

## Transnational Judicial Governance

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# TRANSNATIONAL JUDICIAL GOVERNANCE

*Christopher A. Whytock\**

## INTRODUCTION

This Essay focuses on “transnational judicial governance”—that is, the regulation of transnational activity by domestic courts.<sup>1</sup> Specifically, the Essay makes three points: First, transnational judicial governance is an important form of global governance that interacts with, but is distinct from, other forms of global governance such as international institutions, transgovernmental networks, and private governance. Second, it appears that the influence of U.S. courts in transnational judicial governance may be declining as the transnational litigation system becomes increasingly multipolar. Third, transnational judicial governance seems to be a normatively mixed bag. But, for better or worse, it is likely that domestic courts will continue to play an important role in global governance.

## I. TRANSNATIONAL JUDICIAL GOVERNANCE AND OTHER FORMS OF GLOBAL GOVERNANCE

Legal scholars and political scientists have devoted considerable attention to the role of domestic courts in domestic governance,<sup>2</sup> as well as to the role of international courts in global governance.<sup>3</sup> So far, however,

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<sup>1</sup> See Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 71 (2009) [hereinafter Whytock, *Domestic Courts*] (defining “transnational judicial governance”).

<sup>2</sup> Examples of scholarship on the role of domestic courts in domestic governance include RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* (2002); *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjörn Vallinder eds., 1995); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

<sup>3</sup> Examples of scholarship on the role of international courts in global governance include KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* 219–20 (2001) (emphasizing the role of the European Court of Justice in European governance); *COURTS CROSSING*

they have devoted little attention to the role of domestic courts in global governance.<sup>4</sup> Yet domestic courts are routinely involved in the regulation of transnational activity.<sup>5</sup> This section briefly discusses the important, but often neglected, role of domestic courts in global governance, and highlights the relationship between transnational judicial governance and other forms of global governance.

A. *The Global Governance Functions of Domestic Courts*

Domestic courts perform two basic global governance functions: they allocate authority to regulate transnational activity (a jurisdictional function), and they determine rights and obligations of transnational actors (a substantive function). These functions correspond to two fundamental questions of global governance: Who governs? And who gets what?

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BORDERS: BLURRING LINES OF SOVEREIGNTY (Mary L. Volcansek & John F. Stack, Jr., eds., 2005) (reviewing the role of international courts in world politics); Wayne Sandholtz & Alec Stone Sweet, LAW, POLITICS, AND INTERNATIONAL GOVERNANCE, in THE POLITICS OF INTERNATIONAL LAW 238 (Christian Reus-Smit ed., 2004) (discussing global governance implications of the European Court of Justice).

<sup>4</sup> *But see, e.g.,* Sarah Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745 (2011) (positing a link between domestic courts' application of extraterritorial law and national policy implementation in other countries); Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459 (2009) (exploring how domestic courts have come to regulate persons and conduct outside their states' borders by claiming jurisdiction over transactions with local and extraterritorial elements); Whytock, *Domestic Courts*, *supra* note 1, at 75 (emphasizing two main functions of domestic courts in global governance: allocating authority among states and determining rights and obligations of transnational actors).

<sup>5</sup> A closely related point is that the private international law (or "conflict of laws") principles applied by domestic courts play an important role in global governance. *See* Karen Knop et al., *Forward*, 71 LAW & CONTEMP. PROBS. 1 (2008) (noting "connection between private international law and global governance . . . that is largely ignored by insider experts"); Horatia Muir-Watt, *Private International Law as Global Governance: Beyond the Schize, from Closet to Planet 7* (2011) (noting "governance potential of private international law"), available at [http://works.bepress.com/horatia\\_muir-watt/1](http://works.bepress.com/horatia_muir-watt/1); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 735–43 (2009) [hereinafter Whytock, *Myth of Mess*] (analyzing global governance functions of international choice of law).

