# Transnational Law and Practice

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# TRANSNATIONAL LAW AND PRACTICE

SECOND EDITION

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*In loving dedication to Lisa, Jacob, Caleb, and Shana; to my parents, Donald Earl Childress, Jr. and Joan Ann Childress; and to my entire family, whose love and support has known no bounds.*

**Donald Earl Childress III**

*To Harry and Anne Ramsey, Lisa Pondrom Ramsey, and Christopher and Colin Ramsey.*

**Michael D. Ramsey**

*To my sister, Betsy, a teacher who inspires her students and inspires me.*

**Christopher A. Whytock**

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# PREFACE

The goal of this casebook is to help students learn how to solve the types of transnational legal problems they are likely to encounter in practice, regardless of their field of practice and regardless of whether they think of themselves as practicing international law. Therefore, this casebook is different from traditional public international law casebooks. Like them, it covers the sources of international law and introduces students to international courts. Unlike traditional public international law casebooks, however, this casebook urges students not to be "international law–centric" or "international court–centric" when analyzing transnational legal problems, and gives them the resources to learn how to use national law and national courts, and private norms and alternative dispute resolution methods, to solve transnational legal problems on behalf of their clients.

We believe that this casebook's approach makes it especially well suited for required courses on international or transnational law, since it focuses on problems that all students are likely to encounter in the present-day practice of law regardless of their practice area and regardless of their preexisting interest in international law. It is also well suited for both first-year and upper-division students. Much of the material deals with the transnational dimensions of first-year law courses like Civil Procedure, Contracts, Constitutional Law, and Torts, and thus will provide a less intimidating point of access to the field while also reinforcing learning across the first-year curriculum. The casebook also includes advanced material on transnational litigation in U.S. courts, making it an excellent choice for upper-division elective courses in international civil litigation. Put simply, this book is designed to prepare students for law practice in a globalized world and to equip them with the knowledge and skills they need to solve transnational legal problems, regardless of whether they plan to practice international law as such.

Donald Earl Childress III
Michael D. Ramsey
Christopher A. Whytock

July 2020

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United Nations. Draft Conclusions on Identification of Customary International Law, United Nations (2018).

World Trade Organization, Report of the Appellate Body (16 January 1998). World Trade Organization. 1998.

# *Editorial Notice*

We have edited the cases and other legal materials in this casebook. Where we have judged that citations, footnotes, or internal quotations are not essential for student learning, we have omitted them without indication. Otherwise, we indicate omitted text with ellipses. The formatting and style of some headings and subheadings in the edited materials have been altered to provide consistency. Footnotes in cases and other legal materials retain their original numbering. Our own footnotes appear as asterisks.

# INTRODUCTION

Welcome to the world of transnational law and practice! In an increasingly globalized world, individuals, businesses, and governments are interacting more and more frequently across national borders. Individuals—tourists, businesspeople, government officials—routinely travel from one nation to another. Even when they do not travel, they engage in transactions that cross international borders. Businesses buy and sell goods and make investments all over the world. And nations, through the application of laws and regulations—and sometimes unfortunately through armed force—also participate in transnational interactions, often attempting to govern or otherwise influence activity that takes place beyond their borders. International organizations and private actors are also among today's "global governors." *See generally* WHO GOVERNS THE GLOBE? (Deborah D. Avant et al. eds., 2010). If you doubt that we live in a transnational world, pull out the smartphone in your pocket or look at the computer you are using. Both were likely designed in one nation, assembled in another, and perhaps shipped to you in yet another nation.

All of this means that you as a lawyer are increasingly likely to encounter legal problems that involve individuals, businesses, or governments of more than one nation or activity that crosses international borders. A 2007-2008 survey of lawyers who passed the bar in 2000 suggests that almost half of U.S. lawyers are called upon to solve transnational legal problems for their clients, and in some types of practice the number is considerably higher:

> Forty-four percent (44%) of attorneys reported … work [that involved clients from outside the United States or cross-border matters]. The lawyers most likely to report doing international legal work were those in the largest law firms, where two thirds reported doing it, and inside counsel, where almost as many (65%) reported work that involved non-U.S. clients or cross-border matters. Among legal services and public defense lawyers, work that involved non-U.S. clients or non-U.S. law was also common, with 61% of attorneys reporting they had done some such work during the past year. The international work in large corporate firms mainly serves foreign corporate clients, while the work of legal services and public defense lawyers likely involves individual clients who are facing immigration issues.

THE AMERICAN BAR FOUNDATION AND THE NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION, AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 35 (2009). There can be little doubt that these numbers are higher today. Some lawyers will encounter transnational legal problems at a much higher rate—such as lawyers working for multinational businesses, nongovernmental human rights groups, international organizations, or a nation's foreign

ministry (such as the U.S. State Department), or those specializing in fields such as international family law or immigration law. In addition, many law firms have groups of lawyers focused specifically on transnational practice, such as transnational business transactions, transnational commercial arbitration, and investor-state arbitration. But as the data suggests, you are likely to face transnational legal problems *regardless* of the focus of your practice.

Unlike traditional international law casebooks, which typically focus somewhat narrowly on international law and international courts, this casebook is designed to help you develop the knowledge and skills that you will need to solve the kinds of transnational legal problems you are most likely to encounter in practice. To be sure, this casebook will give you an excellent introduction to international law and international courts—but they are only the tip of the iceberg. For most U.S. lawyers, the most common transnational legal problems are likely to be those that arise when representing U.S. or foreign clients not in international courts, but in U.S. courts, in the courts of other nations, or in arbitration or other alternative dispute resolution processes; or when representing U.S. or foreign clients in disputes or business transactions governed not by international law, but by U.S. law or the law of another nation. Specifically, this casebook focuses on three sets of questions that pervade transnational practice:

- What are the applicable rules? Does national law, international law, or a set of private rules apply? If national law applies, *which* nation's law? Lawyers in transnational practice must be sensitive to the question of what rules apply to a given activity or dispute.
- What transnational dispute resolution methods are available and most appropriate? National courts? If so, *which* nation's courts? How does service of process and discovery work in transnational practice? And what legal doctrines apply specifically to disputes in national courts that have a transnational dimension? Beyond national courts, when are international courts available? And when might noncourt dispute resolution methods, such as mediation or arbitration, be most appropriate? A transnational lawyer must be aware of a variety of possible forums and appreciate how forum selection may influence the outcome.
- If the other party does not voluntarily comply with a dispute resolution outcome, how might that outcome be enforced? Under what circumstances will one nation enforce dispute resolution outcomes reached in another nation? How do considerations of enforcement shape other decisions about a case or a business transaction, such as the selection of a dispute resolution method?

Each set of questions entails many complexities that will be explored in this casebook. By the end of this course, we hope that you will be able to analyze these issues effectively in a wide variety of factual settings. These questions certainly do not capture all the issues that can arise in transnational law and practice. There is much more you can learn both in more specialized courses and in practice. Nevertheless, if you learn to tackle these three basic sets of pervasive issues, you will have a solid foundation for solving transnational legal problems in the real world and for furthering your study of international and transnational law. Indeed,

we believe that by focusing on these questions you will be better equipped to tackle the everyday questions you will face in your law practice generally, even if you do not face transnational legal problems on a regular basis.

