RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

REVIEW ESSAY

INFORMATIONAL SERVICES: GOING ONLINE, GLOBAL, AND LOCAL AGAIN

The Electronic Silk Road: How the Web Binds the World Together in Commerce. By Anupam Chander. New Haven, London: Yale University Press, 2013. Pp. xii, 278. Index. $30.

In *The Electronic Silk Road: How the Web Binds the World Together in Commerce*, Anupam Chander, Professor of Law and Director of the California International Law Center at the University of California, Davis, School of Law, places the globalization of information services under the spotlight. "Net-work" or "Trade 2.0," as Chander labels this topic (p. 11), is a relatively new phenomenon of information services, delivered remotely through communication systems, on a global scale: software code preparation, call-center facilities, and accounting, radiological, and legal services are a few of the examples discussed in the book. Trade 1.0 deals with goods; Trade 2.0 deals with services. Global commerce and its quest for an optimal division of labor drive Trade 2.0, and technology enables the provision of online cross-border information services. The service providers are located in one country, India deserving prominent attention in the book, while the service recipients are located in another country, typically in the United States. Chander offers a rich description of the "net-work," based on carefully selected figures and numerous examples, as well as a close, critical evaluation of pros and cons. Importantly, he argues that services are provided in both directions of the developed-developing countries division (and he seems to avoid deliberately the North/South language), with Google, Facebook, and Apple serving as leading examples of the developed-to-developing direction—or, more accurately, the United States to the world.

I. THE ARGUMENT IN A NUTSHELL

To the intersection of economics and technology, Chander adds the law and identifies the challenges of the "net-work" (p. 2). Ultimately, the question is the familiar issue of conflict of laws: which law governs online services? Chander unpacks this overarching issue and recognizes four subissues: (1) the legal barriers to the online trade of services; (2) an inadequate legal infrastructure; (3) the question of jurisdiction; and (4) the risk of balkanization, namely, the concern that each country will impose its laws onto "its" Internet environment. In response to these challenges, he offers a thoughtful and multidimensional answer, which is composed of several elements meant to both liberalize and regulate cybertrade. As for liberalization, Chander proposes a robust infrastructure with two main elements: technological neutrality, by which he means treating offline and online services in a like manner; and dematerialization of the law, by which he means that international trade law should not only shift from a products-based paradigm to a service-based paradigm but also abandon laws that rely on physical presence and instead apply a different set of rules. As for regulation, Chander suggests "glocalization" and harmonization as two supplementing elements. "Glocalization"—the meeting of the "global" and the "local"—translates into "requiring a global service to conform to local rules" (p. 11), thus applying the law of the recipient, rather than the law of the provider. Glocalization is checked by a companion principle, harmonization of the law, where possible. I shall elaborate on these concepts later on.

https://doi.org/10.5305/amerjintelaw.108.3.0562 Published online by Cambridge University Press

This review begins by summarizing the book's foundations and main arguments along its two principal parts—the description and challenges of Trade 2.0 (chapters 1–5) and the proposed normative framework (chapters 6–9). Along the way, I make a few critical comments as to the book's main arguments. In brief, I argue that the description of the net-work is somewhat too optimistic in that it is not sufficiently sensitive to the asymmetry of the import/export balance among the developed and developing countries and in that it does not take into account particular services, such as online live pornographic services, which may evidence abuse of those involved. The discussion also adds the now-apparent risk to Trade 2.0—state surveillance—following the revelations about the practices of the U.S. National Security Agency (NSA). The review then continues with the book's normative argument, which, I argue, also downplays power relationships. Acknowledging that power relationships shape what kinds of services are provided by whom to whom and that they affect the governing law requires further nuancing of the net-work. However, Chander's overall argument is attractive and offers a fresh outlook on a fast growing aspect of our digital and commercial lives.

