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**Transnational Legal Orders for Private Law
and Business Regulation**

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Trial by Fire: Rana Plaza and the Transnational Legal Order

In 2013, over a thousand workers were killed in a fire that destroyed a building housing many garment factories producing goods for global consumer markets. The fire, and its consequences, exposed the complex interweaving of national law, international standards, and private governance standards, which together might be understood as a transnational legal order that affects business behavior. This paper uses the circumstances of the Rana Plaza fire and its aftermath as the starting point for an examination of the emergence of a transnational legal order governing transnational business activity. That transnational order has a normative structure, operationalizes a legal process, and structures a framework within which international organizations, and state and non-state private actors strive toward building functional coherence within formally polycentric governance orders.

Alexia Brunet Marks

Transnational Legal Ordering, Food Safety and New Governance

Food safety is a significant and increasing global health concern and yet, international economic law does not adequately address today's global food safety needs. While most countries rely on a collection of formalized legal norms organized to provide greater food safety, these norms often leave pressing food safety concerns unsettled. Governments have limited regulatory space under international trade and investment law as raising food safety standards may attract World Trade Organization (WTO) scrutiny and may contravene international investment treaties, transgovernmental regulatory network norms, and regional trade agreements. Private supply chains, in contrast, are more nimble have flexibility to adopt the highest food safety standards available. Perhaps there is a way for countries to learn from supply chains while staying true to their formal commitments.

This Article presents a basis for a conceptual transition from a global food safety regime characterized by top-down regulation to a new regulatory paradigm, with New Governance at the center of the table. Features of this new regime – such as collaboration of stakeholders and non-state actors, decentralization and devolution, flexibility and

context specificity, adaptability, and dynamic learning – are shaping global food safety governance and have the potential to increase collaboration as countries work to stretch scarce resources. The U.S. Food Safety Modernization Act (“FSMA”) passed into law in 2011, provides a natural experiment of New Governance since it incorporates third-party certification, voluntary standards, voluntary standards, and public-private partnerships.

Regulators must tread lightly while navigating a minefield of novel regulations, however. While New Governance approaches to policy-making have been applied in other fields such as environmental law, they have been relatively absent in the context of global food safety. Using applications in other fields, this Article highlights the benefits and shortcomings of new governance efforts in food safety. In doing so, it assesses the prospects for these initiatives to engage actors from different jurisdictions and potentially give rise to what can be viewed as a dynamic, adaptive transnational legal order.

Hannah Buxbaum

Transnational Legal Ordering and Transactions in Securities

This paper will examine transnational transactions in securities and their regulation. These transactions do not fit neatly within existing national regulatory frameworks; as a result, markets in certain securities may be insufficiently regulated, and investors harmed by fraud may be insufficiently compensated. The paper explores this problem in two different regulatory contexts, examining recent episodes in each. First, it addresses the regulation of cross-border derivative securities, examining the rulemaking process in the United States and elsewhere that followed on the financial crisis of the late 2000s to assess whether they show normative and regulatory convergence and concordance, or divergence and discordance. Next, it turns to the enforceability of anti-fraud provisions in lawsuits arising out of cross-border securities fraud, tracing developments in private enforcement in recent years. The paper considers the different actors involved in developing substantive regulatory norms in this area (including national legislatures, agencies and courts, as well as international bodies such as the International Organisation of Securities Commissioners) and maps the challenges slowing progress toward an effective transnational legal order.

Ralf Michaels

U.S. Law as a Transnational Legal Order

If transnational legal orders (TLOs) are defined in opposition to national legal orders (NLOs), then US law cannot be a TLO. And yet, US law is in many ways as transnational as it ever has been. In presenting US law as a TLO, I present, then a critique of the dichotomy between TLOs and NLOs, albeit a friendly one. I find, essentially, the following: First, a concept of TLOs that does not include national laws is arbitrarily confined. Second, a proper understanding of the national law of at least important western jurisdictions like the US, demonstrates their transnational character. Third, it follows that a theory of

transnational orders should, in order to be defensible, be generalized as a theory of legal orders. I inquire to what extent the theory of TLOs can serve as such a general theory.