## 1. Who Governs? Allocation of Global Governance Authority

Transnational activity by definition has connections to more than one state—either because citizens of more than one state are involved or because the activity or its effects occur in more than one state’s territory.<sup>6</sup> These multi-state connections mean that more than one state may claim the authority to govern that activity.<sup>7</sup> Which of these states should govern? This “who governs” question has three basic dimensions, corresponding to three different types of governance authority: prescriptive authority (Which state’s laws should govern particular transnational activity?), adjudicative authority (Which state’s courts should adjudicate disputes arising out of that activity?), and enforcement authority (Which state should enforce a law or court decision that applies to transnational activity?).<sup>8</sup>

Domestic courts help answer these questions. For example, when U.S. courts decide whether to apply U.S. statutes extraterritorially, or when they make international choice-of-law decisions, they help allocate prescriptive authority.<sup>9</sup> When they decide whether to assert personal jurisdiction over a defendant or whether to grant a *forum non conveniens* motion to dismiss a suit in favor of a foreign court, they help allocate adjudicative authority.<sup>10</sup> And when they decide whether to give extraterritorial effect to subpoenas issued by U.S. regulatory agencies or injunctions issued by U.S. courts, they help allocate enforcement authority.<sup>11</sup>

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<sup>6</sup> See STEVEN VERTOVEC, *TRANSNATIONALISM 2* (Routledge ed., 2009) (discussing the “cross-border relationships, patterns of exchange, affiliations and social formations spanning nation-states” and how the growth of interest in transnationalism parallels the growth of social scientific interest in globalization over the same period).

<sup>7</sup> See Cristina M. Rodriguez, *Building Capacity for the Transnational Regulation of Migration*, 110 COLUM. L. REV. 1, 13 (2010) (examining the U.S.-Mexico relationship and conflicting interests in controlling governance of transnational activity, particularly drug trafficking and other cross-border crimes).

<sup>8</sup> These three types of governance authority correspond to the three basic categories of jurisdiction under international law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) (defining prescriptive jurisdiction as a state’s jurisdiction “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things”; adjudicative jurisdiction as a state’s jurisdiction “to subject persons or things to the process of its courts or administrative tribunals”; and enforcement jurisdiction as a state’s jurisdiction “to induce or compel compliance or to punish noncompliance with its laws or regulations”).

<sup>9</sup> See Whytock, *Domestic Courts*, *supra* note 1, at 80–81 (explaining that domestic courts help allocate prescriptive authority by deciding whether to apply domestic law extraterritorially and by making international choice-of-law decisions).

<sup>10</sup> See *id.* at 77–80 (explaining how courts help allocate adjudicative authority by applying personal jurisdiction doctrine, the *forum non conveniens* doctrine, and other doctrines).

<sup>11</sup> See *id.* at 81–83 (explaining how courts help allocate enforcement authority); see

In addition to this “horizontal” inter-state dimension of allocation, domestic courts help allocate governance authority “vertically” between domestic and international institutions. For example, when U.S. courts decide whether a treaty is self-executing, whether to recognize a principle of customary international law, or whether to give priority to domestic or international law in the event of a conflict between the two, they help allocate governance authority along this domestic-international dimension.<sup>12</sup>

Domestic courts also help allocate governance authority along a third, private-public dimension. For example, by determining whether to apply non-state norms such as commercial usages or *lex mercatoria* on the one hand, or state law on the other hand, they influence whether private or public rules will govern transnational activity; and by determining whether to enforce an arbitration agreement, they can influence whether a private arbitrator or a public court will exercise adjudicative authority over a transnational dispute.<sup>13</sup>

In summary, domestic courts perform a jurisdictional global governance function by helping to allocate three types of governance authority over transnational activity: prescriptive authority, adjudicative authority, and enforcement authority. They do so along three dimensions: between states, between domestic and international institutions, and between private and public actors. Globalization entails increased transnational activity over which multiple states may have legitimate claims to govern.<sup>14</sup> Moreover, with the spread of international law and international courts, there are difficult choices to make about whether they or domestic institutions should govern particular transnational activity. Likewise, with private actors

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*also* *FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1315–17 (D.C.Cir. 1980) (explaining the limitations on courts’ enforcement jurisdiction and the distinction between the power to create laws that prescribe certain conduct and the authority to enforce those prescriptive rules); *S.E.C. v. Sabhlok*, 2009 WL 3561523, at \*5–6 (N.D. Cal. Oct. 30, 2009) (recognizing limitations on jurisdiction to enforce a Walsh Act subpoena).