II. FOUNDATIONS

The book first lays out the evidence to make its case. Chapter 1 describes the shift from a global supply of goods to a global supply of services. Chander cites a report of the Organisation for Economic Co-operation and Development (OECD) estimating that one-fifth of the service jobs in developed economies will be affected by cross-border trade (p. 24). The economy provides the motivation, and the technology facilitates the "organizational revolution" of the net-work (p. 19). But the inadequate legal infrastructure raises legal risks. The author recognizes this shift and finds enormous promise in the development of the net-work, and he consequently seeks to offer ways to address the legal risks.

Chapter 2 takes us en route from the United State to other places: France, Brazil, and China. Chander argues that "Silicon Valley has emerged as the world's leading net-work provider" (pp. 36–37). U.S.-based companies such as Google, Yahoo!, and Facebook furnish information services to the world. The numbers talk: the United States exports more services than it imports, to the extent that the author concludes that "[a]t the moment, at least, the United States has a stronger claim to being the world's back office than India" (p. 38). The law—that is U.S. law—has facilitated this information-service export by strong free-speech guarantees, immunity to Internet platforms for user-generated content, and weak consumer privacy. But when the U.S. export ran into local laws that set some limits, as in anti-hate speech laws in France, user-unmasking rules in Brazil, or demands in China for the disclosure of the Internet Protocol (IP) addresses of dissidents, the legal risks became clearer. Should the law follow the services provided from its origin to the destination, or should the law of the destination apply? France, Brazil, and China insisted that their laws should apply. The U.S. companies, eventually and reluctantly, complied. Chander's discussion also explains from the outset that Trade 2.0 is not only about commerce; it is also about people and human rights.

Chapter 3 takes us en route in the other direction, from the developing countries, India in this case, to the developed world. Here, the author argues that "India and other developing countries may become the world's back office" (p. 59), drawing a parallel to the argument made in the previous chapter. What has made India a "service nation" (my term, not Chander's term, but which echoes "start-up nation"[1])? Chander points to economic liberalization, colonialism, which created language bridges, and, especially, the Indian diaspora, which created human networks that overcame the initial lack of trust. It is important to note the examples of services provided there: information technology (IT) services, such as software development, and various business processes, such as accounting, customer service, and human resource management. Another example is medical services: Indian radiologists interpret digital

[1] *See* DAN SENOR & SAUL SINGER, START-UP NATION: THE STORY OF ISRAEL'S ECONOMIC MIRACLE (2009), *available at* www.startupnationbook.com.

https://doi.org/10.5305/amerjintelaw.108.3.0562 Published online by Cambridge University Press

imaging of U.S. patients. However, as Chander reports, this medical service met legal, financial, and eventually cultural barriers. In these cases, the providers willingly tried to comply with the law of the recipients' jurisdiction.

Chapter 4 poses yet another challenge to Trade 2.0: countries, companies, or organizations may deliberately defy the law of other jurisdictions and may cling to the permissive law of their jurisdiction in order to offer their services across borders. Examples are Antigua, a country that allows online gambling; Kazaa, the former peer-to-peer online service that enabled online sharing (or, if you take the music industry's side, copyright infringement) of copyrighted music; the Pirate Bay website in Sweden, which facilitated what was considered copyright infringements in other countries; and Wikileaks, a website that disseminates secret material from various countries, the publication of which in the countries of origin might be illegal. These legal havens reflect a legal rule that applies the law of origin to the activity at stake, rather than the law of the receiving country. Countries that wish to block such offshore activities cannot take their counterparts to court in their own jurisdictions, as the defendants will not show up, and they cannot initiate legal proceedings in the country of origin, as the activity may be (at least in some of the above cases) legal. These countries' sole remedy is to attempt to block their own citizens from accessing or using such foreign services.

The next phenomenon, discussed in chapter 5, is the most popular social network today, Facebook. The author claims that "[i]n some ways, Facebook is more involved with intimate aspects of our lives than governments of liberal states" (p. 117). Note that this comment preceded the 2013 NSA revelations. Given its power, especially in the context of privacy, speech, association, and economic impact, Facebook is a target for regulation. Facebook's case illustrates the ultimate question: Which law should govern? or, in Chander's words, "[W]ho should rule Facebookistan?" (p. 138).