This casebook includes in-depth discussions of international law and international courts (Chapters 2 and 5). But a theme of the casebook is that lawyers should not be "international law–centric" or "international court–centric" when dealing with transnational legal problems. To the contrary, today's lawyers need to understand the crucial role that national law and national courts play in solving transnational legal problems (Chapters 1 and 4). This central insight was captured long ago by Philip Jessup—a lawyer, diplomat, professor, and judge on the International Court of Justice—when he coined the term "transnational law" to refer to "all law which regulates actions or events that transcend national frontiers"—not just international law, but also national law. PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956). Yet even understanding national law and international law is not enough. Private methods of governing transnational activity, including contracting and arbitration (Chapters 3 and 6), are among the most important and fast-growing parts of transnational practice today. Thus, when we refer to transnational law, we mean not only national and international law that applies to transnational legal problems, but also the private forms of regulation and dispute resolution that lawyers and their clients use to address those problems.

No casebook can do everything. This casebook's approach—like any approach—entails trade-offs in coverage. First, we focus on issues that arise in planning for and resolving transnational disputes more than we focus on transnational business transactions. Understanding the former is, however, essential for understanding the latter. Dispute resolution provisions are an important part of almost every business agreement. More generally, expectations about the applicable legal rules and the methods by which disputes arising out of a transaction will be resolved are both major influences on the planning, negotiation, and performance of business transactions. We therefore believe that a course using this casebook can provide an excellent foundation for a subsequent course on transnational business transactions.

Second, the casebook's focus is more systemic than substantive. The national, international, and private dimensions of the transnational legal system that today's lawyers need to be familiar with are treated in depth, but we have not devoted chapters to specialized substantive fields of international law typically covered in traditional public international law courses (such as international trade, the use of force, or the law of the sea). We believe that a student who masters the fundamentals of the transnational legal system will be well equipped to learn and use particular substantive fields of international law, and that a course based on this casebook will be an excellent foundation for advanced courses in public international law—and for legal practice.

Third, this casebook's dominant perspective is U.S. legal practice. The primary reason is simple: we expect that most students using this casebook will practice primarily in the United States or advise clients based in the United States. We also have found that emphasizing the kinds of transnational problems that U.S.-based lawyers commonly encounter in practice has significant pedagogical

advantages—particularly in international law courses—compared to more abstract and theoretical approaches. Nevertheless, we believe in the value of comparative perspectives. Encounters with foreign law and foreign legal systems are an important part of transnational practice. We also believe that policy perspectives can enhance student understanding. Therefore, although the casebook takes a predominantly U.S. practice perspective, we have incorporated comparative and policy material throughout.

In summary, this casebook introduces you to national law and international law, as well as private rules and nonbinding norms; to national courts, international courts, and nonlitigation dispute resolution methods such as mediation and arbitration; and to the techniques that can be used to enforce dispute resolution outcomes, including the enforcement of court judgments and arbitral awards. Unlike many courses, you will find that this course brings together your work in diverse areas such as constitutional law, statutory construction, torts, contracts, and civil procedure, and provides new twists to help you put those courses in perspective and push their boundaries.

This legal diversity can be messy—but that messiness is part of the real-world practice of law in today's globalized world. Legal scholars call this legal diversity "global legal pluralism." As one scholar puts it, "The irreducible plurality of legal orders in the world, the coexistence of domestic state law with other legal orders, the absence of a hierarchically superior position transcending the differences—all of these topics of legal pluralism [appear] on the global sphere." Ralf Michaels, *Global Legal Pluralism*, 5 Ann. Rev. L. & Soc. Sci. 1 (2009). Another scholar emphasizes the "complex overlapping legal authority" that characterizes legal pluralism. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. Cal. L. Rev. 1155, 1162 (2007). One way of thinking about this course is as an introduction to some of the basic methods that lawyers use to grapple with legal pluralism in practice.

This introduction sets the stage for this casebook's exploration of transnational law and practice. Section A explains what this casebook means by transnational law and practice. Section B is a brief overview of the transnational legal system and its main parts, including national legal systems, international legal systems, and private ordering. Section C provides a roadmap for the rest of the casebook. Section D uses a real-world case to give you a first look at some issues that pervade transnational law and practice and to make more concrete the themes raised in this introduction.

## A. What Is Transnational Law and Practice?

Let's begin with some definitions. "Transnational law" is the law that governs transnational activity and disputes arising out of transnational activity. By "transnational activity" we mean activity that involves the citizens or governments of more than one nation or takes place or has effects in the territory of more than one nation. A terminological note is important here: In international law, "state" is a term of art that is generally used instead of "nation." Specifically, "a state is an entity that has a defined

territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §201 (1987). This casebook generally uses the term "nation" to avoid confusion with references to U.S. states. But throughout this course you should remember that when the term "state" is used in international law or international courts, it ordinarily refers to what this casebook calls a "nation," not to one of the 50 states of the United States.

Transnational law includes, but is not limited to, international law. "International law" is the law made among nations by treaty, through custom, or in the form of general principles common to the world's major legal systems (Chapter 2). Traditionally, international law mostly governed relationships among nations (such as diplomatic relations and the use of military force). Since World War II, however, international law has also increasingly addressed the rights and duties of individuals (as in the case of human rights law and international criminal law). But it is important not to be international law–centric, because other types of rules can also govern transnational activity: national law, contractually agreed-upon private rules, and nonbinding norms. As you will learn in Chapter 1, under some circumstances a nation's law may apply to activity outside its territory. And as you will learn in Chapter 3, parties routinely use privately negotiated contracts to govern their cross-border interactions, and nonbinding norms—like declarations of principles or corporate codes of conduct—also play an important role in governing transnational activity even though they are not legally binding.

Transnational practice refers to any work of a lawyer to help a client solve a transnational problem. For most lawyers today, transnational practice is not a distinct field of practice. Some law firms, businesses, nongovernmental organizations, international organizations, and government agencies do have groups of lawyers dedicated to transnational practice. But most lawyers called upon to help clients solve transnational legal problems are not "international lawyers" and do not perceive themselves as practicing "international law." They practice business law, family law, intellectual property law, personal injury law, criminal law, and so on. They work as solo practitioners and in small firms, as well as in large international law firms, government offices like the U.S. State Department's Office of the Legal Advisor, or international organizations like the United Nations. What they have in common is that regardless of practice area, and regardless of whether they consider themselves "international lawyers," they are likely to be called upon to help clients solve transnational legal problems.

In fact, one result of globalization is that transnational legal problems pervade virtually all fields of legal practice. U.S.-based business lawyers routinely represent U.S. clients entering into business transactions with non-U.S. parties, and vice versa. When disputes arise out of those transactions, U.S.-based lawyers help clients resolve those disputes, through litigation in U.S. courts or abroad, or through various alternative dispute resolution methods such as arbitration. U.S.-based intellectual property lawyers routinely represent clients in licensing transactions with parties in other countries, and in efforts to protect intellectual property globally. U.S.-based family lawyers represent clients in cross-border adoptions, marriages, and other relationships between citizens of different nations, and child

custody, child support, or spousal support matters involving parties in different nations. U.S.-based lawyers routinely represent U.S. clients seeking compensation for injuries suffered in other nations, or non-U.S. clients seeking compensation for injuries caused by U.S. parties. For all of these activities and disputes, lawyers must confront the basic questions we posed earlier: What are the applicable rules? Where can disputes be resolved? How can dispute resolution outcomes be enforced?

To make the point as emphatically as possible: This casebook is *not* only for students interested in or expecting to practice international law. It is for *all* law students. It is designed to expose you to the sorts of transnational legal problems you are likely to encounter in real-world practice, and to help you become a better lawyer generally, *regardless* of your field of practice. Among other things, the benefit of studying transnational practice is that you will learn about a host of legal doctrines—civil procedure, antitrust law, securities law, transnational human rights, to name just a few—all within one course. You will learn how to approach these problems as a lawyer and not just as a student. To this end, practice-oriented notes and questions are included throughout the casebook.