<sup>12</sup> See Whytock, *Domestic Courts*, *supra* note 1, at 83–88 (explaining how these decisions help allocate authority along this vertical dimension).

<sup>13</sup> See *id.* at 89–90 (explaining how these decisions help allocate authority between state and non-state actors). See *also* *Jones v. Sea Tow Servs. Freeport NY Inc.*, 30 F.3d 360, 366 (2d Cir. 1994) (reversing an order compelling arbitration, finding it improper where an arbitration clause selected English law and an English forum, both parties were U.S. citizens, and the vessel in question was salvaged from U.S. waters); see *also* *Matabang v. Carnival Corp.*, 630 F. Supp. 2d 1361, 1366–67 (S.D. Fla. 2009) (denying a motion to compel arbitration).

<sup>14</sup> See Whytock, *Domestic Courts*, *supra* note 1, at 90 (noting that “[b]ecause transnational activity by definition has connections to more than one state, more than one state may have a basis for legitimately exercising the authority to govern it”).

increasingly claiming authority to govern transnational activity traditionally governed by states, the allocation of governance authority between private and public institutions also poses serious challenges.<sup>15</sup> As a result, the jurisdictional function of domestic courts in global governance is likely to be of growing importance.

## 2. Who Gets What? Determination of Rights and Obligations of Transnational Actors

It is well understood that domestic courts are important in domestic governance not only because they resolve discrete disputes—itsself a critical governance function—but also because when they do so, they contribute to the authoritative allocation of resources within a society.<sup>16</sup> Domestic courts perform a similar function in global governance by determining rights and obligations of transnational actors.<sup>17</sup>

Neither legal scholars nor political scientists have systematically explored the implications of this judicial function for global governance. But existing research on three types of transnational litigation demonstrates its importance. In transnational regulatory litigation, domestic courts apply domestic regulatory norms to determine rights and obligations of transnational actors.<sup>18</sup> In transnational public law litigation, “[p]rivate individuals, government officials, and nations sue one another directly, and are sued directly, in a variety of judicial fora, most prominently, domestic courts,” based on rights derived from both domestic and international law.<sup>19</sup> And in transnational private litigation, domestic courts resolve transnational disputes under different states’ private law rules—such as rules governing torts, contracts and property—rules that reflect these states’ respective distributive and regulatory policies.<sup>20</sup>

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<sup>15</sup> See THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE, 4–7 (Rodney Bruce Hall & Thomas Biersteker eds., 2002) (highlighting the rise of private power in global governance).

<sup>16</sup> See Martin Shapiro, *From Public Law to Public Policy, or the “Public” in “Public Law,”* 5 POL. SCI. & POL. 410, 413 (1972) (discussing “judicial allocation of values”); see also Robert M. Cover, *Dispute Resolution: A Foreword*, 88 YALE L.J. 910, 911 (1979) (noting that courts both solve disputes and distribute resources).

<sup>17</sup> See Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT’L. L. 281, 321 (1999) (illustrating how domestic courts can determine rights and obligations of transnational actors in the human rights context).

<sup>18</sup> See generally Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251 (2006) (defining and discussing transnational regulatory litigation).

<sup>19</sup> See generally Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) (defining and discussing transnational public law litigation).

<sup>20</sup> See generally Robert Wai, *Transnational Private Litigation and Transnational*

Notwithstanding the differences between these different types of transnational litigation, in all three contexts one sees domestic courts performing a substantive global governance function: the determination of rights and obligations in ways that contribute to the authoritative allocation of resources among transnational actors.<sup>21</sup> In this way, domestic courts help answer a second fundamental question of global governance: Who gets what?

*B. The Transnational Shadow of the Law: Strategic Behavior and Other Forms of Global Governance*

The global governance functions of domestic courts are important not only because of their impact on litigants, but also because of their influence beyond borders and beyond the parties to particular disputes.<sup>22</sup> Extending Mnookin and Kornhauser's concept, I call this the "transnational shadow of the law."<sup>23</sup>

1. Transnational Judicial Governance and the Strategic Behavior of Transnational Actors

For example, domestic court decisions can affect the strategic behavior of transnational actors. Prior court decisions influence actors' expectations about future court decisions. Because the strategic behavior of transnational actors often depends on their expectations about future domestic court decisions regarding their activity, domestic court decisions can influence

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*Governance*, in CRITICIZING GLOBAL GOVERNANCE 243 (Markus Lederer & Philipp S. Müller eds. 2005) (defining and discussing transnational private litigation).

