

Transnational Law

Transnational Law

Cases and Problems in an Interconnected World

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Contents

| | |
|---|-----------|
| Table of Cases | xiii |
| Preface | xv |
| Acknowledgments | xix |
| Chapter 1 · Introduction | 3 |
| I. What and where is transnational law? | 3 |
| A. Synergies and drivers of transnational law | 5 |
| B. Main themes | 7 |
| II. Key concepts | 12 |
| A. Legality and sociality | 12 |
| B. Governance and government | 14 |
| Ole Jacob Sending & Iver B. Neumann, <i>Governance to Governmentality: Analyzing NGOs, States, and Power</i> | 15 |
| C. Plurality and interlegality | 21 |
| D. Territoriality and jurisdiction | 24 |
| Ayelet Shachar, <i>The Shifting Border of Immigration Regulation</i> | 25 |
| John Bellinger, <i>U.S. Delegation Asserts Article 16 of Convention Against Torture Applies Outside U.S. Territory in Certain Circumstances, but Law of Armed Conflict “Takes Precedence” in Situations of Armed Conflict</i> | 27 |
| E. Verticality and horizontality | 29 |
| III. Case Study: <i>Dames & Moore v. Regan</i> | 30 |
| <i>Dames & Moore v. Regan</i> | 30 |
| IV. Discussion | 46 |
| | |
| Part One · Governance through Treaties and International Agreements | |
| Chapter 2 · Treaties and Agreements: The Global Environment | 51 |
| I. Introduction | 51 |
| II. Multinational treaties and agreements | 54 |
| Daniel Bodansky, <i>Legal Options for U.S. Acceptance of a New Climate Change Agreement</i> | 56 |
| A. Ozone depletion and the Montreal Protocol | 59 |
| 1. Background Events | 60 |
| 2. Framing the Montreal Protocol | 64 |

| | | |
|---|---|-----|
| 3. | Analysis of the Protocol Process | 67 |
| B. | Domestic law: Implementing the Montreal Protocol | 72 |
| | <i>Natural Resources Defense Council v. Environmental Protection Agency</i> | 73 |
| C. | Comparing climate change with ozone depletion | 78 |
| | <i>Massachusetts v. Environmental Protection Agency</i> | 78 |
| | Elinor Ostrom, <i>Nested Externalities and Polycentric Institutions: Must We Wait For Global Solutions to Climate Change Before Taking Actions at Other Scales?</i> | 90 |
| D. | The Paris Accords of 2015 | 94 |
| | 1. Goals | 95 |
| | 2. Voluntary Approach | 96 |
| | 3. Enforcement | 99 |
| | 4. Equity | 100 |
| III. | Local approaches to global problems | 106 |
| | <i>Metropolitan Taxicab Board of Trade v. City of New York</i> | 108 |
| IV. | Discussion: Climate politics | 124 |
| | | |
| Chapter 3 · Regional Trade Agreements: The North American Free Trade Agreement | | 127 |
| I. | Internationalism and free trade | 127 |
| II. | The North American Free Trade Agreement: Background | 128 |
| | A. Legalities and socialities | 128 |
| | Stephen J. Randall & Herman W. Konrad, <i>Introduction</i> | 129 |
| | <i>NAFTA: From Conception to Creation</i> | 133 |
| | B. Transnational law: Domestic effects | 142 |
| | C. NAFTA: Government and governance | 146 |
| | Fernanda Somuano, <i>Nongovernmental Organizations and the Changing Structure of Mexican Politics</i> | 146 |
| | D. Government: Verticality — Governance: Horizontality? | 149 |
| | Mark Aspinwall, <i>NAFTA-ization: Regionalization and Domestic Political Adjustment in the North American Economic Area</i> | 150 |
| III. | Free trade, Congress and executive power | 152 |
| | A. Fast track power and NAFTA | 152 |
| | Ian F. Fergusson, Cong. Res. Serv., <i>Trade Promotion Authority and the Role of Congress in Trade Policy</i> (2015) | 153 |
| | B. Negotiating NAFTA | 156 |
| | William P. Avery, <i>Domestic Interests in NAFTA Bargaining</i> | 156 |
| IV. | Territoriality and jurisdiction | 165 |
| | A. NAFTA in the idiom of national security | 165 |
| | Bill Clinton, President of the United States, Remarks on the Signing of NAFTA (December 8, 1993) | 166 |
| | B. Institutionalizing the link between tariff-reduction agreements and national security | 168 |