## B. The Transnational Legal System

It is important to understand the system in which transnational law is made, applied, and enforced, and in which transnational practice takes place. The transnational legal system has three basic parts: national legal systems, international legal systems, and private ordering. This section provides a brief overview of these parts. In the chapters that follow, you will learn about them in greater depth.

National legal systems are the legal systems of individual nations. National legal systems include the U.S. legal system (a "domestic" legal system, from a U.S. perspective) as well as the legal systems of other nations ("foreign" legal systems, from a U.S. perspective). Among the basic building blocks of a national legal system are institutions for lawmaking (such as legislatures), adjudication (such as courts), and law enforcement (such as regulatory agencies and police). There are more than 190 nations in the world. This means that there are more than 190 national legal systems in the world. Moreover, in some nations, there are legal subsystems—for example, in the United States, there are both state and federal legal systems.

Although there are similarities across different national legal systems, there also is considerable diversity. To try to make sense of this diversity, comparative legal scholars have long tried to categorize national legal systems. Although many different approaches to categorization have been proposed, "civil law" and "common law" are perhaps the most enduring categories for comparison. Among the differences between these two legal traditions, three stand out: history, sources, and the role of the judge. Historically, the civil law tradition has its roots in Roman law, whereas the origins of the common law tradition can be traced to England.

Regarding sources of law, in the civil law tradition, legislation, systematically organized into "codes," is the primary source of law. In the common law tradition,

the "common law"—the rules that can be generalized from court decisions—is an important source of law, with the doctrine of precedent requiring courts to use rules developed in earlier cases to decide later, similar cases. This difference is significant, but it should not be overstated. Courts do cite prior decisions in civil law nations (for example, for points of legislative interpretation) and legislation is indeed an important source of law in common law systems.

In the civil law tradition, the judge plays the leading role in directing and developing litigation. There is no jury in civil trials, although some civil law nations provide for juries for serious criminal offenses. In the common law tradition, lawyers take the initiative in the development of litigation, including factual discovery, in an adversarial process overseen by the judge.

Most national legal systems today fall roughly into the common law or civil law category. England, for example, is a classic example of a common law system, and France of a civil law nation. The United States is a common law nation (although one U.S. state—Louisiana—is strongly influenced by the civil law tradition). Aside from former British colonies, most nations have civil law traditions.

Nevertheless, the common law/civil law distinction is problematic. For one thing, it is too simplistic: some civil law nations share some characteristics of common law nations, and vice versa. The distinction also neglects national legal systems that do not fall neatly into either category, such as mixed systems, like India and Israel, or Islamic law systems, like Iran and Saudi Arabia. There are also features of some nations' legal systems that are not reflected by the civil law/common law distinction. For example, among the features of the U.S. legal system that distinguish it from most other legal systems is the availability of broad factual discovery backed by judicial sanctions, widely available civil juries, and punitive damages. This makes it especially important not to assume that other nations' legal systems—even other common law systems—necessarily share particular characteristics of the U.S. legal system.

Moreover, some comparative law scholars argue that the differences highlighted by the civil law/common law distinction are decreasingly pronounced—in part due to what some scholars claim is a tendency toward the convergence of national legal systems—or that the common law/civil law distinction does not capture more fundamental differences. These debates are beyond the scope of this casebook and can be explored in a course on comparative law. For our purposes, the essential point is that national legal systems are diverse. Even if you do not master the details of foreign legal systems and traditions, you will be a better lawyer if you are aware of and sensitive to their diversity and avoid assuming that a foreign legal system necessarily resembles your home legal system.

International legal systems are created by nations. Like national legal systems, international legal systems are diverse. They can be global, like the United Nations, or they can be regional, like the European Union. Moreover, they can be general in the sense that they attempt to govern a wide range of activity (again, like the United Nations or the European Union), or they can be specialized (like the system established by the U.N. Convention on the Law of the Sea, including the International Tribunal for the Law of the Sea). It is admittedly more common to refer to a single "international legal system" than to the plural "international legal

systems." Not only is the singular usage traditional, it also highlights the existence of general systemic rules—rules that you will learn about in Chapter 2—that, among other things, define the sources of international law. The problem with the singular is that it suggests something more coherent and uniform than exists in reality. The plural usage is truer to the complexity of international law and the reality that the various legal institutions that operate at the international level often do so largely separately from each other—much like national legal systems do.

Some international legal systems are highly institutionalized in ways that at least formally resemble a national legal system to a certain degree, such as the European Union and arguably the World Trade Organization. Others are largely inchoate and lack the features ordinarily associated with national legal systems—such as a legislature that can enact legally binding rules, an executive that can enforce rules, and courts that can authoritatively adjudicate disputes. This has led some scholars to question whether, from the perspective of legal theory, international law is really "law." Debates about whether international law counts as law have long preoccupied legal theorists (we touch on these debates in Chapter 2), and you might learn more about them in a course on legal philosophy or public international law. From the perspective of transnational practice, however, the essential point is that international legal systems play an important role in solving many transnational legal problems. Have no doubt, what we discuss in the following chapters is law in the sense that it is (or may be) applied to govern transnational activity.

Private ordering is another important part of the transnational legal system. Nongovernmental actors, including individuals and businesses, routinely govern themselves through their own rules. For example, nongovernmental organizations—such as the International Organization for Standardization (ISO) (which you will learn about in Chapter 3) or private arbitral institutions like the International Chamber of Commerce (ICC) (which you will learn about in Chapter 6)—often develop procedural or substantive rules. Individuals or businesses engaged in business relationships routinely enter privately negotiated contracts containing detailed rules to govern those relationships. Beyond these private norms, private arbitral institutions offer dispute resolution services as alternatives to litigation in national courts. These alternative forms of dispute resolution are among the most important parts of transnational practice.

There are interesting theoretical debates about the extent to which private ordering can be autonomous from national and international legal systems. One question is whether private parties will comply with the rules they make when it becomes inconvenient to do so, and whether they will abide by the outcomes of private dispute resolution processes such as arbitration even when they are on the losing side. Some commentators argue that private ordering could not work without the existence of national legal systems willing to apply coercive force to ensure compliance. Others argue that there are alternative enforcement mechanisms that foster compliance with private rules and private dispute resolution, mechanisms that do not rely on national legal systems for support—such as retaliation, exclusion, and reputational sanctions. The reality is probably somewhere in between, with national legal systems, international legal systems, and private ordering

interacting in complex ways. In any event, the willingness of national legal systems to enforce contracts and to enforce arbitral awards enhances the effectiveness of private ordering of transnational activity. *See* Christopher A. Whytock, *Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration*, BUS. & POL., Vol. 12, No. 3, Article 10 (2010).

The term "system" may suggest a high degree of order and coordination. In fact, the transnational legal system is highly decentralized and only loosely coordinated. There is no centralized "transnational government" that oversees the system's parts. As a result, there is often uncertainty about whether a national legal system, international legal system, or private ordering governs particular persons or activities. Moreover, the different parts are often in conflict. For example, more than one nation may claim to govern the same transnational activity with its law or adjudicate the same transnational dispute in its courts; national law may be inconsistent with international law; and some individuals or businesses may prefer to govern their behavior not according to a particular nation's law, but rather according to contractually agreed upon rules that may or may not be consistent with national law. This question of conflict is an important one, and it is addressed in the chapters that follow.