<sup>21</sup> See Robert Wai, *Transnational Private Law and Private Ordering In a Contested Global Society*, 46 HARV. INT'L L. J. 471, 474 (2005) (discussing how domestic courts redistribute resources between actors in private litigation); Whytock, *Domestic Courts*, *supra* note 1, at 91–96 (arguing that one of the basic global governance functions of domestic courts is the determination of rights and obligations of transnational actors).

<sup>22</sup> See Buxbaum, *supra* note 18, at 254 (arguing that domestic courts influence the transnational process on a global scale by recognizing and enforcing international norms); Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT'L L. 449, 453 (2008) (arguing that "transnational litigation is the foundation of a form of global governance, whereby judges make decisions that not only directly affect the parties to particular disputes, but also indirectly regulate the behavior of actors who engage in activity in the transnational shadow of the law").

<sup>23</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951, 972–73 (1979) (describing the "shadow of the law" concept in domestic context); Whytock, *Domestic Courts*, *supra* note 1, at pt. III (extending concept to transnational activity).

that activity.<sup>24</sup> For example, international choice-of-law decisions by domestic courts can influence transnational activity by helping transnational actors determine which state's laws would be applied to their activity in the event of litigation—and, in the same way, these decisions can facilitate bargaining among transnational actors.<sup>25</sup> Similarly, the personal jurisdiction and forum non conveniens decisions of a particular state's domestic courts can influence forum shopping behavior by shaping litigants' expectations about whether a suit would be able to proceed in that state.<sup>26</sup>

## 2. The Relationship Between Transnational Judicial Governance and Other Types of Global Governance

Of course, transnational judicial governance is only one possible method of global governance. But the transnational shadow of the law extends to other forms of governance. The most familiar (even if not the most pervasive) approach to global governance involves international institutions, such as international law (e.g. the law of the sea), international organizations (e.g. the United Nations), and international courts (e.g. the International Court of Justice).<sup>27</sup>

Another method of global governance consists of transgovernmental networks between the regulatory agencies of different states.<sup>28</sup>

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<sup>24</sup> See Whytock, *Domestic Courts*, *supra* note 1, at 98–101 (explaining impact of domestic court decisions on the strategic behavior of transnational actors). See also Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. INT'L ECON. L. 1297, 1306 (2004) (discussing the interplay between lawmaking and transnational actors and how procedural choices of courts can influence transnational activity).

<sup>25</sup> See Whytock, *Myth of Mess*, *supra* note 5, at 742; see also Ralf Michaels, *Two Economists, Three Opinions? Economic Models for Private International Law - Cross-Border Torts as Example*, in AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 143, 156 (Jurgen Basedow & Toshiyuki Kono eds., 2006) (noting that the predictability of applicable law may enable parties to either settle in light of the particular applicable law or litigate regardless of the choice of law).

<sup>26</sup> See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 487 (2011) [hereinafter Whytock, *Forum Shopping*] (explaining that, other things being equal, plaintiffs are more likely to file in a particular court if they expect that the particular court will make a favorable court access ruling).

<sup>27</sup> See Jose E. Alvarez, *International Organizations as Law-maker*, 31 SUFFOLK TRANSNAT'L L. REV. 591 (2005) (emphasizing the importance and “practical significance” of international organizations in global governance); see also Katrina C. Szakal, *Manual on International Courts and Tribunals*, 32 N.Y.U. J. INT'L L. & POL. 858, 858 (2000) (observing that international adjudicatory authorities have jurisdiction over a variety of areas of law and that use of these authorities to resolve international disputes has become increasingly common).

<sup>28</sup> See Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 216 (2003) (discussing the



Transgovernmental networks are “pattern[s] of regular and purposive relations among like government units working across . . . borders.”<sup>29</sup> An example of a transgovernmental network is the active cooperative relationship between antitrust authorities in the United States and the European Union.<sup>30</sup> Transnational judicial governance itself may sometimes take the form of transgovernmental networks, particularly at the highest levels of national judiciaries.<sup>31</sup> However, it is likely that most domestic judges—especially the busy trial court judges on the front lines of transnational litigation—usually will have insufficient time and resources to actively participate in networks of regular and purposive relations with their foreign counterparts.<sup>32</sup> Therefore, it is likely that most transnational judicial governance occurs outside the context of transgovernmental networks.