| | | |
|--|--|-----|
| | George W. Bush, President of the United States, Introduction to the Announcement of National Security Strategy 2002 | 169 |
| | <i>Ignite a New Era of Global Economic Growth through Free Markets and Free Trade</i> | 171 |
| V. | Was NAFTA constitutional? | 175 |
| | Bruce Ackerman & David Golove, <i>Is NAFTA Constitutional? Made in the USA Foundation v. United States</i> | 176 |
| | | 179 |
| VI. | NAFTA and the environment: <i>Department of Transportation v. Public Citizen</i> | 188 |
| | <i>Department of Transp. v. Public Citizen</i> | 189 |
| VII. | Renewing the borders after NAFTA | 198 |
| | Saskia Sassen, <i>The Mobility of Labor and Capital</i> | 199 |
| VIII. | NAFTA and labor | 201 |
| | Lance Compa, <i>From Chile to Vietnam: International Labour Law and Workers' Rights in International Trade</i> | 201 |
| | Washington apples case | 204 |
| | Ministerial Agreement Mexican NAO Case Nos. 9801 (<i>Solec</i>), 9802 (<i>Washington Apples</i>), and 9803 (<i>DeCoster Egg Farm</i>) (May 18, 2000) | 205 |
| IX. | Discussion: Governance through states | 208 |
| | | |
| Chapter 4 · The World Trade Organization and the Interlegalities of Globalization | | 211 |
| I. | From regionalization to globalization: Legality and sociality | 211 |
| A. | What is the WTO? Government and governance | 215 |
| | Christina L. Davis, <i>Why Adjudicate? Enforcing Trade Rules in the WTO</i> | 217 |
| B. | The powers of the WTO | 218 |
| | Christina L. Davis, <i>Why Adjudicate? Enforcing Trade Rules in the WTO</i> | 219 |
| II. | WTO and harmonization of standards | 222 |
| A. | Introduction to harmonization | 222 |
| | Humberto Zúñiga Schroder, <i>Harmonization, Equivalence and Mutual Recognition of Standards in WTO Law</i> | 222 |
| 1. | Case Study: The Beef Hormone Dispute | 224 |
| | Lori M. Wallach, <i>Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards</i> | 224 |
| B. | Other tools for international standards: Equivalence and mutual recognition | 228 |
| III. | WTO — Dispute resolution | 229 |
| A. | The Dispute Settlement Understanding (DSU) Agreement | 229 |
| B. | Processes and procedures | 230 |
| | Robert Z. Lawrence, <i>The United States and the WTO Dispute Settlement System</i> | 231 |

| | | |
|-----|---|-----|
| C. | WTO dispute settlement — Combining politics and law | 233 |
| D. | Are WTO tribunal decisions binding on the United States? | 234 |
| | <i>Timken Co. v. United States</i> | 235 |
| IV. | WTO, the environment and labor | 239 |
| A. | The environment | 240 |
| 1. | <i>Shrimp/Turtle</i> | 241 |
| | Elizabeth Trujillo, <i>A Dialogical Approach to Trade and Environment</i> | 241 |
| B. | WTO and labor | 245 |
| 1. | The ILO core standards in global, regional and bilateral trade | 246 |
| | Jordi Agustí-Panareda, Franz Christian Ebert & Desirée LeClercq, <i>Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System</i> | 247 |
| 2. | Linking labor and trade | 247 |
| a. | Arguments Against Labor-Trade Linkage | 247 |
| | Jagdish Bhagwati, <i>Afterword: The Question of Linkage Symposium: The Boundaries of the WTO</i> , José E. Alvarez, ed. | 247 |
| b. | Arguments for Labor-Trade Linkage | 250 |
| | Renee Chartres and Bryan Mercurio, <i>A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards</i> | 250 |
| V. | Counter-globalization movements | 255 |
| A. | Alter-globalizations: The World Social Forum, Occupy and other counter-movements | 255 |
| 1. | The World Social Forum | 256 |
| | World Social Forum Charter of Principles | 256 |
| 2. | Experiments in democratizing globalization | 258 |
| B. | Indigenous and peasant movements against the WTO | 260 |
| | DECLARATION, <i>The World Trade Organization (WTO) and Indigenous Peoples: Resisting Globalization, Asserting Self-Determination</i> | 261 |
| C. | Indigenous peoples as third parties before the WTO | 264 |
| | <i>WTO Members comment on indigenous amicus brief in lumber dispute</i> | 264 |
| D. | Political mobilizations for social protection | 267 |
| VI. | WTO and human rights | 268 |
| A. | Free trade and other freedoms | 269 |
| | Ernst-Ulrich Petersmann, <i>From ‘Negative’ to ‘Positive’ Integration in the WTO: Time for ‘Mainstreaming Human Rights’ into WTO Law?</i> | 269 |
| B. | Free trade and political trade-offs | 271 |