This is part of the messiness of global legal pluralism that confronts all lawyers who encounter transnational legal problems. By learning how to determine the applicable rules (Part I), how to identify which dispute resolution methods are available and most appropriate (Part II), and how to enforce transnational dispute resolution outcomes (Part III), you will have some of the basic tools needed to deal confidently with transnational legal pluralism.

## C. Roadmap

As discussed above, this casebook is organized around three groups of issues that pervade transnational practice: What rules apply to a particular transnational problem? What transnational dispute resolution methods are available and most appropriate? How can a transnational dispute resolution outcome be enforced?

First, what rules apply to a transnational legal problem? This is the focus of Part I of the casebook. It is critical to know what law governs a legal problem that you are trying to solve on behalf of a client. For transnational legal problems, the answer is often far from obvious. There is no single centralized source of transnational lawmaking. The governing law may be a mix of international law and the law of various national legal systems; the question may be even more complex because more than one nation's law may arguably cover the same set of events. For instance, U.S. law sometimes (but not always) governs the actions of U.S. citizens in a foreign nation, while foreign law (and possibly international law) may govern the same actions. Moreover, since judicial enforcement of international law takes place primarily in national courts, there is the additional question of the extent to which international law itself operates within a national legal system.

Part I introduces you to the various types of rules that might apply to a transnational problem. Chapter 1 focuses on national law. It covers the principles

governing the application of the law of individual nations to transnational activity, including limits on the extraterritorial application of U.S federal law and the principles and methods of choice of law. Its basic inquiry is: Should U.S. law or the law of another nation apply to a transnational problem? Chapter 2 focuses on international law. It covers the different types of international law—including treaties, customary international law, and general principles of law—and their role as law in U.S. courts. Among other things, we will ask how litigants and courts approach finding and applying international law. Chapter 3 focuses on two other types of rules that play an important role in transnational practice: nonbinding norms and private rules. Nonbinding international norms—such as resolutions of the U.N. General Assembly—are not legally binding. Nevertheless, they can play a significant role in transnational practice. Private rules—as discussed above—are made by private actors. When included in a valid contract, they may be legally enforceable—and even if not directly enforceable they may be important considerations for transnational actors.

Part II asks: What methods are available and most appropriate for resolving a transnational dispute? As with determining the applicable rules, choosing the appropriate court (or other dispute resolution forum) may be a complex task. Just as there is no centralized transnational lawmaking authority, there is no centralized forum for transnational dispute resolution. Many transnational disputes are resolved in the same way as purely domestic disputes—in national courts. There are, in addition, a relatively small but growing number of international courts, some devoted to particular subject matter or to resolution of disputes under particular treaties. In addition, private dispute resolution methods are very important in transnational practice. Chapter 4 introduces you to the jurisdiction of national courts to hear transnational disputes, with an emphasis on U.S. federal and state courts. Among other topics, this chapter covers personal and subject matter jurisdiction, which you may have already encountered (or be concurrently encountering) in a civil procedure course—but Chapter 4 examines these jurisdictional issues in the context of transnational legal problems and also offers a comparative perspective. Chapter 5 covers international courts, such as the International Court of Justice. Chapter 6 introduces you to dispute resolution methods other than litigation in national or international courts (often called "alternative dispute resolution"). These alternatives to litigation include mediation and arbitration.

Part III asks: How can a transnational dispute resolution outcome be enforced? Just as there is no centralized structure for transnational lawmaking or transnational dispute resolution, there is no centralized method of enforcement in the transnational legal system. Most enforcement of dispute resolution outcomes depends on national courts—often the courts of nations other than the nation where the dispute was resolved. Chapter 7 covers the enforcement of national and international court judgments. Chapter 8 covers the enforcement of arbitral awards.

Part IV examines special problems in transnational dispute resolution. For example, you may have already learned about service of process. But how do you serve a defendant located in another nation? Chapter 9 gives you the background needed to answer this question by introducing you to the rules and techniques

of transnational service of process. What happens if the courts of more than one nation have (or potentially have) jurisdiction over a dispute? Which nation's courts should resolve the dispute? Chapter 10, on alternative forums, examines three methods that can be used to answer this question: the *forum non conveniens* doctrine, parallel proceedings doctrines (including *lis pendens* stays and anti-suit injunctions), and forum selection clauses. What happens when a plaintiff sues a foreign nation? According to the doctrine of foreign sovereign immunity, a nation is generally immune from suit in another nation's courts. Chapter 11 examines both this general rule and the exceptions to it. What happens if a transnational dispute raises questions of foreign affairs? Should courts nevertheless resolve the dispute? Or is it more appropriate for courts to abstain in deference to the political branches of government? Chapter 12 introduces you to a variety of doctrines that courts use to answer these questions, including the act of state doctrine, foreign affairs preemption, and the political question doctrine. And you may have already learned about the discovery tools available under the Federal Rules of Civil Procedure that help litigants obtain relevant information from each other and from third parties. But how do you obtain relevant information located in foreign nations or held by foreign citizens? To help you tackle these problems, Chapter 13 introduces you to the tools of transnational discovery.

In sum, we believe this casebook's emphasis on three core issues that pervade transnational practice—determining the applicable rules, identifying which dispute resolution methods are available and most appropriate, and enforcing dispute resolution outcomes—will help you build a solid foundation for real-world practice and for the further study of international and transnational law. Such further study may include one or more courses such as public international law, comparative law, conflict of laws, and complex litigation, as well as more specialized transnational dispute resolution courses such as transnational litigation, transnational arbitration, and transnational negotiation, or specialized substantive international law courses such as human rights law, international criminal law, international business transactions, international environmental law, international trade law, or the law of the sea. And beyond serving as a foundation for practice and further study, we believe transnational law and practice provides a fruitful lens through which to consider your own national legal system. Indeed, just as transnational law and practice is all about legal problems that cross national borders, national law and practice in the United States is largely about legal problems that cross U.S. state borders. Above all, we hope that you will look forward to the interesting and challenging transnational legal problems that you are likely to encounter after law school, confident that you have the basic knowledge and skills that will help you tackle them.

## D. A First Look at Transnational Law and Practice

Before continuing to Chapter 1, consider the following description of a case involving alleged harms arising from a U.S. company's activities in Ecuador. Although the case is in some ways unusual, it illustrates many of the sorts of transnational legal problems that lawyers encounter in practice.

## The Chevron-Ecuador Case

In 1993, residents of the Lago Agrio region of the Amazon rainforest in the Republic of Ecuador sued Texaco, Inc., a U.S. corporation, in the U.S. District Court for the Southern District of New York. The complaint alleged extensive environmental damage and personal injuries caused by Texaco's oil extraction operations in Ecuador, as part of a joint venture with Ecuador's national oil company, Petroecuador. At Texaco's request, the U.S. court dismissed the suit, concluding that it had "everything to do with Ecuador, and nothing to do with the United States," and therefore should be brought in Ecuadorian courts. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001). The U.S. Court of Appeals for the Second Circuit affirmed. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002). Meanwhile, Chevron Corp., also a U.S. corporation, acquired Texaco in 2001; it thereafter terminated its operations in Ecuador and no longer has a business presence there.

After the court dismissed the U.S. lawsuit, the Lago Agrio plaintiffs sued Chevron in Ecuador. Chevron argued that Texaco had entered an agreement with Ecuador and Petroecuador whereby Texaco agreed to take certain environmental remediation measures; that Ecuador and Petroecuador agreed to release Texaco from liability upon completion of those measures; and that Texaco fulfilled all of its obligations under the agreement and was therefore released from liability. The Ecuadorian court disagreed, finding Chevron liable for personal injury and environmental damage as Texaco's successor, and entered a $17.2 billion judgment against Chevron. Ecuadorian courts of appeal later affirmed the judgment (but reduced its amount to $8.6 billion).