Robert Wai

Transnational Private Law as Transnational Legal Order

This paper argues that private law should be understood to be already transnational in ways that illuminate the productive role that private law can play in relation to global regulatory challenges of transnational business conduct. The relevance and plausibility of a productive role for private law is strengthened if we see that private law has already been and remains transnational. The already transnational nature of private law is first highlighted when private law is considered as a legal practice that integrates private international law rules. Such an integrated understanding of the substance and process of transnational private law, which is not the traditional way that private law is taught and researched, highlights how recognition of and accommodation for the coexistence of other applicable legal systems is already a feature of domestic private law traditions. Secondly, and equally significantly, the core approach of private law towards private ordering has not been jurisdictionally bounded. This openness to transnational private ordering provides another crucial source of transnationalism in domestic private law, notably through support for cross-border contractual arrangements or transnational customary practices (e.g. historically significant instruments such as bills of exchange, letters of credit, or marine insurance). When these two key features of private law are considered together with other transnational influences on private law, such as the migration of theories and doctrine among national traditions, private law appears as an established transnational praxis. As praxis it offers a storehouse of techniques, but it also suggests models for how a legal system can manage cross-border complexity less through traditional public law principles of integration through sovereign hierarchy, and more through a heterarchical frame animated by a cosmopolitan recognition of the simultaneous existence of, and mutual and multiple influences among, plural foreign legal systems and non-state normative orders.

Cynthia Williams

Expanded Disclosure and Corporate Accountability: A Hopeful Critique of a Potential Transnational Legal Order

Corporate social responsibility is a subject of growing importance in business and law. Today, no analysis of corporate governance systems would be complete without considering the pressures on companies to be seen as responsible corporate citizens. One of the mechanisms that is being emphasized in both voluntary and governmental efforts to promote responsible corporate action is increasing disclosure of environmental, social and governance (ESG) information. This article first provides an overview of developments in the field, describing both requirements by governments and stock exchanges, and

voluntary initiatives. The article then uses the frame of a voluntary, transnational ESG disclosure regime, the Global Reporting Initiative (GRI), as the focus of analysis. GRI has become the global benchmark for expanded corporate disclosure. Today, 93% of the Global 250 companies voluntarily disclose more ESG information than required by law, and of these, 82% use GRI's framework for their disclosure.

GRI is successful as a normative transnational order that enhances disclosure, but is it legal? GRI has "touched down" in domestic legal requirements in a small, but growing, number of countries, and in that sense has formal legal link. For the most part, though, national and international *legal* orders have resisted efforts to require GRI-type ESG disclosure. The article will evaluate that resistance to advance a critique of using disclosure as a primary mechanism to advance corporate accountability. Yet it also will inform understanding of some weaknesses of traditional formal legal orders for purposes of advancing social welfare, and address the role of a broader concept of the legal in creating a transnational understanding of obligation that can indeed, potentially, give rise to a transnational legal order.

Christopher Whytock

Conflict of Laws, Private International Law, and Transnational Legal Order

Today's world is highly globalized. People, goods, services, money, ideas—and many other things—readily cross borders. Yet the transnational legal system, if such a system can be said to exist, is highly decentralized. Legal authority is still organized primarily by national territory, and law differs considerably across nations, reflecting nations' diverse policies and values about how to govern human activity. This raises a fundamental problem. When activity has connections to more than one nation—that is, when activity is transnational—more than one nation may plausibly have the authority to govern that activity. Which nation's laws should apply? Which nation's courts should resolve a dispute arising out of that activity? And if one nation's court decides such a dispute, what effect—if any—should the decision have in other nations? Simply put, the question is, "Who governs?" That is the central question in private international law.