| | | |
|---|---|-----|
| | Robert Howse, <i>Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann</i> | 271 |
| VII. Discussion | | 273 |
| Part Two · Rights and Responsibilities Offshore | | |
| Chapter 5 · Interlegalities of Offshore Supply Chains | | 277 |
| I. Corporations move offshore | | 277 |
| | Harry Arthurs, <i>Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad</i> | 278 |
| II. Self-Regulation: The legal authority of corporate social responsibility codes | | 282 |
| III. Apple in China | | 287 |
| A. China, Congress and the WTO | | 287 |
| B. Social and legal infrastructures | | 288 |
| 1. Labor Migration Within China | | 288 |
| | Yukon Huang, <i>China's Conflict Between Economic and Political Liberalization</i> | 290 |
| 2. China's Labor Law | | 292 |
| | <i>Labour Contract Law of the People's Republic of China</i> (promulgated by Ministry of Commerce, March 20, 2007) | 293 |
| 3. Apple Supplier Code and Social Responsibility Standards | | 296 |
| | <i>Apple Supplier Code of Conduct</i> | 296 |
| 4. Electronics Industry Code of Conduct | | 301 |
| | <i>Electronics Industry Citizenship Coalition (EICC) Code of Conduct (2016)</i> | 301 |
| C. Apple and Foxconn Technology | | 304 |
| IV. The Apparel Industry in Bangladesh | | 306 |
| A. Ready-made garment manufacture in Bangladesh | | 307 |
| | Majority Staff of Comm. on Foreign Rel., 113th Cong., <i>Worker Safety and Labor Rights in Bangladesh's Garment Sector</i> | 307 |
| B. Legal infrastructure: The Accord and the Alliance | | 313 |
| 1. Accord on Fire and Building Safety in Bangladesh | | 313 |
| | <i>Accord on Fire and Building Safety in Bangladesh</i> | 313 |
| 2. The Alliance: Bangladesh Worker Safety Initiative | | 318 |
| | <i>Members Agreement, Alliance for Bangladesh Worker Safety</i> | 318 |
| 3. Comparison of the Accord and the Alliance member agreement | | 325 |
| | Majority Staff of Comm. on Foreign Rel., 113th Cong., <i>Worker Safety and Labor Rights in Bangladesh's Garment Sector</i> | 325 |
| V. Adjudicating supply chain responsibilities for worker safety | | 327 |
| | <i>Doe v. Wal-Mart Stores, Inc.</i> | 328 |

| | | |
|---|--|-----|
| VI. | Interlegalities as arenas of mobilization | 335 |
| | Cesar Rodríguez-Garavito, <i>Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labor Rights in the Americas</i> | 336 |
| VII. | Discussion | 340 |
| | | |
| Chapter 6 · Interlegalities of Offshore Labor | | 343 |
| I. | <i>Bridgestone</i> and Alien Tort Statute jurisprudence | 343 |
| | A. <i>Bridgestone</i> and <i>Flomo</i> : Labor without labor markets | 345 |
| | B. Territory as the expression of transnationalism: The Liberia Truth and Reconciliation Commission Reports | 347 |
| | Truth and Reconciliation Commission of Liberia, Report — Preliminary Findings (2009) | 348 |
| | Truth and Reconciliation Commission of Liberia, Consolidated Final Report, vol. 2 | 348 |
| II. | Legal challenges to plantation labor practices in Liberia | 354 |
| | A. <i>Roe v. Bridgestone Corporation</i> | 354 |
| | <i>Roe v. Bridgestone Corp.</i> | 355 |
| | B. <i>Flomo v. Firestone Natural Rubber Co.</i> | 373 |
| | <i>Flomo v. Firestone Natural Rubber Co.</i> | 373 |
| III. | Collective bargaining in the shadow of litigation | 381 |
| | <i>Stop Firestone Coalition Celebrates Victory as Liberian Supreme Court Decision Approves Union Election on Firestone Plantation</i> | 382 |
| IV. | <i>Kiobel v. Royal Dutch Petroleum Co.</i> | 384 |
| | <i>Kiobel v. Royal Dutch Petroleum Co.</i> | 385 |
| | Civil Rights Act of 1991 | 390 |
| V. | Discussion | 392 |
| | | |
| Part Three · Governance through Government | | |
| Chapter 7 · Interlegalities Between Public and Private Sectors | | 397 |
| I. | Introduction | 397 |
| II. | Standards as interlegalities: International Organization for Standardization (ISO) | 400 |
| | A. Purpose and structure of the ISO | 401 |
| | <i>ISO Statutes</i> , International Organization for Standardization (2013) | 402 |
| | B. ISO's evolution and goals | 403 |
| | <i>Friendship Among Equals: Recollections From ISO's First Fifty Years</i> , International Organization for Standardization (1997) | 403 |
| | <i>Benefits of International Standards</i> | 404 |
| | <i>ISO Strategy: 2016–2020</i> | 405 |

