign direct investment, the international sale and distribution of goods and the licensing of intellectual property. Consequently it was not difficult to determine the core documents for the course. We also had no trouble deciding that the class sessions must cover major regulatory concerns in such transactions; the issue of corruption and policing of it by states through anti-corruption statutes like the Foreign Corrupt Practices Act (FCPA), export controls for technology products and information, and the Anti-Boycott rules of the U.S. Since the problem was to hinge on IP licensing it was also clear that students would have to be exposed to the reality of gray market goods competition. We were also aware that a key aspect of drafting any viable joint venture, IP licensing or distribution agreement would be to handle the issue of dispute resolution and thus the need to train students about both ADR and international commercial arbitration. Our last step in developing the course, however, was to realize that it would be a highly effective vehicle for teaching comparative law.

Why Teach Comparative Law and why through Transactional Skills

Comparative law has been one of the foundation international law courses in most U.S. law schools since 1950.¹³ This is not to suggest the comparative law was not engaged in or necessary to the development throughout U.S. history.¹⁴ What is true is that America benefitted from an influx of comparative law scholars in the WWII era and that they changed the academic reception of the field in universities and law schools. It was in this period that the American Association for the Comparative Study of Law (the American Society of Comparative Law since 1992) and the *American Journal of Comparative Law* were founded. U.S. law students are exposed to comparative law not only in courses in law school but also in summer and semester abroad programs which have (under ABA requirements) international and comparative law as their focus.

Arguably we are living in a great era for comparative law because of globalization. While there has been a great convergence of economic laws due to this process, as well as the growth and extended power of law and international organizations, such as the World Trade Organization (WTO), and the regionalization of the world, particularly with the formation of the European Union and the burgeoning of free trade areas throughout the world, the economic laws of all countries have not become identical. Equally true is that while any type of globalized business transaction will be either transnational or truly international, most laws bearing on the economy of countries remain national law. Since this is the case lawyers need to understand those laws and also the ideological, political and economic conflicts that underlie the approach each country has taken with regard to economic laws.¹⁵

¹² The problem for the course involves releasing three sets of facts at different points in the course – just as a client would provide information to its lawyers. The students, working in groups of four, have to produce three major international documents – a joint venture agreement, a licensing agreement granting the rights to use a firm's patents, copyrights (in software), trade secrets and trademarks, and a distribution agreement. In addition, the students are required to draft three of the documents that would be necessary for part of the financing of the transaction – a promissory note, a guaranty, and an opinion letter.

¹³ See David S. Clark, *Development of Comparative Law in the United States* in OXFORD HANDBOOK OF COMPARATIVE LAW 175,204 (Reimann and Zimmerman, eds.) Oxford University Press 2006)[hereinafter Clark]

¹⁴ Clark, *supra* at 176 (Clark notes that according to Roscoe Pound "Comparative law is as old as the American republic.")

¹⁵ Richard M. Buxbaum, *Comparative Law as a Bridge Between the Nation-State and the Global Economy: An Essay for Herbert Bernstein*, 1 Duke L. CiCLOPs 63, 73 (2009)(According to Buxbaum these conflicts can be left unarticulated at the national level but

Nevertheless, as an international law teacher I had noticed for some time that it was becoming harder to interest students in the Comparative Law course. This could be a reflection of many things.¹⁶ Most U.S. law students only speak and write English and have not traveled extensively. The post-WW II and post- Cold War economic dominance of the U.S. has also persuaded many students that they do not need to learn about the law or legal systems of other countries.¹⁷ In recent years there has even been debate about whether it is even appropriate to use comparative law by the U.S. Supreme Court.¹⁸ As an internationalist, but not a comparative legal scholar, I understood the essential short-sightedness of such ideas. How to best combat them? One way was to build comparative law into my new transactional skills course. Arguably the point of the course is to help students develop the skills lawyers will need to navigate in a globalized business environment rather than analyze the market place for such laws. It would have been far easier¹⁹ the problem “start” after the client had decided both the country in which wants to invest as well as its target markets for sales. That would have required students to deal with only two laws, the U.S. and the target investment country, for the joint venture and IP licensing agreement. Instead we chose to make the study of comparative law a key component of the course.

The problem for the course begins with the client coming to the lawyer²⁰ with two countries selected as equally possible from a business perspective.²¹ The first thing the client wants from the lawyer is an opinion as to which country is the best legal environment for its deal. By approaching the course in this fashion, we make the students responsible for not only learning in detail about the investment and intellectual property rights laws of two countries but also learning them in order to draw a comparison. Intellectual property and investment laws are fruitful for comparison purposes. Each set of laws is structured around the creation of a set of rights and a set or series of mechanisms for protecting those rights. Each country drafts such laws trying to strike the right balance between its needs for economic development and the other needs faced by its population.

at the inter-state level “they need to be articulated – to be translated and made transparent – if transnational facilitation and regulation of economic activity and economic actors are to be successfully coordinated.”)