III. INTERMEDIATE ASSESSMENT: ASYMMETRY OF POWER

These first five chapters are the descriptive parts of the book, and they lay the foundations for its arguments to come. The diverse examples that Chander provides show the complexity of the legal web that hangs above the technological web. The choice of law that should apply in each situation immediately raises questions of free trade, respect for sovereignty, and human rights. Chander tries to achieve all goals simultaneously. For example, French limitations on Yahoo!'s ability to offer a platform for the sale of Nazi memorabilia in France interfere with free trade, mandate the application of French law in a "French" web, and protect the dignity of those offended by the sale of such items.[2] Had U.S. law applied to this scenario, which would have permitted such sales, it would have been a mix of free trade, free speech, but disrespect to the French people's choices as to the scope of freedom of expression and its contours. But this case, like the other cases discussed thus far, indicates that the matrix is even more complex: it depends on which legal systems are at stake, the kind of service, and its impact on freedom of expression or other human rights. We shall return to this increasingly complex matrix later on.

Another important point to make is that despite Chander's attempt to draw parallels between the export of services from the United States to other countries, and the export of information services from India and other developing countries to the United States, many differences persist. The developing-to-developed services are usually on a one-to-one basis: a proofreader provides a service to an author or a publisher, a radiologist provides a service to a patient and her physician, a software developer writes code for a foreign company. These relationships can be subject to a contract with low transaction costs, so as to contain a clear stipulation of the choice of law. These services, important as they are, often do not raise human

[2] *See* Ligue Contre le Racisme et l'Antisémitisme c. Yahoo! Inc. (LICRA v. Yahoo!), Tribunal de grande instance [ordinary court of original jurisdiction] Paris, May 22, 2000, Interim Order No. 00/05308 (Fr.), *available at* http://www.lapres.net/yahen.html (final ruling issued later that year); *see also* Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 169 F.Supp.2d 1181 (N.D. Cal. 2001), *rev'd en banc on other grounds*, 433 F.3d 1199 (9th Cir. 2006); Joel R. Reidenberg, *States and Internet Enforcement*, 1 U. OTTAWA L. & TECH. J. 213 (2004).

https://doi.org/10.5305/amerjintelaw.108.3.0562 Published online by Cambridge University Press

rights issues. Moreover, the provider has an incentive to adapt the services to the needs, legal interests included, of the service recipient.

The developed-to-developing services, by contrast, are technologies offered to multiple users around the world. These are one-to-many services, often subject to nonnegotiable standard-form contracts, which might affect human rights in various ways, such as enhancing free-speech opportunities on the one hand or implicating privacy rights on the other hand. Importantly, these services involve *information* technology. While proofreading, deciphering body images, and writing code involve information, the essence of these services is skill, time, and knowledge, and often they are much cheaper than the equivalent services in the United States. In other words, the information services are subject to the power of the stronger party, this party being, in most cases, the developed country, and more specifically, the United States. Thus, both the services that are provided to and those that are provided by U.S. parties accord the U.S. party with control over the law that governs the service. The world of Trade 2.0 is not a flat one; perhaps it is more American than Trade 1.0.

This concentration of control, which the network helps to facilitate, means that not only the market, but also the U.S. government, has tremendous power in subtle ways. Following the enactment of the U.S.A. PATRIOT Act[3] shortly after the terror attacks of 9/11, Niva Elkin-Koren and I pointed to the "Invisible Handshake" between the government and the private sector.[4] The government-market cooperation that took place behind the scenes enabled market players to collect personal data about users in an almost unlimited way, and it enabled the government to use this information, bypassing regular constitutional safeguards. Edward Snowden's 2013 revelations about the NSA's activities were no surprise to those familiar with the mechanism of the Invisible Handshake, perhaps other than the scope of the collection of data and its sophistication. Now it has become highly visible. That the major providers of global services are from the United States has facilitated the U.S. government's collection of personal data. This review is not the place to assess the NSA's activities, but, for the current purposes, suffice it to point out that this unholy alliance between the government and the market poses substantial risks to Trade 2.0: trust in global services is likely to decline. Reports suggested that Google considered moving its servers out of the United States,[5] and the European reaction (the United Kingdom excluded) indicated a breach of trust.[6]