| | | |
|------|---|-----|
| C. | From voluntary to mandatory (and in between) | 407 |
| | Isabelle Schömann, <i>ISO 26000: The New Face of Corporate Social Responsibility?</i> | 409 |
| | Introduction, ISO 26000, Guidance on Social Responsibility (2010) | 410 |
| | Isabelle Schömann, <i>ISO 26000: The New Face of Corporate Social Responsibility?</i> | 413 |
| III. | Interlegalities in the world market for land | 414 |
| | Food and Agriculture Organization of the United Nations Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012) | 415 |
| | Transnational Institute (TNI), <i>The Global Land Grab: A Primer</i> (2013) | 419 |
| IV. | Interlegalities in the globalization of essential services | 423 |
| A. | Privatization and neoliberalization | 423 |
| | Alfred C. Aman, Jr. & Carol J. Greenhouse, <i>Prison Privatization and Inmate Labor in the Global Economy</i> | 423 |
| B. | Private Welfare Services | 426 |
| | State ex rel. <i>Indiana Family & Social Services Admin. v. International Business Machines Corp.</i> | 427 |
| V. | Interlegalities across transnational arbitration and litigation | 444 |
| A. | International Arbitration: UNCITRAL and ICSID | 444 |
| B. | International investment agreements, state sovereignty and human rights | 448 |
| | 1. <i>Amicus Curiae</i> and Transparency under ICSID and UNCITRAL Rules | 452 |
| | 2. Human Rights in BIT Formation | 453 |
| | 2012 U.S. Model Bilateral Investment Treaty | 454 |
| VI. | Chevron: A complex mix of transnational adjudication and arbitration | 456 |
| A. | Chevron — An overview of an on-going lawsuit | 456 |
| | 1. <i>Aguinda v. Texaco, Inc.</i> , 945 F. Supp. 625 (S.D.N.Y. 1996) | 457 |
| | 2. <i>Chevron v. Donziger</i> , 768 F. Supp. 2d 581 (S.D.N.Y. 2011) | 458 |
| | 3. <i>Chevron Corp. v. Naranjo</i> , 667 F.3d 232 (2d Cir. 2012) | 464 |
| | 4. <i>Chevron v. Ecuador</i> , 795 F.3d 200 (D.C. Cir. 2015) | 465 |
| B. | <i>Chevron</i> and transnational litigation: Two perspectives | 469 |
| | Theodore Boutrous, Jr., <i>Ten Lessons from the Chevron Litigation: The Defense Perspective</i> | 469 |
| | Judith Kimerling, <i>Lessons from the Chevron Ecuador Litigation: The Proposed Intervenors' Perspective</i> | 471 |
| VII. | Discussion | 477 |