The plaintiffs next sought to enforce the Ecuadorian judgment against Chevron in several nations, including Argentina, Brazil, and Canada (but not the United States). Chevron argued in response that the Ecuadorian judgment was invalid because the Ecuadorian legal system did not provide due process and the proceedings leading to the judgment were tainted by fraud and other improper conduct by the plaintiffs' lawyers. Chevron also brought an action in the U.S. District Court for the Southern District of New York seeking an injunction to block enforcement of the Ecuadorian judgment anywhere in the world. The district court issued the injunction, but the court of appeals reversed, finding that Chevron could not seek such an order unless the Ecuadorian plaintiffs attempted to enforce their judgment in the United States and that a U.S. court does not have the authority to determine whether another nation's courts may enforce a judgment. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 234 (2d Cir. 2012).

In 2009, Chevron initiated arbitration proceedings against Ecuador pursuant to the Ecuador-U.S. Bilateral Investment Treaty. Bilateral investment treaties (BITs) are treaties between two nations that give each other's investors certain protections. For example, under the Ecuador-U.S. BIT, U.S. investors in Ecuador have rights that Ecuador must protect and Ecuadorian investors in the United States have rights that the United States must protect. These rights include a right to fair and equitable treatment, a right against arbitrary and discriminatory measures, and a right to effective means of asserting claims and enforcing rights with respect to the

investment. The BIT also gives investors the right to submit investment disputes to arbitration instead of the courts of the nation where they have invested. Arbitration is a dispute resolution method whereby the disputants agree to have private third parties called "arbitrators" resolve the dispute. Typically, each party selects an arbitrator of its choice, and the two arbitrators so selected then select a third arbitrator.

In the arbitral proceedings, Chevron sought an award* releasing Chevron from liability and finding that Ecuador or Petroecuador is "exclusively liable for any judgment that may be issued in the Lago Agrio Litigation." Claimant's Notice of Arbitration, *Chevron Corp. and Texaco Petrol. Co. v. Republic of Ecuador*, PCA Case No. 2009-23 (Sept. 23, 2009), *available at* http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf. The arbitral tribunal issued interim awards ordering Ecuador "to take all measures to suspend or cause to be suspended the enforcement and recognition within and without Ecuador" of the Lago Agrio judgment until the panel issues a decision on the merits. Fourth Interim Award on Interim Measures, *Chevron Corp. and Texaco Petrol. Co. v. Republic of Ecuador*, PCA Case No. 2009-23, at 25-26 (Feb. 7, 2013).

In response to the developments in the BIT arbitration proceedings, the Lago Agrio plaintiffs filed a request with the Inter-American Commission on Human Rights in February 2012, asking it to prevent Ecuador from taking steps that would impair the plaintiffs' rights under the Lago Agrio judgment. The Inter-American Commission on Human Rights is, along with the Inter-American Court of Human Rights, an organ of the Organization of American States (OAS), which is a regional international organization that includes the United States and most Latin American nations. Specifically, the plaintiffs requested the Commission "to call for precautionary measures from [Ecuador] sufficient to assure the Commission that [Ecuador] will refrain from taking any action that would contravene, undermine, or threaten the human rights [of the plaintiffs] and that to the contrary [Ecuador] will take all appropriate measures to assure the full protection and continued guarantee of those rights." Letter from Pablo Fajardo et al. to Dr. Santiago Cantón, Exec. Sec'y, Inter-Am. Comm'n on Human Rights, Org. of Am. States (Feb. 9, 2012), *available at* http://lettersblogatory.com/wp-content/uploads/2012/02/OAS-Petition.pdf.

For more information about the case, see *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), and Michael Goldhaber, Crude Awakening: Chevron in Ecuador (Kindle Single, Aug. 20, 2014). There have been a number of further developments in the Chevron-Ecuador case, some of which are described later in this casebook, and the dispute remains ongoing.

The following notes and questions explore some of the transnational legal issues raised by the *Chevron-Ecuador* case. But do not worry about providing correct legal answers at this point. For now, the goal is simply to become familiar with the issues and to grapple with them. This will help prepare you for in-depth exploration in the chapters that follow.

* The dispute resolution outcome in arbitration is called an "award" rather than a "judgment."

## NOTES AND QUESTIONS

1. **What Are the Applicable Rules?** This issue pervades transnational law and practice. Consider the following ways that this issue can arise:
   a. If the U.S. District Court for the Southern District of New York had decided to hear the Chevron-Ecuador case, what rules do you think the court should have applied? U.S. law? Ecuadorian law? International law? Why? What considerations should guide a U.S. judge when deciding what law to apply in a transnational dispute? Should a U.S. judge ever apply a foreign nation's law? Why or why not? Consider the same questions from the perspective of an Ecuadorian judge and the arbitrators in the BIT arbitration initiated by Chevron. Would the answers be different? In 2011, Chevron sued the plaintiffs' lawyers in the U.S. District Court for the Southern District of New York alleging that they engaged in a pattern of fraudulent activity in obtaining the Ecuadorian judgment. Chevron argued that this activity violated the Racketeer Influenced and Corrupt Organizations Act (RICO), a U.S. federal statute. Should a U.S. statute apply in this case? Does it depend on where the alleged fraud occurred? Does it depend on the nationality of the plaintiffs' lawyers?
   b. Chevron argued that Ecuador violated the Ecuador-U.S. BIT. If Chevron were to make this argument in a U.S. court, should the court decide the case based on the investor rights contained in the BIT? Should a U.S. court ever apply treaties or other types of international law as binding rules of decision? Why or why not? What about an Ecuadorian court? What about the arbitrators in the BIT arbitration initiated by Chevron?
   c. Chevron's Business Conduct and Ethics Code states that "Chevron expects compliance with the letter and the spirit of applicable environmental, health and safety laws, regulations and policies" and that "[e]ach of us has the authority and responsibility to stop—or not start—any work activity if hazards or risks pose a threat to safety or the environment." *See* https://www.chevron.com/-/media/shared-media/documents/chevronbusinessconductethicscode.pdf. Do you think a judge or arbitrator should apply provisions of this code to the dispute? If not, does the code matter? Why or why not?
2. **How Can Transnational Disputes Be Resolved?** This is another pervasive issue in transnational law and practice. Consider the following from both a legal and strategic perspective:
   a. Why do you think the plaintiffs initially filed their lawsuit in the United States? What other forums may have been available, and why didn't they select one of them instead? What legal doctrines would limit the options available?
   b. What about the perspective of Texaco and Chevron? Why do you think they wanted to get the litigation out of the United States? Why might they have initially preferred to litigate in Ecuador? Why might they have hoped that the dismissal of the lawsuit by the U.S. District Court would have ended the litigation altogether? Why would they then want to file their own RICO suit in the United States?

c. Should the U.S. court have dismissed the plaintiffs' claim? Is it true that the case was more appropriately litigated in Ecuador? What factors might be appropriate for the court to consider when deciding which nation's courts should hear the case?

d. What is the role for international courts in transnational cases? Should the Lago Agrio plaintiffs have filed their suit in an international court to begin with? Why did they file with the Inter-American Commission? What other forums might have been available for the plaintiffs' claims against Ecuador? Why do you think they filed their application in the Inter-American Commission instead of an alternative forum? What would give the Inter-American Commission authority to hear a claim against Ecuador? Should the Commission (or the associated Inter-American Court of Human Rights) have authority to order Ecuador to take actions? What if Ecuador refused?

e. Based on the overview above, in what key respects is arbitration different from litigation? Why do you think Chevron decided to use arbitration for its claims against Ecuador? What other forums might have been available for Chevron's claims, and why do you think it decided against those alternatives? Arbitration requires the consent of the parties. What was the source of Ecuador's consent to arbitration?