¹⁶ Another factor could be the current critical examination of how comparative law is being used and received by academics and courts throughout the world. According to MM Siems this lack of use of comparative law has come about not only because of parochialism but also because of the current changes in how law is made and how comparative law is practiced. See MM Siems, *The End of Comparative Law*, 2 J. Comp. L. 133-150 (2007)

¹⁷ For a discussion of this issue, see Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 Tulane European and Civil Law Forum 49,53 (1996),

¹⁸ The most notable discussions occurred in opinions involving the use of the death penalty and homosexual rights. See *Foster v. Florida*, 537 U.S. 990 (2002); *Roper v. Simmons*, 543 U.S. 551,608 (2005); *Lawrence v. Texas*, 123 S.Ct. 2472, 2495 (2003).

¹⁹ One aspect of trying to practice comparative law is the need to find and present to students accurate translations of the original course materials and valuable secondary commentaries or explanations.

²⁰ The course opens with the students being told that they will, throughout the course, play the role of associates in a law firm.. Their job is to assist the senior partners, my co-teacher and myself, in working on the deal. The students are informed that the law firm will be working as the “lawyer for the transaction” and as such they are to try to draft balanced agreement that will work for the best interests of all parties. The bulk of the teaching of how to do the deal comes in the extensive document review sessions conducted to debrief each student group about whether their drafts are both legally correct and effective (i.e., they make the deal happen as the parties would wish).

²¹ The client has done its due diligence on possible JV partners. The client has also determined that the lower labor costs available in each country will allow it to produce a new technology product in Europe, the Middle East and Asia where the firm cannot command the high prices it gets in North America.

While has been a modern trend towards harmonizing these sets of economic laws – through international treaties and agreements in the case of intellectual property²² and in the power of Bilateral Investment Treaties and free trade agreement chapters on investment – no country approaches, applies or interprets these laws in exactly the same way. In the transactional skills course we have had the students use Mexico and Brazil as well as Mexico and China as the comparison countries. The countries were chosen both for economic reality (Mexico, Brazil and China are competitors for much a great deal of the world's foreign direct investment)²³ and because they take quite different approached to these two areas of economic law.

Since its revolution and constitutional moment in 1917, Mexico has experimented with relative openness, wide-scale expropriation and in the modern era adopted a state-led approach to economic development accompanied by tight investment restrictions and pre-conditions (1970s) before culminating in a shift to a pro-investment regime put in place with the completion of the NAFTA negotiations.²⁴ The result for current investors is a regime with some exclusions, particularly the oil sector committed by the constitution to the State, but one which allows investors freedom to design the form and content of their investments. In turn, this pro-investment approach is backed up by the requirements of NAFTA Chapter 11 on investment rights and access for investors to investor/ host state arbitration for the ultimate protection of investment rights.²⁵ By contrast, China with its “socialist market economy”²⁶ has taken a tightly state-controlled approach to what types of investments it will approve, what type of investment vehicles and forms are allowed and what types and the contents of the agreements investors can sign.²⁷

The students are required to read the law, secondary materials analyzing the laws, materials created by the U.S. government about the investment climate in each country. They are also and attend multiple class sessions devoted to breaking down and comparing the laws both to the U.S. laws and to each other. This section of the class ends with an in-depth discussion focused upon which country from the perspective of the client's goals provides the best legal environment for protecting both the investment and the IP rights being put into play. After six years of teaching the class in this fashion, I cannot imagine doing it in any other way. Since the assignment to learn the laws and the surrounding climates comes from “the client” and not a professor, the students are eager to read the laws and all of the accompanying

²² The most influential are the treaties promulgated by the World Intellectual Property Organization (WIPO) and the Trade-Related Intellectual Property Rights Agreement (TRIPs) of the WTO.

²³ Daniel Pruzin, U.S. Reports Marginal Increase in Global FDI in 2010, as Developing Countries Take Lead, 28 ITR 148 (Jan. 27, 2011) (noting that China, Brazil and Mexico were among the leaders of developing countries in attracting foreign direct investment). Over the last decade all three countries have been in the top ten of developing countries receiving foreign direct investment.

²⁴ Folsom, Gordan & Gantz, *supra*, at 309-311.

²⁵ NAFTA Chapter 11 provides for the protection of investor rights (Section A) and the enforcement of those rights through investor host-state arbitration (Section B). NAFTA was the first free trade agreement to contain such an investment chapter and it has become the model for all other U.S. free trade agreements.

²⁶ Description of China's view of its economy in 1994, Statement of China's Delegate to the General Agreement on Tariffs and Trade (now WTO) (1994)

²⁷ Chinese investment and IP laws are notable for their complete nature. In the field of investment, for example, there are “Provisions Guiding Foreign Direct Investment” (2002) and separate laws dealing with each form of investment – Wholly Foreign-Owned Enterprises, Sino-Foreign Equity Joint Venture Enterprises and Sino-Foreign Cooperative Joint Ventures along with detailed Implementing Regulations for each.

materials. Before they are aware of it the students have developed the habit of breaking down the goals of the laws we are discussing, what that means for a business trying to invest or assure protection of IP rights, and asking questions about what would lead the country to take one approach as opposed to another. The students stop speaking about the U.S. approach to investment and IP rights -- offered as a baseline for teaching the relevant concepts that students must study to do the deal—and focus upon the countries at hand. We have never told the students that they are engaged in comparative law and yet we have made them converts to its importance in a practical sense.