# TRANSNATIONAL LITIGATION: TRENDS AND CHALLENGES

PAUL HERRUP*

"Foolish persons believe that the future will be much better and quite different."

Shazada Hussam-ul-Mulk, cited in Karl Jettmar, Beyond the Gorges of the Indus, Oxford, 2002, p. xviii

*This tribute to Linda Silberman attempts to distill in short compass and at a very general level views developed over three and a half decades of experience in the fun-house of transnational litigation by a simple, bare-foot West Virginia country courthouse litigator. I first survey the changes in the background transnational landscape over this period, notably the sharp and accelerating increase in global mobility and the increasing democratization of participation in that mobility, the realities of resolution of the concomitant increase in disputes, the shift in persons caught in those disputes, and the increasing complexity of these disputes. I then discuss these developments in light of the mechanisms of dispute resolution provided by states in a system of juridically equal sovereigns that are inextricably interconnected in ways old and new. Finally, I will venture to identify some of the implications of the rise of global mobility and its collision with systems of state adjudication, some of the new challenges posed by these developments, and make some modest suggestions for addressing those challenges.*[1]

* Paul Herrup is a member of the Pennsylvania Bar.

1. Given the nature of this contribution, it dispenses with much of the paraphernalia of scholarship but is derived from personal experience and professional anecdote. Some parts may have the air of *ipse dixit* as a result. I attempt to provide a sketch of the more general considerations and thoughts underlying proposals and analyses of more specialized subjects, such as the recognition and enforcement of judgments and the resolution of parallel proceedings. Some of my writings on these specialized subjects focus and apply these general considerations. This contribution borrows from portions of this earlier work. *See*, in particular, Paul Herrup & Ron Brand, *A Hague Convention on Parallel Proceedings*, 63 HARV. INT'L L. J. ONLINE 1 (2022) (discussing developments from the Hague Conference on Private International Law and arguing that the Conference should not undertake a project to prohibit or require exercise of original jurisdiction in national courts); Paul Herrup & Ron Brand, *A Hague Parallel Proceedings Convention: Architecture and Features*, U. CHI. J. INT'L L. (CJIL Online 2.1 – Winter 2023) (discussing how an instrument to regulate parallel proceedings is necessary and how developments in creating this instrument are advancing); RON BRAND ET AL, THE 2019 HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS, (Oxford Univ. Press, forthcoming Feb. 2024) (discussing history of the convention and providing

## I. THE FRAMEWORK OF TRANS-NATIONAL LITIGATION

### A. *The Explosion of Global Mobility*

The basic, inescapable, and decisive fact shaping transnational litigation is the rapid expansion of global communication and transportation over the past quarter-century, and the near certainty that these developments will accelerate in the future. There now is greater knowledge of opportunities across borders, this knowledge is available to far more people than ever before, and there has been and will continue to be a dramatic lowering of transaction costs to those seeking to benefit from those opportunities. There now is an unprecedented—indeed, from the vantage point of a half-century past, unimaginable—ability of people, goods, ideas, electrons, and even microbes to move across borders, easily and cheaply, creating new forms of personal, social, cultural, and economic connections that reflect the ingenuity and plasticity of human endeavor. With such movement inevitably comes the attendant disputes.

The consequences of this explosion of global mobility for transnational litigation may be classed under three heads. The first may be termed quantitative: there has been an absolute increase in the number of disputes with discernible connections or relations to more than one country—or no clear connection to any country at all. The second class of consequences may be termed qualitative: the breadth, novelty, flexibility, and plasticity of relationships and their effects has proliferated. Furthermore, these connections to different countries are not simply

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a comprehensive discussion of each of the convention's provisions). I thank David Goddard and Hans van Loon for their trenchant observations and suggestions.

sequential, but also may be simultaneous. Thus, we are seeing the emergence of new types of family relations, new interpersonal concerns, such as privacy, are moving to the forefront, and new variations in commercial relations, such as licensing and other arrangements in the area of intellectual property, must be cast into legal forms to accommodate resolution of the related disputes. These new forms of connections and relations pose new challenges to old methods of legal ordering and classification, and to the institutional structures that give these methods effect. This qualitative dimension is particularly challenging insofar as these connections may involve either actual movement or effects of activity projected beyond borders that will have close connections to multiple countries, or connections that only make sense if they are aggregated in ways that tie numerous countries together, or that may even lack the kind of physical presence that ties them to any country.[2] The third class of consequences may be labeled as the democratization of global mobility: the general availability and relatively low cost of means to move increases not only the amount and types of movement, but also the range of people who can move or take actions with transnational consequences. Far more people with limited means or capacities will be able to participate in global flows than at any time in human history.