| | |
|---|-----|
| Chapter 8 · Transnational Law, Courts and Judicial Review | 481 |
| I. The proliferation of international courts | 481 |
| Anne-Marie Slaughter, <i>Judicial Globalization</i> | 484 |
| II. Resisting international law: Two case studies | 485 |
| A. Haitian immigrants and the Inter-American Commission | 485 |
| B. <i>Medellín v. Texas</i> | 492 |
| <i>Medellín v. Texas</i> | 493 |
| III. Transnational litigation: Domestic courts | 506 |
| A. The presumption against extraterritoriality | 506 |
| <i>Morrison v. National Australia Bank Ltd.</i> | 509 |
| B. Antitrust law | 524 |
| <i>Hoffman-La Roche Ltd. v. Empagran S.A.</i> | 525 |
| IV. Courts without borders: Extraterritorial jurisdiction in lower courts | 539 |
| <i>Republic of Philippines v. Westinghouse Elec. Corp.</i> | 540 |
| V. Discussion | 552 |
| | |
| Chapter 9 · The Transnational Executive | 553 |
| I. Defining national executive power: The paradigm of trade and investment | 558 |
| <i>United States v. Curtiss-Wright Export Corp.</i> | 559 |
| II. Extraterritoriality in question: Search and surveillance | 564 |
| A. Executive action that contravenes customary international law | 564 |
| Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities | 565 |
| B. Abrogating the Fourth Amendment | 573 |
| <i>United States v. Verdugo-Urquidez</i> | 573 |
| III. Citizenship in question | 586 |
| A. Detention without trial | 586 |
| <i>Hamdi v. Rumsfeld</i> | 587 |
| B. Surveillance without warrants | 598 |
| <i>American Civil Liberties Union v. National Security Agency</i> | 599 |
| C. Extraterritorial targeted killing | 604 |
| D. Torture | 607 |
| 1. Panel Opinion | 607 |
| 2. En banc opinion | 609 |
| IV. Borders in question: Immigration | 613 |
| Jason A. Cade, <i>Enforcing Immigration Equity</i> | 614 |
| <i>Texas v. United States</i> | 617 |
| V. Foreign affairs reconsidered | 627 |
| <i>Zivotofsky v. Kerry</i> | 629 |
| VI. Discussion | 642 |
| | |
| Index | 645 |

Table of Cases

Aguinda v. Texaco, 457
American Civil Liberties Union v. National Security Agency, 599
Chevron v. Donziger, 458
Chevron v. Ecuador, 465
Chevron Corp. v. Naranjo, 464
Dames & Moore v. Regan, 30
Dep't of Transportation v. Public Citizen, 189
Doe v. Wal-Mart Stores, 328
Flomo v. Firestone Natural Rubber Company, 373
Hamdi v. Rumsfeld, 587
Hoffman-LaRoche v. Empagran, 524
Kiobel v. Royal Dutch Petroleum Co., 385
Made in the USA Foundation v. United States, 179
Massachusetts v. Environmental Protection Agency, 78
Medellín v. Texas, 493
Metropolitan Taxicab Board of Trade v. City of New York, 108
Morrison v. National Australia Bank Ltd., 509
Natural Resources Defense Council v. Environmental Protection Agency, 73
Republic of Philippines v. Westinghouse Elec. Corp., 540
Roe v. Bridgestone, 355
State ex. rel. Indiana Family and Social Services Admin v. International Business
Machines Corp., 427
Texas v. United States, 617
Timken Co. v. United States, 235
United States v. Curtiss-Wright, 559
United States v. Verdugo-Urquidez, 573
Zivotofsky v. Kerry, 629

Preface

The term “transnational law” was coined in 1956 by Phillip Jessup, when he gave his Storrs Lectures at Yale Law School that title.¹ In those lectures, he claimed that transnational law includes “all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.” In the decades since Jessup’s lectures, the term *transnational law* has become well established, even if its usage remains slippery—sometimes referring to practical questions such as jurisdiction and remedies, and sometimes to theoretical questions such as arise in relation to the disciplinarity of law, or the status of law as scientific knowledge, or the distinction between academic and political work.² In general, transnational law is taken to refer to the body or bodies of law that govern across jurisdictions, or in the gaps between them. This casebook takes its point of departure in the possibility that those apparent gaps may be fully inhabited. We approach our subject matter from a vantage point grounded in the various legal settings in which domestic legal institutions struggle with questions arising from the tensions between the inherently extraterritorial aspects of capitalism and the presumptively territorial commitments of national sovereignty.

Jessup’s celebrated formulation serves us well, since—at least for our purposes—its key elements are in his references to *transcending national frontiers* and to the *partial fit* with standard legal categories. These phrases are related, in that they point to the relevance of domestic law as the main location of transnational law, and, correspondingly, to the ways transnational law flows through standard categories while also unsettling them. That is our approach in this volume: we focus on the relationship between domestic and transnational law, as that relationship is institutionally produced in treaties, agreements, codes, and judgments, and as it introduces both constraints and opportunities for those who would choreograph the movements of