A third approach to global governance is private global governance, whereby private actors regulate transnational activity.<sup>33</sup> For example, private actors play an important role in international standard setting,<sup>34</sup> and

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reasons transgovernmental networks are often thought to be the most efficient means of global governance). *See generally* ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (describing transgovernmental networks).

<sup>29</sup> *See* SLAUGHTER, *supra* note 28, at 14 (defining transgovernmental networks as regular and constructive relations among like governments working across borders).

<sup>30</sup> *See* Christopher A. Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation*, 23 B.U. INT'L L.J. 1, 39–43 (2005) (explaining the transgovernmental relationship between antitrust authorities in the United States and the European Union).

<sup>31</sup> *See* SLAUGHTER, *supra* note 28, at 34 (discussing transgovernmental networks of judges).

<sup>32</sup> However, U.S. bankruptcy judges sometimes directly engage with their foreign counterparts in global bankruptcy cases. *See id.* at 94–96 (noting that U.S. bankruptcy judges sometimes directly engage with their foreign counterparts in global bankruptcy cases).

<sup>33</sup> *See* Morton Ougaard, *Private Institutions and Business Power in Global Governance*, 14 GLOBAL GOVERNANCE 387, 387 (2008) (noting the influence private actors have on global governance and standard setting). *See generally* *Special Issue, Private Regulation in the Global Economy*, 12 BUS. & POL., no. 3 (2010), <http://www.bepress.com/bap/vol12/iss3/> (conceptualizing and describing examples of private governance).

<sup>34</sup> *See* Eyal Benvenisti, *The Move from Institutions? Substituting International Law*, 100 AM. SOC'Y INT'L L. PROC. 289, 292 (2006) (discussing instances where private actors have coordinated to regulate international action); THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE, *supra* note 15 (discussing the increased influence private actors have on international governance standards). *See generally* Tim Büthe & Walter Mattli, *Accountability in Accounting? The Politics of Private Rule-Making in the Public Interest*, 18 GOVERNANCE 399 (2005) (analyzing private global standard setting in accounting).

private arbitral institutions offer dispute resolution services that are widely used by transnational actors.<sup>35</sup>

Even combined, these methods of global governance do not extend to all transnational activity. But activity to which these international, transgovernmental and private governance methods do not extend are not necessarily ungoverned. To the contrary, they may be governed by domestic law—and when this is the case, domestic courts, as explained above, can help determine which state's domestic law governs.<sup>36</sup> Even when one of these three methods of global governance do apply to particular transnational activity, they may overlap with domestic regulations—here, too, domestic courts can play a significant role by allocating authority along the domestic-international dimension or the private-public dimension.<sup>37</sup> In these ways, domestic courts can help fill global governance gaps and resolve governance conflicts.

More fundamentally, these other methods of global governance depend significantly on domestic courts for their effectiveness.<sup>38</sup> For example, domestic courts can support efforts to govern through international institutions by contributing to the development of international law,<sup>39</sup> and they can support (or limit) those efforts by enforcing (or declining to enforce) international law and the judgments of international courts.<sup>40</sup>

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<sup>35</sup> See MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS & JUDICIALIZATION* 334 (2002) (noting that private parties increasingly use private arbitration to resolve disputes that arise from trans-border commercial activity); Christopher A. Whytock, *Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration*, 12 *BUS. & POL.*, no. 3, 5–8 (2010), available at <http://www.bepress.com/bap/vol12/iss3/art10/> [hereinafter Whytock, *Private-Public Interaction*] (empirically documenting the rise of transnational commercial arbitration).

<sup>36</sup> See *supra* Part I.A.1.

<sup>37</sup> See *supra* Part I.A.1; see also Melissa A. Waters, *Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 *YALE J. INT'L L.* 455, 458 (2007) (discussing the importance of domestic courts in the transnational legal process).