IV. CHANDER'S FRAMEWORK

In returning to Chander's argument, the remainder of the book is devoted to describing a comprehensive and compelling legal framework. As mentioned earlier, Chander outlines four legal challenges of the net-work: (1) legal barriers to the free flow of the net-work; (2) inadequate legal infrastructure; (3) the very question of conflict of laws, which he phrases as a "threat to law itself" (p. 142); and (4) the concern that local control will lead to "*Balkanization*" of the Internet, namely that each country will impose its law onto "its" digital space, or to "*Stalinization*," namely repression of critical voices (pp. 142–43). To respond to these challenges, Chander offers two combined strategies: liberalization of Trade 2.0, which should enable and support it, thus answering the first two challenges; and regulation, thus answering the third and fourth challenges.

Chapter 6 examines the World Trade Organization's Dispute Settlement Body in the case between Antigua and the United States regarding online gambling.[7] This discussion enables the author to compare Trade 1.0, international trade

[3] Pub. L. No. 107-56, 115 Stat. 272 (2001).

[4] Michael D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 6 (2003).

[5] Cadie Thompson, *Google Mulled Ditching US After NSA Scandal*, CNBC, Nov. 22, 2013, *at* http://www.cnbc.com/id/101222237.

[6] *See, e.g.*, Anton Troianovski, Thomas Gryta & Sam Schechner, *NSA Fallout Thwarts AT&T*, WALL ST. J., Oct. 30, 2013, *at* http://online.wsj.com/news/article_email/SB10001424052702304073204579167873091999730-lMyQjAxMTAzMDMwMDEzNDAyWj.

[7] Appellate Body Report, United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services, WT/DS285/AB/R (adopted Apr. 20, 2005) (reported by Joel Trachtman at 99 AJIL 861 (2005)).

of goods, to Trade 2.0, international trade in services. He reviews the General Agreement on Trade in Services (GATS) and its shortcomings in addressing the globalization of information services. Chander's conclusion is the first answer to the first legal challenge: the law should support both kinds of trade—Trade 1.0 and Trade 2.0—in the same way, consequently reflecting a principle of technological neutrality for both the offline (goods and services) and the online (information services).

Chapter 7 responds to the second legal challenge, dematerialization. By this term, Chander means a legal infrastructure that promotes information-service transactions. The infrastructure that he envisions should include "real-time information transfer, low information and other transaction costs, the ability of individuals around the world to collaborate, and electronic identification" (p. 158). The purpose of this proposed toolbox is to create trust in the online world. The United Nations Commission on International Trade Law (UNCITRAL) was an important step in this direction, for example, by its introduction of electronic signatures.[8] However, other international trade instruments, such as the Convention on the International Sale of Goods[9] (CISG), actually focus on physical goods, and many of its standards, Chander argues, fall short of answering the needs of information services (p. 160). The remedy should be to revise the law so that it is not based on a material paradigm.

Responses to the third and fourth legal challenges (conflict of laws and balkanization, respectively) are the most intriguing mechanisms in Chander's toolbox: glocalization and harmonization. They are discussed in chapter 8, the epicenter of the book's argument. Borrowing from sociological literature about the meeting point of the global and the local, Chander injects glocalization into the discussion:[10] in this case, global services and local law. "Legal glocalization would require *the creation or distribution of products or services intended for a global market but customized to conform to local laws—within the bounds of international law*" (p. 169). In practice, this requirement means that the service provider should comply with the local law at the place of destination (p. 171). Chander admits that this rule defies the vision of "cyberspace enthusiasts," who would like to see a unified global Internet (p. 172). But glocalization better reflects local norms and sovereignty, and it answers the problems caused by legal havens.