We have lowered the entry cost of movement, yet the transaction costs of resolving disputes arising from those movements have not notably diminished. For many, current transaction costs of transnational litigation are a far more pervasive and serious barrier to access to justice than any other. Yet, those affected most by these costs are often are the people with little voice and less representation in lawmaking and related legal discussions in the area of transnational litigation.

### B. *The Presence of the State*

This new global mobility occurs within a framework of juridically equal and independent sovereign states that are increasingly connected with each other—often with connections that

2. Emerging technologies such as block chain illustrate this concern. Many actions may no longer involve traditional concepts of "physical presence" of the actors in any place, or, conversely, "presence" may be non-physical but in a multitude of locations simultaneously, many of which will not necessarily be known to the actors at the time of the action.

themselves are relatively new or unfamiliar to many states. While some have looked wistfully to the withering away of the State, states have shown no inclination to cooperate in their own demise. To the contrary, most disputes that involve movement or effects across borders will be resolved in whole or in part in national courts for the foreseeable future. These adjudications will involve assertions of state power, such as whether to adjudicate, the proper scope and limitations on remedies that may be ordered, or recognition or enforcement of judgments or other actions. Needless to say, the very process of adjudication requires states and their courts to make choices in exercising these state powers. Even when efforts are made to resolve disputes through means other than courts, at the least enforcement often must be through national courts, and national courts may set the entry and boundary conditions for the non-state resolution of disputes.

Furthermore, the state itself increasingly is a litigant in courts or otherwise has a direct interest in litigation outcomes. This results, in part, from the growth in size and type of activity of states, that, in turn, involve states as parties in disputes arising from contracts, relation to property, or other types of rights and obligations. In part, adjudication increasingly involves issues of interest that extend beyond the parties to affect state regulatory and policy choices; this includes the use of civil actions (or criminal complaints) by private persons as part and parcel of the enforcement scheme of statutes or regulations.

Finally, more and more types of objections to state actions are being cast into the form of a litigable dispute, posing serious threshold issues for courts as well as issues of their ability to inquire into state actions or have their judgments recognized if the litigation proceeds. This has direct ramifications on the attitude of national states to questions of jurisdiction, applicable law, and recognition and enforcement of judgments, including their willingness to accept provisions that might limit their freedom of action in these spheres.

## II. Legal Doctrine

Much of the legal framework for global mobility is provided by something often labeled "private international law." As Otto Kahn-Freund observed, the "common core" of private

international law "consists of ubiquitous and recurrent problems much more than of a body of secured general principles."[3] Traditionally, these problems have involved questions of various kinds of jurisdiction (in the broad sense of the power and authority of state institutions to do certain things), applicable law, and recognition and enforcement of foreign judgments.[4] In addition, to restrict the scope of "private international law" to matters that some legal families classify as "private law" is distorting and inadequate. Some systems have no such private law/public law distinction, and transnational litigation must take into account the increasing role of states as litigants and the brute fact of state power that undergirds the entire edifice.

There have been a number of approaches to resolving the problems posed by transnational litigation.[5] In terms of transnational litigation, each of these approaches requires a court to abstract one or more salient characteristics from the bundle of characteristics presented to it in any request for adjudication, assign a weight to that characteristic or group of characteristics regardless of other characteristics present in the bundle, and make a decision on jurisdiction in its various forms, applicable law, or recognition of foreign judgments based on the selected characteristic. Some of these approaches are:

1. Reliance on an array of single-factor connections (tight boxes);
2. Identifying a group of circumstances, and finding a little rule of law when all the circumstances are present (the "pile" approach);
3. Balancing various salient characteristics almost like a vector analysis;
4. Centre of gravity analysis; and
5. State interest analysis.