<sup>38</sup> For a more detailed discussion of how domestic courts can support (or hinder) other methods of global governance, see Whytock, *Domestic Courts*, *supra* note 1, at 103–14.

<sup>39</sup> See BENEDETTO CONFORTI, *INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS* 104 (René Provost trans., 1993) (noting that domestic courts add a greater body of case law to the interpretation of treaties than do international tribunals); see also Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 *U. RICH. L. REV.* 99, 137 (1994) (positing that a unified commitment by judicial institutions is more likely to establish international rule of law than a single international court).

<sup>40</sup> See Whytock, *Domestic Courts*, *supra* note 1, at 104–11 (explaining how domestic courts can support or hinder governance through international law and international courts); see also Melissa A. Waters, *Mediating Norms and Identity: the Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 *GEO. L.J.* 487, 501 (2005) (finding that participation of domestic courts in the transnational judicial dialogue plays a significant role in the creation of international legal norms).

Insofar as domestic courts are involved in the interpretation, application and review of the regulations and other decisions of government agencies that are part of transgovernmental networks, domestic courts can provide support for those networks. And domestic courts support private global governance by interpreting and enforcing transnational contracts.<sup>41</sup> In particular, they provide critical support for the transnational commercial arbitration system by enforcing arbitration agreements and arbitral awards.<sup>42</sup> Of course, these alternative forms of governance do not rely entirely or necessarily even primarily on domestic courts. But domestic courts can enhance the effectiveness of these alternative methods by providing support, and can sometimes hinder them by withholding support.

In summary, the effects of domestic court decisions in transnational litigation radiate beyond borders and beyond the parties to particular lawsuits.<sup>43</sup> Domestic courts not only influence the strategic behavior of transnational actors, but also provide support for other methods of global governance, including international institutions, transgovernmental networks, and private governance.

## II. INCREASING MULTIPOLARITY IN TRANSNATIONAL JUDICIAL GOVERNANCE?

What is the role of the United States in transnational judicial governance? The conventional wisdom is that, for a variety of reasons, the United States is the leading provider of courts and law for transnational disputes, perhaps along with England. Thus, the general impression seems to be that the transnational litigation system is unipolar, or perhaps bipolar. This would imply that the United States is among the most influential participants in transnational judicial governance.

But several empirical trends seem to indicate that other countries are playing an increasingly influential role in the transnational litigation system.

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<sup>41</sup> See Whytock, *Domestic Courts*, *supra* note 1, at 111–14 (explaining how domestic courts can support or hinder governance through private institutions, including private contracting and transnational arbitration).

<sup>42</sup> See Christopher R. Drahozal, *Penn State Law Review Symposium: Building the Civilization of Arbitration: Private Ordering and International Commercial Arbitration*, 113 PENN ST. L. REV. 1031, 1040 (2009) (arguing that public courts play an important role in the process of enforcing international arbitration awards); Whytock, *Private-Public Interaction*, *supra* note 35, at 18–22 (explaining how domestic courts help solve enforcement problems in transnational commercial arbitration).

<sup>43</sup> Cf. Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117, 121 (Keith O. Boyum & Lynn Mather eds., 1983) (referring to “[t]he [r]adiating [e]ffects of [c]ourts” in the domestic context).

These trends suggest that compared to other states, the influence of the United States in transnational judicial governance may be declining.

First, according to data collected by the Administrative Office of the U.S. Courts, alienage litigation—that is, transnational litigation over which federal subject matter jurisdiction exists because the suit is between a U.S. citizen and a foreign citizen—is declining.<sup>44</sup> Transnational tort claims are declining, which would seem to suggest less ex post forum shopping into U.S. courts by plaintiffs;<sup>45</sup> and transnational contract claims are likewise declining, which would seem to suggest fewer ex ante forum selection clauses favoring U.S. courts.<sup>46</sup> The U.S. Supreme Court's recent decision in *J.M. McIntyre Machinery, Ltd. v. Nicastro*<sup>47</sup>—which rejected personal jurisdiction in a suit by a U.S. plaintiff against a foreign defendant for an injury caused in New Jersey by a machine manufactured by the defendant<sup>48</sup>—suggests that this trend will continue.

