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# Transnational Law: What is it? How Does it Differ from International Law and Comparative Law?

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It is a pleasure for us at the American Society of International Law to co-sponsor this program on the important subject of transnational law. Charlotte has suggested that I begin by drawing from my personal experience, both educational and professional, to comment on the appropriateness of looking at law in transnational rather than international or comparative terms.

In this context, I can't resist beginning with Paul Simon's lines (from the song "Kodachrome"): "When I think back on all the crap I learned in high school, it's a wonder I can think at all." As this audience can imagine, I am tempted to substitute "law school" for "high school." I say that not because I was offered a poor education in international law. To the contrary, I was the beneficiary of a perfectly fine, traditional course in public international law. What I did find inadequate, even potentially misleading in terms of what I later experienced in practice, was a blinkered, purely domestic focus on U.S. civil procedure. My courses in that area all proceeded on the assumption that there was only one way to handle the procedural steps involved in dispute resolution, that which is found in U.S. courts; and my professors even assumed that a system such as our judicial process made procedural sense—a dubious assumption, I learned later. I think my education would have benefited from an infusion of an international prospective in this and other subjects.

Following a federal court clerkship, I began practice in 1970 and immediately found myself immersed in transnational disputes. Thirty five years ago, globalization was well underway. For example, I quickly found myself involved as a junior associate in disputes arising out of

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expropriation of copper mines in Chile and oil fields in Libya. The disputes involved parallel and sometimes inconsistent proceedings in the courts of several countries, as well as international arbitration proceedings. These matters included a combination of public and private international actors and legal principles and required the coordination of cases around the world in many different legal systems. All of this introduced me to such efficient, non-American litigation processes as written witness statements used in place of depositions and even in place of affirmative testimony at hearings.

I then became involved, and I have continued to be involved, in litigation in which parallel (or at least closely related) claims are asserted in the U.S. and in one or more foreign courts. Important issues here turn largely on comity and other judgmental factors.

I also have litigated problems involving international letters of credit (which are regulated by private industry customs and practices), transnational insolvency problems and trans-border merger and acquisition issues. Indeed, very little that I do involves problems that can be compartmentalized into the law of one nation alone.

My personal experience at a large law firm reinforces my view that we have all become transnational. A significant number of the new lawyers whom we hire each year at my firm were born outside the United States or are members of the first generation of their families born here. Many have useful language skills and significant transnational "life experience." We hire significant numbers of lawyers who were educated in Canada and elsewhere and have received LLM degrees in the U.S. but have had their fundamental legal training elsewhere. There are difficulties and risks involved in this, but we find that the language skills and other abilities that such lawyers bring to bear worth the effort.

Charlotte also has asked that I comment on organizations, other than the American Society of International Law and the Association of American Law Schools, of course, that can be seen to be considering issues of transnational law. First among these in my experience are the organizations that are developing law on an ongoing basis through transnational networks of largely private actors. This occurs in the world of international commercial arbitration, and more particularly in the case of international sports disputes. There, in the last ten years the Court of Arbitration for Sport, based in Lausanne, has led the way in developing a "lex sportiva" that is followed by the sports federations that comprise the Olympic movement and that is respected and to some degree employed by domestic courts in various countries.

Two documents created just within the past year are good examples of a developing body of transnational arbitral principles—though not particular to sports disputes. Neither is statutory "law," but each is likely

to be given significant weight when the issues to which it relates arise in domestic courts. The first of these is the American Arbitration Association/American Bar Association "Code of Ethics for Arbitrators in Commercial Disputes," a document first promulgated in 1977, widely cited by courts, and modified significantly and issued in a new edition in 2004 to encompass more completely international commercial disputes.[1] The second is the International Bar Association's "Guidelines on Conflicts of Interest in International Arbitration," which addresses disclosure requirements for arbitrators in transnational disputes.[2]

There are many other organizations working on similar transnational projects. For example, the American Law Institute and UNIDROIT recently published their "Principles and Rules of Transnational Civil Procedure."[3] Other ALI projects of a transnational nature include currently ongoing works entitled "Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes" and the "International Jurisdiction and Judgments Project."[4]

The American Bar Foundation also addresses the internationalization of legal values and legal practices through numerous projects. Two among those currently pending involve "Globalization of Insolvency Lawmaking" and "Legal Professionalism and the Transformation of the Field of Legal/Business Advice" (focusing on multi-jurisdictional practice issues).[5]

Finally, Charlotte suggested that I offer a view regarding possible content for such a course in transnational law. It is perhaps bold for a practitioner to address an academic audience on how best to structure a course. Nevertheless, I did note the following course description a few months ago from the catalogue of one (anonymous) law school:

> Introduction to Transnational Law: "It will teach students the minimum that every lawyer should know about the international dimensions of law in the modern world. . . . The course will cover both the public and private dimensions of transnational law. Among

1. AMERICAN ARBITRATION ASSOCIATION/AMERICAN BAR ASSOCIATION, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004), at http://www.adr.org; *see* Bruce Meyerson and John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained*, DISPUTE RES. J. (Feb./April 2004) at 10.

2. INTERNATIONAL BAR ASSOCIATION, IBA GUIDELINES AS CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2004), at http://www.ibanet.org/images/downloads/guidelines%20text.pdf.

3. THE AMERICAN LAW INSTITUTE, ALI-UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE (Proposed Final Draft March 9, 2004).

4. Current ALI projects are listed at http://www.ali.org.

5. Current areas of research are described at http://www.abf-sociolegal.org/currentAR/index/html.

> the topics to be studied are the law of treaties; customary international law; trade law; international environmental law; international criminal law; international tax law; international business transactions law; law on the use of force; transnational litigation; and transnational arbitration.

This sounds like a course that I would have been delighted to have had available to me as a student, but I wonder whether it does not try to cover too much. In a review essay this past year in the *American Journal of International Law*, Professor David Bederman discussed the latest crop of U.S. international law casebooks, noting how they now tend to stretch to add various elements of private, typically transnational law to the traditional public international law curriculum.[6] Conversely, this transnational law course description suggests that courses entitled "transnational" also find it necessary to include substantial elements of public international law.

I think it may be asking too much to put all of this in a single course. I was glad to have had a good course in public international law in my student days. I could have used a separate course in transnational law to stand beside it. But perhaps more important, I also would have appreciated, in my law school days, the infusion of a transnational perspective into courses generally.[7]

6. David J. Bederman, *International Law Casebooks: Tradition, Revision, and Pedagogy*, 98 A.J.I.L. 200 (2004).

7. The University of Michigan, among others, takes such an approach. *See* Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN ST. INT'L L. REV. 397 (2004); Panel, *International Law and the Legal Curriculum*, 96 ASIL PROC. 54 (2002).