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3. Otto Kahn-Freund, *General Problems of Private International Law* in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, VOL. III 148 (1974).

4. Although the last should be seen as but one in a number of topics that might be termed international legal cooperation, including such topics as reduction of formal requirements, and cooperation in movement of service of process and evidence.

5. For convenience, I list these approaches together, although I acknowledge that some have seen more use with respect to particular problem areas, such as "interest analysis" in questions of applicable law.

## III. Inadequacies of Current Approaches

Given the realities of global mobility, the doctrines undergirding these approaches are currently inadequate, and will become less adequate over time. Traditionally, they have depended on a localization of a person or a particular conduct, and have given decisive weight to one or more types of personal presence or abstracted form of activity rooted in nineteenth century dogma to select a forum, applicable law, etc. They do not fare well in a world that is increasingly multi-local or delocalized, or sometimes both.

The classic examples of this are the single-factor connections contained in the E.U. Brussels Regulations.[6] Yet, we are in a world in which the significance of single-factor connections largely based upon physical presence for the disposition of claims or issues is increasingly confused or attenuated. The signal fact about many instances of the new global mobility is either a significant connection through various sorts of physical presence to multiple states, or a connection to no state at all. Further, in a litigation landscape in which costs of dispute resolution for small actors need to be reduced, correlations between the types of physical presence classically selected as salient for private international law purposes and the actual costs and inconveniences of litigation are increasingly attenuated, if they ever existed at all. In addition, lists of boxes for resolution of issues are both under-inclusive and inconclusive. They will be under-inclusive in that they cannot account for new and emerging types of connections and relations, thus casting these new forms into a legal no-man's land, even though these are the disputes that may most need guidance to resolve. They are inconclusive in that, given the profusion of variant factual situations in which multiple fora can claim a dispositive connection to an adjudication, single-factor connection tests require priority rules to create a hierarchy of preferences. Insofar as the priority rules themselves are based upon notions of personal presence (e.g., a priority for the defendant's home forum or place

6. *See, e.g.*, Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [hereinafter Brussels Regime] (establishing certain specified "connections" as bases of jurisdiction). Some of the Brussels boxes may begin to converge with the "pile" approach insofar as they use multiple factors.

of performance), however, the priority rules suffer from the same infirmities as the single-factor connections they attempt to sort out—and there seems to be no agreement among states on proper priorities. Nor should there be. States have different values and face different circumstances, which understandably leads to different priorities and emphases.

The justification for single-factor connection tests—the creation of legal certainty as an absolute prerequisite for economic activity—also fails inspection. First, at least in the Brussels Regime, these tests have not created certainty.[7] Instead, we see a steady stream of requests to the Court of Justice of the European Union for clarification of the interpretation and results of Brussels Regime rules, often in the context of relatively simple fact patterns in a narrow regional context, with an apex court that will not be available to resolve such questions on a global scale.[8] Second, even if the box approach resulted in legal certainty—and it demonstrably does not—there is no correlation between the purported legal certainty and levels of economic activity. The economic performance of the United States after the so-called "conflicts revolution," which has reduced ex ante legal certainty, is at least as good as that of Western European countries in the same time interval.[9]

The "pile" approach fares no better in a world of global mobility. First, insofar as the connections that are piled are based upon the same nineteenth-century notions of personal presence as those contained in single-factor connection tests, they suffer from the same infirmities. Second, as with single-factor connection tests, to be coherent, a pile approach assumes an underlying principle or set of principles that indicate what should be piled, and how it should be weighted. These underlying fundamentals are rarely articulated, and even less rarely examined by the courts themselves for real-world adequacy. Third, the result is a narrowly applicable rule when all of a selected group of characteristics are clustered, and it is often unclear ex ante how often that particular cluster will be present

7. *Id.*

8. For a detailed discussion of the semantic and logical complexities of Brussels boxes in the Recognition Convention, *see* Ron Brand, *supra* note 1.