Second, there is evidence of a growing number of foreign judgments being brought to the United States for enforcement. Unfortunately, there is not good data on foreign judgment enforcement in the United States. But analysis of opinions published in Westlaw by the U.S. District Court for the Southern District of New York indicates an overall upward trend between 1990 and 2009.<sup>49</sup> This trend is consistent with the observations of transnational litigators who have identified foreign judgment enforcement as a growing field of legal practice in the United States.<sup>50</sup> If there is indeed an increase in foreign judgments, this would seem to suggest an underlying

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<sup>44</sup> See Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments and Foreign Law*, 18 SW. J. INT'L L. 31, 34 (2011) (illustrating in a chart that alienage suits involving torts and contract claims have experienced an overall decline in the period from 1996 to 2005).

<sup>45</sup> Whytock, *Forum Shopping*, *supra* note 26, at 510–11 (emphasizing that if there is a wave of foreign plaintiffs in the U.S. federal court system, it is not a result of alienage claims).

<sup>46</sup> See Quintanilla & Whytock, *supra* note 44, at 33 (stating that “the decline in transnational contract claims suggests that the world’s commercial actors may be negotiating fewer forum selection clauses that provide for litigation in the United States.”).

<sup>47</sup> 131 U.S. 2780, 2792 (2011).

<sup>48</sup> *Id.* (concluding that New Jersey did not have personal jurisdiction over petitioner).

<sup>49</sup> See Quintanilla & Whytock, *supra* note 44, at 36–37.

<sup>50</sup> See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 1078 (4th ed. 2007) (noting “increasingly frequent efforts by courts and legislatures around the world to impose substantial judgments against companies perceived to have the wherewithal to pay them”); see also Press Release, Gibson Dunn Launches Transnational Litigation and Foreign Judgments Practice Group, Dec. 15, 2010, available at <http://www.gibsondunn.com/news/Pages/GibsonDunnLaunchesTransnationalLitigationandForeignPracticeGroup> (announcing the creation of a new practice group focused on representing clients in foreign judgment enforcement actions).

increase in transnational litigation in foreign courts. Moreover, this trend would suggest that if U.S. courts in some ways function as “world courts,”<sup>51</sup> they may increasingly be perceived less as the world’s trial courts and more as the world’s appellate courts as they review the judgments of foreign courts to decide whether they are enforceable.<sup>52</sup>

Third, there is evidence that U.S. courts are applying the law of other countries with increasing frequency. Contrary to the conventional wisdom, recent empirical analysis suggests that U.S. judges making international choice-of-law decisions are not systematically biased in favor of U.S. law.<sup>53</sup> Moreover, an analysis of decisions of the U.S. District Court for the Southern District of New York shows a steady increase since 1990 in the number of references to Rule 44.1 of the Federal Rules of Civil Procedure, which is the rule governing determinations of foreign law.<sup>54</sup> This trend suggests that even when U.S. courts do adjudicate transnational disputes, foreign law is increasingly being applied to govern the underlying transnational activity.

These are just snapshots of discrete trends—but together they provide some support for the conjecture that transnational judicial governance has been, and will continue to be, increasingly multipolar.

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<sup>51</sup> See Ralf Michaels, *U.S. Courts as World Courts*, 12 WASEDA PROCEEDINGS OF COMPARATIVE LAW (2009), available at [http://wine.wul.waseda.ac.jp/record=b2576729\\*eng](http://wine.wul.waseda.ac.jp/record=b2576729*eng).

<sup>52</sup> Cf. *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000) (Posner, J., concurring) (expressing concern that by reviewing foreign judgments too closely, U.S. courts risk “in effect giv[ing] the judgment [debtor] a further appeal on the merits”). Ordinarily, however, the review of foreign judgments by U.S. courts is far less searching than appellate review of lower court decisions within the U.S. legal system. See generally Christopher A. Whytock & Cassandra B. Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, pt. I.B (2011) (discussing the judgment enforcement doctrine).

<sup>53</sup> See Whytock, *Myth of Mess*, *supra* note 5, at 764–69 (providing empirical evidence suggesting that U.S. judges are not biased in favor of domestic law in their international choice-of-law decisions).

<sup>54</sup> See Quintanilla & Whytock, *supra* note 44, at 38 (empirically documenting this increase). Rule 44.1 provides as follows: “A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.” FED. R. CIV. P. 44.1.