However, applying the local law might cause what Chander calls "*Balkanization*" and "*Stalinization*" (p. 179): if each country imposes its territorial law onto some national cyberspace (and it is here that the physical metaphors are unhelpful, though there seems to be no better metaphor), the Internet will cease to be a global network, and some countries might impose restrictive laws. Chander raises additional concerns, but these are the main ones. Chander's answer is to supplement glocalization with the equally important principle of harmonization: states should attempt to reach agreement on legal rules (pp. 179–80). The result is a general maxim: "Harmonize where possible, and glocalize where necessary" (p. 191). Chander admits that this maxim does not answer "difficult questions" when the two principles conflict (*id.*). It is here that his argument is most vulnerable. I shall return to this point shortly.

Finally, chapter 9 takes us back to China. After explaining India's relative power in Trade 2.0 earlier, Chander now asks: "[W]hy did . . . China, the champion of international goods, not also become a champion of trade in services?" (p. 193). The explanation is found in China's repression that keeps foreign companies away from China and does not enable local Chinese companies to offer their services outside China (*id.*). The answer

[8] UNCITRAL, MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT 2001, UN Sales No. E.02.V.8 (2002), *available at* http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf.

[9] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, UN Doc. A/CONF.97/18, 19 ILM 668, 671 (1980) (entered into force Jan. 1, 1988).

[10] I have applied glocalization in a different context, that of the conflict between copyright law (now more global than ever) and speech regulations (local norms). Michael D. Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO ARTS & ENT. L.J. 491 (2006).

to this repression, Chander suggests, is in (democratic) companies' self-regulation, pursuant to Google's mantra of "do no evil" (p. 199).

V. THE SHORTCOMINGS OF GLOCALIZATION AND HARMONIZATION

I join Chander's observations on the positive sides of and the much-needed sobering-up from cyber utopia. But missing from this picture is the place of power relations among different kinds of importers/exporters of information services situated in different political, social, economic, and legal contexts. Once we observe more nuances, glocalization might be somewhat less attractive. Harmonization, too, suffers from the same problem: it is not sensitive enough to the various manifestations of power divisions. Unfortunately, no panacea exists for these legal challenges.

We can draw a matrix of possibilities, in addition to the parameters of import/export of information services: (1) What kind of service is at stake? Is it a pure commercial service, such as call centers, or does it involve political-cultural norms? (2) What sort of information is involved in the service? Using personal data about citizens in the country that enables foreigners to access (or export) such data in order to import information services, as with offshore customer-relationship management, is different from importing nonpersonal information. The former case carries a direct, legitimate interest of the exporting-data–importing-services country as to its citizens' personal data, which is absent in the latter case. (3) Which countries are involved? What is their relative power vis-à-vis each other?

Let us consider a few situations. If the law in the country of origin provides a lower standard than the country of destination, for example in medical services, then glocalization will require meeting the higher medical standard, which might have a positive spillover in the country of origin. It is hard to think of a case where the standard in the destination country is lower than that of the country of origin. Another situation is not about the quality of the service, but about its legality. If an activity is legal in the country of origin but illegal in the country of destination, such as the online gambling in the Antigua-U.S. case, glocalization will not allow such services. This result might be good or bad, depending on one's views as to the matter itself. The reversed situation, namely that the activity is illegal in the country of origin but legal in the country of destination, for example, a French company that would offer Nazi memorabilia for sale to Americans only is unlikely to occur. Glocalization might allow such transactions, but the transaction is unlikely to be offered in the first place as the providers might risk violating the law in their own country. A third situation relates to political morality, for example a service that carries with it a democratizing power, such as a social network or a search engine that does not interfere with the search results. Glocalization will allow the country of destination to block the search results of which its government disapproves. China, North Korea, Iran, and other countries regularly do so. In such cases, glocalization runs afoul of freedom.