1. PHILLIP JESSUP, *TRANSNATIONAL LAW: STORRS LECTURES ON JURISPRUDENCE* (1956).

2. “The ambiguity of technical terms, legal concepts and principles coincides with the daily challenge to position oneself and one’s work. This anxiety is particularly prevalent where academic research, writing and teaching is so intertwined with real politics. The open-endedness of categories such as labour law, economic law, social law, ‘public’ and ‘private’ law, allows us to lay bare and to make visible ‘national traditions’ of legal scholarship; in turn, these traditions are themselves intertwined, non-linear, disputed and contested.” Peer C. Zumbansen, *Transnational Law* (Comparative Research in Law & Political Economy, Research Paper 09/2008) <http://dx.doi.org/10.2139/ssrn.1105576>.

people, goods, and capital investment. The traditional authority of the president in foreign affairs, for example, takes on new meaning—and significant new powers—in the context of a world economy now reliant on trade agreements and other such protocols. There are many such examples in the materials of the book; their common touchstone is uncertainty.

Accordingly, we delve into the shifting ground under issues of trade, territoriality, separation of powers, and related questions in the following chapters. For now, suffice it to say that our goal in this book is not a comprehensive account of transnational law. Such would entail a major review of the law of trade, banking and securities, family law, telecommunications, human rights, humanitarianism, immigration, and international law, as well as standard domestic law categories such as torts, business law, constitutional law, criminal law, property and administrative law—among other components of the standard law curriculum. While we intend this book to be useful to students, scholars and practitioners as a stand-alone resource, we would be well pleased to know that it is useful as a supplement to resources in these fields (including more technical and comprehensive accounts of transnational law principles, procedures, jurisdiction and litigation). We also hope that the book will be useful to social science scholars engaged with law.

It would be natural for readers to expect an account that follows the contours of the world economy. However, the seemingly borderless world of global capitalism is only one vector of contemporary transnationalism. Others inhere in highly territorialized or localized scenarios—since that is where people live, work, shop and vote, and that is where companies are located and corporations registered. Our approach emphasizes the tensions between globalism and localism as domestic law contends with problems that—as Jessup phrased the matter—transcend national frontiers. Our attention to the local aspects of transnational law also invites analytical resources beyond law. This is an interdisciplinary account, drawing especially on anthropologists' ethnographic accounts of law. Contrary to the stereotype of anthropology, ethnographic accounts of law do not deal mainly with custom or quaint localisms, but with the ways interpersonal relations and various forms of collective social life both shape and are shaped by their context in regional, national and transnational affairs. Ethnography is especially useful, then, as a resource for understanding both the diversity of human arrangements under common or uncommon constraints, and interrelationships among categories of law that, seen from above, might seem to be unrelated (e.g., kinship obligations and international investment—an example from Chapter 6).

Our book is arranged in three parts, after an introductory chapter that elaborates the scope and aims of the volume and explicates the key terms of its analysis. Part I (“Governance through treaties and international agreements”) first takes up the law, politics, and social effects of multinational agreements on tariffs and climate change. Part II (“Rights and responsibilities offshore”) takes up situations from the spheres of multinational corporations in which offshore investment creates complex webs of public-private interlegality with heavy consequences for workers. Part III

(“Governance through government”) considers the implications of transnational law for the relationship between judicial and arbitral regimes, and, in the U.S., in relation to questions of judicial review and separation of powers—culminating in a discussion of what we call the transnational executive.

In addition to emphasizing the book’s selectivity in focusing on particular dilemmas of transnational law where its social and political effects are particularly evident, we should also note the book’s periodization—for the most part—in the Clinton, Bush and Obama years. Divided government and impeachment during the Clinton years, followed by the intensive unilateralism of the Bush years and the obstructionist response to the Obama administration in the U.S. Congress, have made for a turbulent domestic front in relation to presidential power, “free trade,” human rights, collective bargaining, and immigration. The case materials reflect that turbulence, as territoriality became increasingly politicized in terms of its potential for encoding unilateralism in the security context, and, more recently, restrictions on immigration, particularly across the southern border of the United States. Such rationales and codings are sometimes explicit (as in the case materials discussed in Part III) but not always; our commentary teases out these wider realms of significance as the Trump administration begins.

In sum, we hope that our interdisciplinary effort will be helpful to readers interested in law as a dimension of contemporary transnationalism. In each chapter, we offer critical and activist perspectives, as well as those of the relevant courts or other legal institutions—both to remind readers that law and markets remain indelibly interconnected, and that the character and consequences of those interconnections are not givens. A more equitable world is always possible.

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