## III. TRANSNATIONAL JUDICIAL GOVERNANCE: FOR BETTER OR WORSE?

Is it a good thing that domestic courts play an important role in global governance? On the one hand, at least in the more “high politics” world of foreign relations law, there are plausible arguments to be made that courts are not institutionally well suited to get involved in transnational matters. On the other hand, empirical research suggests that U.S. district court judges do a surprisingly good job applying frustratingly vague principles of transnational litigation, including choice-of-law principles and the forum non conveniens doctrine.<sup>55</sup> Empirical evidence also suggests that while generally staying true to the U.S. Supreme Court’s pro-enforcement policy in arbitration, U.S. judges also appear to take seriously their role in supervising the transnational arbitration system.<sup>56</sup> Moreover, U.S. judges do not appear to carry out these governance functions in a manner that is strongly influenced by partisan or ideological biases.<sup>57</sup> This is not to say that domestic courts are necessarily the best suited institutions for making global governance decisions. But in the absence of other governance institutions—international, transgovernmental or private—transnational judicial governance may end up filling some of the gaps.<sup>58</sup>

Second, aside from whether transnational judicial governance in general is a good thing, is increased multipolarity in transnational judicial governance—the trend suggested in Part II—a good thing? On the one hand, from a U.S. perspective, one might lament a decline in the influence of U.S. courts and U.S. law in global governance. On the other hand, this may be seen as good news for other states that previously exerted relatively little influence in the governance of transnational activity. Moreover,

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<sup>55</sup> See Whytock, *Myth of Mess*, *supra* note 5, at 790 (arguing that judges do a better job at applying choice of law principles than many scholars assume); see also Whytock, *Forum Shopping*, *supra* note 30, at 528 (concluding that “judges apply the forum non conveniens doctrine fairly well”).

<sup>56</sup> See Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts*, 2 *WORLD ARB. & MEDIATION REV.* 39, 80–81 (2008) (suggesting that courts supervise arbitration in a manner that helps reinforce arbitration’s status as the leading method of transnational dispute resolution).

<sup>57</sup> See Whytock, *Myth of Mess*, *supra* note 5 at 777–78 (presenting statistics showing that even if ideological factors influence judge’s choice-of-law decisions, the influence is rather small when compared to other factors); see also Whytock, *Forum Shopping System*, *supra* note 26 at 525–26 (finding that a judge’s ideology may affect the factors emphasized in a forum non conveniens decision, but that ideology does not appear to have a strong impact on the probability of dismissal in general).

<sup>58</sup> See Whytock, *Domestic Courts*, *supra* note 1, at 88 (discussing the increasingly prevalent role domestic courts will play in the absence of supranational governance institutions).

business-oriented interest groups, like the U.S. Chamber of Commerce, have been fighting for years to reduce the flow of transnational litigation into U.S. courts and limit the application of U.S. tort law to transnational activity because of concerns about the negative impact on U.S. and U.S.-based businesses.<sup>59</sup> For them, perhaps the declining role of the United States might be viewed as good news. But it is far from clear that these businesses will ultimately find foreign courts and foreign law more beneficial.<sup>60</sup>

The bottom line is that, for better or worse, domestic courts play an important role in global governance, and it is likely that they will continue to do so even if the influence of U.S. courts is declining. It is therefore important for legal scholars, political scientists and policymakers to develop a better understanding of transnational judicial governance.

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<sup>59</sup> See, e.g., U.S. CHAMBER INST. FOR LEGAL REFORM, *THE GLOBALISATION OF CLASS ACTIONS: SAFEGUARDS TO CURB LITIGATION ABUSE* 1–6, (2008), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/safeguardspaper.pdf> (proposing legal reforms to limit the abuse of transnational class action lawsuits against U.S. businesses).

<sup>60</sup> See Michael D. Goldhaber, *Forum Shopper's Remorse*, CORP. COUNS., Apr. 1, 2010, available at <http://www.corpcounsel.com> (describing how defendants sometimes regret having forum-shopped into foreign legal systems); Whytock & Robertson, *supra* note 52, at 1448–49 (explaining possible reasons for this trend).