There are three basic responses to this governance problem. International law tries to transcend national legal systems by creating a single body of international legal rules to govern transnational activity and a system of international courts to apply those rules. Harmonization seeks convergence and ultimately uniformity of national laws, thereby reducing the salience of the "who governs" question, but leaving application and enforcement of those laws to national legal institutions. This article examines a third response: conflict of laws (also known as private international law). Conflict of laws accepts the role of national legal institutions in governing transnational activity (unlike international law's impulse), and it accepts cross-national legal diversity (unlike harmonization's impulse). Instead, conflict of laws responds by providing rules to help nations allocate governance authority among themselves.

By allocating governance authority among nations, conflict of laws helps bring order to transnational activity in a globalized world that lacks centralized legal institutions. Yet conflict-of-laws rules are predominantly national rules and, like other fields of national law, they are cross-nationally diverse. In short, conflict of laws contributes to transnational legal order, but conflict of laws is itself transnationally disordered.

In this Essay, I use the transnational legal order (TLO) framework to explore this apparent paradox and develop four claims. First, there presently is no global conflict-of-laws TLO. Instead, there are many different national approaches to conflict-of-laws. Second, however, there are two regional conflict-of-laws TLOs: a highly institutionalized European conflict-of-laws TLO and a less institutionalized Latin American conflict-of-laws TLO. Third, there are also several emerging global conflict-of-laws TLOs with limited legal scope. Finally, even national conflict-of-laws norms are relevant to TLO research in two ways: even when they are not themselves part of a TLO, these norms can contribute to transnational legal ordering both independently, and by helping to allocate authority to decide issues. The Essay concludes by raising a number of empirical questions that could motivate future TLO research in the field of conflict of laws, including the extent to which national conflict-of-laws norms are transnationally influenced (for example, through diffusion across borders).

Peer Zumbansen

Foundations of Transnational Legal Orders: Why the Nation State Matters, and How

At various times in history, lawyers were made aware of growing gaps between the definition and aspiration of legal categories, on the one hand, and the concrete impact of those categories in the real world, on the other. In part, these reminders were brought to lawyers through empirical evidence and expert testimony from an increasingly sophisticated and organized scientific community interested and engaged in the machinery of justice. Another source of challenging lawyers' views of the world and law's operation in it has been an ever further expanding interdisciplinary investigation into the actors, norms and processes of social ordering and decision making. That law, in other words, would make much more sense when seen through the lenses of 'law and society' or of 'socio-legal studies' was as obvious as it was difficult to apply in the established routines of legal thought, education and theorizing. Questions of boundary drawing between "law" and other theories, concepts or disciplines of social, political, cultural and other ordering never just concerned matters of putting things on the right shelf or into the correct box. Much more seemed at stake, once law became relativized, de-centered, questionable as regards its foundations, its substance and its teleology.

Globalization, then, and in particular the emergence of a transnational regulatory landscape beyond and across jurisdictional as well as conceptual confines appears to have amplified and further accentuated this ongoing identity crisis of law and lawyers. The task of learning to 'think like a lawyer' (Mertz 2007) and to do so in a transnational context (Macaulay, Friedman, Mertz 2007, 1017ff) challenges the theoretical and political foundations of law but does so without the privilege of a system of material as well as ideological references

that can be negotiated and contested along the lines of right vs. left, liberal vs. conservative, and the institutionalized forms associated with these distinctions (state vs. market, public vs. private). Instead, the transnational regulatory landscape is what empirical legal scholars have always dreamt of (or, rather, seen as given), while it is the nightmare of those looking to law for stability, refuge and control. The paper will trace the development of socio-legal thought from a domestic to a global and transnational context to explore the viability of concepts such as TLO against the background of competing programs such as global administrative law and global constitutionalism, which themselves can be viewed as either more formalized TLOs or as efforts to construct more formalized TLOs.