3. **How Can Transnational Dispute Resolution Outcomes Be Enforced?** If you determine the applicable legal rules and select an appropriate method for resolving a dispute, and you obtain a favorable outcome for your client, what can you do if the losing party refuses to comply with that outcome voluntarily? For example, in the *Chevron-Ecuador* case, Chevron did not voluntarily pay the plaintiffs the amount ordered by the Ecuadorian court judgment. One option is to seek a court order that seizes and sells assets of the noncomplying party and uses the proceeds to pay the prevailing party the amount owed under the judgment. To explore this issue, consider the following questions:

a. Why do you think the plaintiffs didn't simply seek enforcement of the Ecuadorian judgment against Chevron in the courts of Ecuador? Why do you think they instead pursued enforcement in the courts of Argentina, Brazil, and Canada? Why do you think they did not pursue enforcement in the United States?

b. What arguments might Chevron make to oppose enforcement of the Ecuadorian judgment against it? Who should decide whether those arguments are valid? An Ecuadorian appellate court? A U.S. court? The courts of some other nation? An international court? What considerations should be kept in mind when answering this question?

c. Should a court in one nation ever enforce a judgment of a court in another nation? Why or why not? The problem of enforcement can arise not only with court judgments, but also arbitral awards. Should a court ever enforce an arbitral award? Why or why not?

d. What alternatives to judicial enforcement might you consider to encourage a losing party to comply with a dispute resolution outcome in favor of your client?

4. **Don't Be International Law– or International Court–Centric.** As the *Chevron-Ecuador* case illustrates, international law (such as the BIT) and international organizations (such as the Inter-American Commission on Human Rights) may play a significant and sometimes very important role in solving transnational legal problems. But as this introduction has emphasized, it is important not to be international law–centric or international court–centric. As review, what sources of law other than international law, and what dispute resolution methods other than international courts, have played a role in the *Chevron-Ecuador* case?

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Don't worry if you didn't understand all of the nuances of the *Chevron-Ecuador* case or if you don't have answers to all of the questions above. It is most important at this stage for you to get a preliminary taste of the kinds of transnational legal problems that you are likely to face in practice. With careful study of the materials in this casebook, we are confident that by the end of this course you will have developed the knowledge and skills you need to analyze and solve those problems and that this will make you a better lawyer regardless of your field of practice.

PART I

# *WHAT ARE THE APPLICABLE RULES?*

In its most basic form, legal analysis involves the application of law to facts to reach a legal conclusion. These elements of legal analysis are as important in transnational law and practice as they are in purely domestic law and practice. However, determining the applicable law and relevant facts poses special challenges for lawyers and judges called upon to solve transnational legal problems. In Part I, you will learn how to determine the applicable law in the context of transnational legal problems.

Even in domestic law and practice, it can be difficult to determine what law applies to a particular problem. For example, should a U.S. federal court apply state law or federal law? This question will be familiar to you if you studied the *Erie* doctrine in a course on Civil Procedure. Or what if there is a dispute that involves persons, property, or activity with connections to more than one U.S. state, say California and Oregon? Should a court in California apply California law or Oregon law to resolve the dispute? Judges have developed "choice of law" methods to help them answer these difficult questions, and in many cases they will apply the law of a state other than their own state to resolve interstate disputes.

These issues can be especially important in the context of transnational legal problems, where the question may be whether to apply the law of one nation or the law of another nation. For example, in a dispute involving persons, property, or activity with connections to both California and Japan, should a court in California apply California law or Japanese law? Because legal differences across nations are often much more significant than legal differences across U.S. states, the stakes are often high: The outcomes of disputes may depend on which jurisdiction's law applies.

Part I has two goals. The first goal is to help you understand the different types of law that may apply to transnational legal problems, including national law (such as U.S. federal statutes, U.S. state law, or the law of a foreign nation) and international law. Part I will also briefly examine private rules and nonbinding norms, which can also play a significant role in solving transnational problems.

The second goal is to help you learn the principles that lawyers and judges use to determine what rules apply to particular transnational legal problems.

Chapter 1 introduces you to the role of national law in solving transnational legal problems. For example, U.S. state or federal law — "domestic law" from the perspective of a U.S. lawyer or judge — may be the applicable law. Alternatively, "foreign law" (again, from the perspective of a U.S. lawyer or judge), say the law of Germany, Nigeria, Japan, or Mexico, may be the applicable law. Or the laws of two or more nations may apply to different aspects of the same transnational problem. As Chapter 1 explains, just because a legal problem has a transnational dimension does not necessarily mean that international law applies. To the contrary, national law, whether domestic or foreign, will be the applicable law for many — perhaps most — transnational legal problems that you are likely to encounter in practice. Therefore, as Chapter 1 emphasizes, it is important not to be "international law–centric" when you analyze transnational legal problems.

Nevertheless, to competently analyze transnational legal problems, lawyers do need to understand the fundamentals of international law, including how it is made and how it is used in transnational disputes. Chapter 2 introduces you to these fundamentals. It begins by providing an overview of the nature and role of international law, including the three types of international law: treaties, customary international law, and general principles. It then examines treaties and customary international law in depth, from the perspectives of both the international legal system and the U.S. legal system.

Chapter 3 introduces you to nonbinding and private norms. Nonbinding norms include international declarations of principles and United Nations General Assembly resolutions. Private norms include the rules that individuals and businesses routinely agree upon to govern their relationships, and when those agreements are valid contracts, national courts will ordinarily enforce them. Unlike national law and international law, and unlike legally enforceable contracts, nonbinding norms are not legally binding. Unless the parties to a dispute have agreed that those norms will govern their activity, courts generally will not apply them as rules of decision. Nevertheless, nonbinding norms are important. As Chapter 3 explains, they may provide evidence of international law and they may eventually be adopted by states or their courts as binding law. Nonbinding norms may also provide focal points for the coordination of cross-border business and regulation and other transnational activity. Moreover, parties sometimes agree to have nonbinding norms govern their relationships — and such agreements may themselves constitute legally binding contractual obligations that are enforceable by courts.

When determining what law applies to transnational problems, the stakes are high for both client counseling and international relations. One important role of a lawyer is to help clients comply with the law and manage their exposure to legal liability — but you cannot perform this role if you do not know what laws potentially apply to your client's activity. If your client is involved in a dispute, you cannot help your client weigh whether to settle the dispute or to litigate unless you know what law applies, because that law can determine the outcome of litigation. Often, two or more legal rules may be potentially applicable, one of which may

be more favorable to your client than the others — but if you do not understand the principles used to determine the applicable law, you will be unable to develop and assess arguments that might convince a judge to apply the rule that is most favorable to your client. Most fundamentally, because legal analysis requires you to apply law to the relevant facts, you cannot perform legal analysis or develop legal arguments without determining and understanding the applicable law.