9. *See, e.g.*, Handbook of Macroeconomics (Volume 2A) 24–26 (John B. Taylor & Harald Uhlig eds., 2016), available at https://perma.cc/5VXV-57QC (displaying comparative rates of economic growth over time).

in the real world.[10] Even when all the characteristics of the particular cluster are present, the pile approach leaves open the question of whether the narrow rule that has been formulated to cover a specified groups of characteristics can apply when additional salient characteristics are tossed into the mix.

Tight boxes and piles are symptomatic of a fundamental columbicubulomania which has become part and parcel of modern western legal traditions. It may be inescapably endemic, but it nonetheless should be acknowledged.

Balancing tests and center of gravity analysis also are inadequate to the new global mobility. Rather than taking one connection as decisive or accumulating a number of connections, these approaches select a group of salient characteristics that may point in different directions, and then attempt to strike a sort of vector balance. This assumes some sort of commensurability of the characteristics selected, a point that often is unexamined and untested. Insofar as what is balanced or examined for a center of gravity are characteristics rooted in physical presence, they succumb to the same emerging difficulties as the previous tests. In addition, as with the previous approaches, these tacitly assume principles of selection and assignment of weight that are rarely articulated, and often seem to depend on notions of priorities of types of physical presence. Finally, a center of gravity approach will be particularly bedeviled in a world where there is no clear center of gravity of a movement or group of related movements, or when these defy gravity altogether.

State interest analysis also fails for the above reasons, insofar as interest is derived from notions of physical presence, but also for more fundamental reasons. This approach requires that a court of one state determine the existence and intensity of the interest of another state on a particular issue—usually in the absence of the foreign state. This is presumptuous, to say the least, in an international system of juridically equal sovereigns. It also usually exceeds the capacity of any given national court to gather a record for decision.[11]

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10. Indeed, one suspects that often the point of the exercise, at least in the common-law world, is to resolve the particular case in front of the court without recourse to a general rule. As noted in the second point above, mere cumulation devoid of underlying principles is merely rootless cumulation.

11. However, as will be discussed below, interest analysis of another sort properly comes into play as a constraint on the court of one state venturing into certain areas that affect the interests of other states.

None of this is to say that current approaches are completely erroneous or irrelevant. Much of global mobility now and in the future will involve discernible physical presences. But whether the sorts of presence involved will yield the best forum for resolution of transnational litigation challenges, especially with regard to burdens on smaller litigants, is far from clear. In any event, an increasing number of situations will not be well-captured or efficiently resolved by approaches dependent upon an abstraction of a physical presence or the presence of a single type of formally identified conduct—and those that may be captured will not be the hard cases in which guidance is most required.

## IV. Challenges to States

In addition to the challenges inherent in these legal approaches, emerging global mobility also will challenge state institutional frameworks aimed at resolving transnational litigation.

First, there will be a quantitative challenge, as the number of transnational disputes presented for adjudication will continue to rise. Adjudications are costly services for states to provide. Budgets for adjudicative services will not necessarily rise at the same pace as demand. This, predictably, will create pressures on legal systems as to what type of cases can and should be adjudicated in the forum and at what expense in time, money, and resources. In a sense, this is the social and collective side of the often-trumpeted phrase "access to justice." While "access to justice" usually is presented as the literal access of a particular litigant to a court or particular kind of court, unconstrained access in the particular case may deny other litigants better served by that forum the full consideration of their cases.[12]

Second, there will be qualitative challenges, which may have the same crowding and cost effects. The issues posed in transnational litigation arising out of the new variability and plasticity of global movements and relationships will challenge courts to engage in novel, complicated, and difficult analyses, especially in the areas of jurisdiction to adjudicate and

12. Recognition of this point, and a limited attempt to deal with it, may be found in the declaration provided in the Convention on Choice of Court Agreements art. 19, June 30, 2005.

remedies.[13] National courts will be caught between the Scylla of being overburdened with cases only tangentially tied to their state, and the Charybdis of assuming jurisdiction and issuing orders that might be seen as improperly interfering with the sovereign arrangements of foreign states.