Unfortunately, while global unified and ethical standards are worthy of pursuit, harmonization cannot answer this latter concern: the repressive country is unlikely to join a harmonization project if it jeopardizes what the country considers to be its own core mores. The process of achieving harmonization is sometimes harmful. Put differently, there is rarely any harmony in harmonization. Global declarations may set a moral and legal standard, but they lack the power of hard law. Such declarations are soft law, even if they are influential, such as the Universal Declaration of Human Rights, but this illustration is the exception rather than the rule. Other harmonized agreements have been achieved only by way of maneuvering in a sophisticated diplomatic manner, taking advantage of political weaknesses, shifting from one forum to another, according to the needs of the stronger party, bundling various issues, and many other tactics. The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a well-known example.[11]

Complying with the law of the destination of the service might have yet other unintended

[11] *See* Peter K. Yu, *Are Developing Countries Playing a Better TRIPS Game?*, 16 UCLA J. INT'L L. & FOREIGN AFF. 311 (2011).

https://doi.org/10.5305/amerjintelaw.108.3.0562 Published online by Cambridge University Press

consequences. For instance, glocalization *à la* Chander favors large companies that can afford to tailor their activities to each separate local market. Google can do it, but for the new start-up just put together in Bangalore, this endeavor is costly. In other words, applying the law of the service recipients may protect the consumers, but it raises new and high barriers of entry into the global market, favoring incumbent global companies, which are in most cases situated in developed countries. A related side effect is that the combination of the global economy and Chander's proposed glocalization principle incentivizes service providers to tailor their services to the laws and mores of the country of destination, often neglecting their own locality. For example, think of an Israeli start-up that develops a sophisticated filtering technology meant to prevent children from accessing pornography. The designers of the technology embed their understanding of the definition of pornography in the country where they intend to market their product. The designers in Kfar Saba in Israel may well attempt to imagine the community standards in, for example, faraway places like Alabama or California.[12] The local Israeli market is simply too small to bother about. Parents in liberal Tel Aviv will be offered the same filters, with its embedded values, as those in the more conservative U.S. Bible Belt, or perhaps the more permissive U.S. West Coast. In other words, complying with a foreign law might be at the expense of the local community. What matters is the size of the markets in the areas of the importer and exporter of information services.

Chander beautifully weaves together theory, practice, trade, culture, and politics into a complex yet clear argument, a sophisticated yet down-to-earth analysis, and a beautifully written text. While glocalization and harmonization are not perfect, the alternatives, as Chander elaborates, are probably worse. His discussion and arguments are timely and crucial for enabling a better global electronic environment. The book is a highly important contribution to the discussion about international trade, globalization studies, and the ongoing debate about the role of the law in a dynamic technological setting. Chander paves a new path in all these discourses. His analysis is informed by international law and conflict of laws, together with a deep understanding of the implications of globalization. He constantly reminds us of the human face of the net-work—to use the globalization studies lingo—and he is keenly sensitive to the human rights aspects of the topic at stake. *The Electronic Silk Road* opens up a new set of issues with which the global or local "we" are bound to engage in the near future.

MICHAEL BIRNHACK
Faculty of Law, Tel Aviv University

[12] U.S. courts follow a three-prong test to define obscene material, which is not protected by the First Amendment. *See* Miller v. California, 413 U.S. 15 (1973). The first prong is whether the average person, applying contemporary *community standards*, would find that the work, taken as a whole, appeals to the prurient interest. *Id.* at 30–31.

BOOK REVIEWS

Taming Globalization: International Law, the U.S. Constitution, and the New World Order. By Julian Ku and John Yoo. Oxford, New York: Oxford University Press, 2012. Pp. viii, 272. Index. $35.

According to Julian Ku of Hofstra University School of Law and John Yoo of the University of California, Berkeley, School of Law, globalization poses a significant threat to the U.S. constitutional system of governance. In their recent book, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order*, they seek to reassure readers that this threat can be deflected. If their prescriptions are followed, Ku and Yoo argue, the United States can avoid constitutional problems while continuing to reap the benefits of international cooperation. Ku and Yoo insist that they are neither trying to stop globalization (a hopeless endeavor in any event) nor categorically opposed to the international community's efforts to regulate globalization's effects. Instead, their approach is "accommodationist" (p. 13); they offer three proposals to alleviate the "tension" between international governance and the U.S. Constitution (p. 2). First, U.S. courts should presume that treaties are not self-executing

https://doi.org/10.5305/amerjintelaw.108.3.0562 Published online by Cambridge University Press