Beyond client counseling, nations themselves may care about the applicable law. One way that nations regulate transnational activity is by applying their law to that activity. Therefore, whether a nation's law applies beyond its borders affects its ability to project regulatory power in the world. When more than one nation attempts to apply its law to the same transnational legal problem, the result can be international conflict. One way that nations may try to avoid this type of conflict is by creating international law to govern transnational legal problems instead of national law — but this in turn raises difficult issues about the applicability of international law in national courts, and how to handle conflicts between national law and international law. You are encouraged to keep these stakes in mind as you work through the materials that follow.

CHAPTER 1

# NATIONAL LAW

Imagine that your client is a U.S. citizen who lives in Los Angeles, California and, until recently, worked in the Los Angeles office of a corporation that is incorporated in California and has its principal place of business in California. Your client alleges that the corporation wrongfully terminated her employment. Because this legal problem has connections only to California, the applicable law is most likely U.S. law (California state law and, depending on the facts, perhaps U.S. federal law).

Now imagine the same scenario, but with the following changes: Your client is a Mexican citizen, working in the corporation's Los Angeles office, but the corporation is incorporated in Canada and has its principal place of business in Vancouver, located in the Canadian province of British Columbia, where all of the corporation's business decisions are made. Now what is the applicable law? Mexican law, because your client is a Mexican citizen? California law or U.S. federal law, because California was the place of employment? Canadian law, because Canada is the employer's place of incorporation and the place where the termination decision was made? The answer is not obvious. Unlike the first example's purely domestic legal problem, this second scenario involves a transnational legal problem — that is, a legal problem with connections to more than one nation (here, Canada, Mexico, and the United States). These multinational connections raise the possibility that more than one nation's law may apply. The challenge is to determine the applicable law based on these connections in light of your client's objectives.

One way to approach the question is to focus on a particular nation's law and ask *whether* it applies to the conduct in question. Based on the principle of territorial sovereignty, you would usually conclude that a nation's law applies within its own territory, but there may be doubt whether the law applies outside the nation's territory. To be clear, nations often do apply their laws extraterritorially, but courts may be reluctant to apply law extraterritorially if the law does not clearly indicate that it has extraterritorial reach. Thus, whether a law applies extraterritorially becomes a question of statutory analysis; courts may look at the language

and purpose of a law and use canons of statutory construction to decide the law's reach. For example, in the hypothetical above, a court in the United States might use extraterritoriality analysis to determine whether it should apply a U.S. federal statute to adjudicate the parties' employment dispute. As described in Section A below, U.S. courts typically use this approach in evaluating the extraterritorial reach of U.S. federal statutes.

Another approach is to think of the question as involving a choice among various potentially applicable laws, and thus to ask *which* of these laws is the right one to apply. Thus unlike extraterritoriality analysis, this approach looks not at one nation's law, but at all the nations' (or states') laws that might apply. Courts (and sometimes legislatures) have developed "choice of law" principles to guide the selection among competing laws. For example, in the above hypothetical involving contacts with Canada, Mexico, and California, a court might consider its job to choose which of the potentially applicable national laws — Canadian, Mexican, or California law — ought to govern. As described in Section B below, U.S. courts typically use this approach in claims — especially private law claims such as torts, contracts, and property — potentially involving the law of a U.S. state and a foreign nation (or, in purely domestic claims, those involving the law of multiple U.S. states).

Why there should be two approaches instead of one is something of a conceptual puzzle. As a practical matter, however, U.S. courts ordinarily use extraterritoriality analysis when a U.S. federal statute (or in some cases a state statute) potentially applies, and choice-of-law analysis when tort, contract, property, or other areas of private law are at issue.

The materials that follow are selected to help you learn these two approaches. Section A examines the extraterritorial scope of U.S. federal statutes. Section B discusses choice of law — the choice between a U.S. state's law and foreign (non-U.S.) law. Section C considers an important point of transactional strategy: to avoid the difficult project of guessing which law a court may apply, parties can specify in advance, by contract, what law governs their relationship.

## A. Extraterritorial Application of National Law

How does a lawyer or a judge determine whether a nation's law applies to persons or conduct outside that nation's territory? If the law explicitly states that it does (or does not) apply extraterritorially, the task is relatively easy. But most laws do not explicitly define their geographical reach. Instead, most laws state that behavior "x" is prohibited or behavior "y" gives rise to liability. For example, as discussed in one of the cases below, the Jones Act, a U.S. federal statute, provides a cause of action for "any seaman who shall suffer personal injury in the course of his employment." Does a statute like this one, drafted in this general way and without an explicit statement about its geographical reach, apply to conduct throughout the world? The answer is often "no," but sometimes "yes," or "to some extent," depending on the facts and circumstances.

In this section, you will learn how lawyers and judges analyze these issues in the United States. This section begins by examining two rebuttable presumptions

that help determine whether a U.S. federal statute will be applied extraterritorially: (1) that Congress ordinarily intends to legislate with respect to domestic, not foreign, matters (the presumption against extraterritoriality) and (2) that Congress ordinarily does not intend for a statute to violate international law (the presumption against violating international law). This section then takes a closer look at what has been a particularly contentious extraterritoriality issue: the extraterritorial application of antitrust law. As you read these materials, consider the origins of the two presumptions and whether the lower courts have reliably applied them. Also consider whether these presumptions are appropriate for their stated purposes, or whether there are other judicial or nonjudicial approaches that are more workable.

First, an important note: The cases in this section involve federal statutes, some of which are complex and may be unfamiliar to you. These statutes include Title VII of the U.S. Civil Rights Act of 1964, the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act (RICO), the National Labor Relations Act, the Hostage Taking Act, and the Sherman Act. You will surely encounter some of these statutes in other courses and in practice. But we include these cases *not* because we expect you to master these statutes in this course, but instead to help you understand the more general principles that determine whether a U.S. court will apply a federal statute to persons or activity outside U.S. territory. Therefore, we urge you to focus on learning those principles and the analytical steps courts use to make extraterritoriality determinations. Don't worry if you don't have a thorough understanding of the particular statutes involved.

### *1. The Presumption Against Extraterritoriality*

In the three cases that follow, the U.S. Supreme Court discusses and applies a presumption against extraterritoriality. A presumption is the acceptance of a conclusion until it is shown that the conclusion is false — that is, until the presumption is rebutted. As you study the cases, focus on understanding both *what* must be presumed in extraterritoriality analysis and *how* that presumption can be rebutted.

#### Equal Employment Opportunity Commission v. Arabian American Oil Company

*499 U.S. 244 (1991)*

Chief Justice REHNQUIST delivered the opinion of the Court.

These cases present the issue whether Title VII [of the U.S. Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.] applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad. The United States Court of Appeals for the Fifth Circuit held that it does not, and we agree with that conclusion.

Petitioner Boureslan is a naturalized United States citizen who was born in Lebanon. The respondents are two Delaware corporations, Arabian American

Oil Company (Aramco), and its subsidiary, Aramco Service Company (ASC). Aramco's principal place of business is Dhahran, Saudi Arabia, and it is licensed to do business in Texas. ASC's principal place of business is Houston, Texas.

In 1979, Boureslan was hired by ASC as a cost engineer in Houston. A year later he was transferred, at his request, to work for Aramco in Saudi Arabia. Boureslan remained with Aramco in Saudi Arabia until he was discharged in 1984. After filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC or Commission), he instituted this suit in the United States District Court for the Southern District of Texas against Aramco and ASC. He sought relief under both state law and Title VII of the Civil Rights Act of 1964, on the ground that he was harassed and ultimately discharged by respondents on account of his race, religion, and national origin.

Respondents filed a motion for summary judgment on the ground that the District Court lacked subject-matter jurisdiction over Boureslan's claim because the protections of Title VII do not extend to United States citizens employed abroad by American employers. The District Court agreed and dismissed Boureslan's Title VII claim; it also dismissed his state-law claims for lack of pendent jurisdiction and entered final judgment in favor of respondents. A panel for the Fifth Circuit affirmed. After vacating the panel's decision and rehearing the case en banc, the court affirmed the District Court's dismissal of Boureslan's complaint. Both Boureslan and the EEOC petitioned for certiorari. We granted both petitions for certiorari to resolve this important issue of statutory interpretation.

Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Cf. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-285 (1949); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957). Whether Congress has in fact exercised that authority in these cases is a matter of statutory construction. It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States.

It is a longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros.*, 336 U.S., at 285. This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained." *Ibid.* It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963).

In applying this rule of construction, we look to see whether "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Foley Bros.*, *supra*, 336 U.S., at 285. We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is "the affirmative intention of the Congress clearly expressed," *Benz*, *supra*, 353 U.S., at 147, we must presume it "is primarily concerned with domestic conditions." *Foley Bros.*, *supra*, 336 U.S., at 285.

Boureslan and the EEOC contend that the language of Title VII evinces a clearly expressed intent on behalf of Congress to legislate extraterritorially. . . .

[P]etitioners argue that the statute's definitions of the jurisdictional terms "employer" and "commerce" are sufficiently broad to include United States firms that employ American citizens overseas. . . . We conclude that petitioners' evidence, while not totally lacking in probative value, falls short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders.

Title VII prohibits various discriminatory employment practices based on an individual's race, color, religion, sex, or national origin. See §§ 2000e-2, 2000e-3. An employer is subject to Title VII if it has employed 15 or more employees for a specified period and is "engaged in an industry affecting commerce." An industry affecting commerce is "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce. . . ." § 2000e(h). "Commerce," in turn, is defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." § 2000e(g).

Petitioners argue that by its plain language, Title VII's "broad jurisdictional language" reveals Congress' intent to extend the statute's protections to employment discrimination anywhere in the world by a United States employer who affects trade "between a State and any place outside thereof." More precisely, they assert that since Title VII defines "States" to include States, the District of Columbia, and specified territories, the clause "between a State and any place outside thereof" must be referring to areas beyond the territorial limit of the United States.

Respondents offer several alternative explanations for the statute's expansive language. They contend that the "or between a State and any place outside thereof" clause "provide[s] the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce" but not to "regulate conduct exclusively within a foreign country." They also argue that since the definitions of the terms "employer," "commerce," and "industry affecting commerce" make no mention of "commerce with foreign nations," Congress cannot be said to have intended that the statute apply overseas. In support of this argument, respondents point to Title II of the Civil Rights Act of 1964, governing public accommodation, which specifically defines commerce as it applies to foreign nations. Finally, respondents argue that while language present in the first bill considered by the House of Representatives contained the terms "foreign commerce" and "foreign nations," those terms were deleted by the Senate before the Civil Rights Act of 1964 was passed. They conclude that these deletions "[are] inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially."

We need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application discussed above. Each is plausible, but no more persuasive than that. The language relied upon by petitioners — and it is they who must make the affirmative showing — is ambiguous, and does not speak directly to the question

presented here. The intent of Congress as to the extraterritorial application of this statute must be deduced by inference from boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas. See, *e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2052(a)(12); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(b); Transportation Safety Act of 1974, 49 U.S.C. App. § 1802(1); Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 et seq.; Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

Petitioners' reliance on Title VII's jurisdictional provisions also finds no support in our case law; we have repeatedly held that even statutes that contain broad language in their definitions of "commerce" that expressly refer to "foreign commerce" do not apply abroad. . . .

The EEOC places great weight on an assertedly similar "broad jurisdictional grant in the Lanham Act" that this Court held applied extraterritorially in *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952). In *Steele*, we addressed whether the Lanham Act, designed to prevent deceptive and misleading use of trademarks, applied to acts of a United States citizen consummated in Mexico. The Act defined commerce as "all commerce which may lawfully be regulated by Congress." 15 U.S.C. § 1127. The stated intent of the statute was "to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce." *Ibid*. While recognizing that "the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears," the Court concluded that in light of the fact that the allegedly unlawful conduct had some effects within the United States, coupled with the Act's "broad jurisdictional grant" and its "sweeping reach into 'all commerce which may lawfully be regulated by Congress,'" the statute was properly interpreted as applying abroad. *Steele*, *supra*, 344 U.S., at 285, 287.

The EEOC's attempt to analogize these cases to *Steele* is unpersuasive. The Lanham Act by its terms applies to "all commerce which may lawfully be regulated by Congress." The Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. Since the Act expressly stated that it applied to the extent of Congress' power over commerce, the Court in *Steele* concluded that Congress intended that the statute apply abroad. By contrast, Title VII's more limited, boilerplate "commerce" language does not support such an expansive construction of congressional intent. . . .

. . . Without clearer evidence of congressional intent to do so . . . , we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.

This conclusion is fortified by the other elements in the statute suggesting a purely domestic focus. The statute as a whole indicates a concern that it not unduly interfere with the sovereignty and laws of the States. See, *e.g.*, 42 U.S.C. § 2000h-4 (stating that the Act should not be construed to exclude the operation of state law or invalidate any state law unless inconsistent with the purposes of the

Act); § 2000e-5 (requiring the EEOC to accord substantial weight to findings of state or local authorities in proceedings under state or local law); § 2000e-7 (providing that nothing in Title VII shall affect the application of state or local law unless such law requires or permits practices that would be unlawful under Title VII); §§ 2000e-5(c), (d), and (e) (provisions addressing deferral to state discrimination proceedings). While Title VII consistently speaks in terms of "States" and state proceedings, it fails even to mention foreign nations or foreign proceedings.

Similarly, Congress failed to provide any mechanisms for overseas enforcement of Title VII. For instance, the statute's venue provisions, § 2000e-5(f)(3), are ill-suited for extraterritorial application as they provide for venue only in a judicial district in the State where certain matters related to the employer occurred or were located. And the limited investigative authority provided for the EEOC, permitting the Commission only to issue subpoenas for witnesses and documents from "any place in the United States or any Territory or possession thereof," 29 U.S.C. § 161 incorporated by reference into 42 U.S.C. § 2000e-9, suggests that Congress did not intend for the statute to apply abroad.

It is also reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures. In amending the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq. to apply abroad, Congress specifically addressed potential conflicts with foreign law by providing that it is not unlawful for an employer to take any action prohibited by the ADEA "where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer . . . to violate the laws of the country in which such workplace is located." § 623(f)(1). Title VII, by contrast, fails to address conflicts with the laws of other nations.

. . .

Our conclusion today is buttressed by the fact that "[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute. See, *e.g.*, the Export Administration Act of 1979, 50 U.S.C. App. § 2415(2) (defining "United States person" to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern"); Coast Guard Act, 14 U.S.C. § 89(a) (Coast Guard searches and seizures upon the high seas); 18 U.S.C. § 7 (Criminal Code extends to high seas); 19 U.S.C. § 1701 (Customs enforcement on the high seas); Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001(5)(A) ed. Supp. V) (definition of "national of the United States" as "a natural person who is a citizen of the United States . . ."); the Logan Act, 18 U.S.C. § 953 (applying Act to "[a]ny citizen . . . wherever he may be . . ."). Indeed, after several courts had held that the ADEA did not apply overseas, Congress amended § 11(f) to provide: "The term 'employee' includes any individual who is a citizen