Finally, the presence of small actors with limited means will put pressure on states to find ways to make dispute resolution more affordable. More small actors puts pressure on states to make transnational dispute resolution more affordable in two ways: (1) pressure from unhappy and disadvantaged small actors to have their needs accommodated; and (2) the failure of such accommodations will limit and distort beneficial global mobility that most states wish to foster, or, at least, not obstruct. This is both in terms of direct cost and convenience, as well as regarding understandable rules of decision that can be operated by generalist lawyers and judges that can yield more or less acceptable results.

Of course, the obvious response to this litany of inadequacy is to find better rules, whether via connecting factors or otherwise. The challenge is doing so when we lack basic empirical data as to what does and does not work, and in which situations, while also lacking a satisfactory set of concepts that will generate such rules. Some suggestions for a variety of steps that might be helpful (some modest, perhaps all utopian) will be the topic of the next section.

## V. Suggestions

Experiment, experiment, experiment. We are in a transition period. It is clear that current approaches and institutional structures are not adequate to current and foreseeable future challenges. There is little benefit in trying to build bridges between different legal frameworks which themselves do not work well now, and are likely to work less well in the future. However, we must acknowledge that it is largely unclear what approaches and structures might be adequate, in the sense of resolving disputes efficiently while not constraining litigation

13. *See, e.g.*, Unwired Planet v. Huawei Technologies (UK) Co. Ltd., [2020] UKSC 37 (demonstrating the complexity of litigation in adjudication in national courts with international ramifications, as seen through a U.K. proceeding on telecommunications).

with artificial legal rules, and that also will be acceptable to the states that must make them work.[14]

We should look to four sources of experimentation and innovation. As with any good experiment, data on which of these arrangements work, work well, or work not at all, should be collected and evaluated for use in steps that might be taken by states or international organizations in determining whether there is a global problem that requires a solution and whether there are tested solutions to that precise actual problem.[15]

The first source of experimentation and innovation is private initiative, perhaps historically and potentially the most important. There is nothing that says that the search for new ways to handle new problems needs to be a monopoly of states or international organizations. Private parties can and often do develop a variety of ways to deal efficiently and fairly with new realities, including forms of evaluation of cases, mediation, determinations of disputes by professional sector experts on a limited and agreed record without substantial participation by legal professionals, on-line dispute resolution, and much, much more. For these private conceptions and initiatives to be a useful testing ground for new approaches, ultimately they will need to be given some sort of state imprimatur (or have the possibility of that state imprimatur hovering in the background), helping establish its legitimacy as both a form of dispute resolution and a method for enforcement of results. States can and should sympathetically examine these private initiatives, and foster them where deemed appropriate.

The second source of experimentation can be internal to interested states. These initiatives can take several forms, both in terms of substantive content and in terms of institutional measures. As they deem appropriate, states should test new concepts or rules, eliminate or modify older ones that may have outlived any purposes that they may have served, and search for new concepts that achieve core results while eliminating undesirable features or side-effects of current doctrine. One such

14. There may be something of an analogy between the issues created by the new global mobility and the challenges created for traditional vested rights theories in choice of law by an earlier burst of new mobility, the diffusion of the automobile.

15. There may be a significant role for an organization that can assist with expertise in fostering these initiatives and providing a platform for subsequent global evaluation.

desirable area of work would be experimentation to reduce wasteful or abusive concurrent proceedings through steps or methods that will concentrate related actions in a better forum according to some set of modern criteria, rather than using approaches shackled to bases of jurisdiction rooted in physical presence that have no necessary correlation to costs and burdens on the litigants. This would serve the interests of smaller actors, who often can afford only one shot at adjudication in one forum, and reduce the number of potentially inconsistent judgments in circulation. Such experiments might also require new examinations of pendant or supplemental jurisdiction, so that the better forum can offer as complete and fair a resolution as possible. In terms of institutional initiatives, there may be something to be said for fostering a cadre of judges with interest and expertise in transnational litigation. Insofar as municipal systems allow, transnational cases can be steered to such judges, or they can provide advice to assist their colleagues. However, I am skeptical of a separate set of specialized courts in this area: specialized courts are expensive to maintain, tend to develop their own often baroque procedures, and become captured by a specialized and expensive bar that may be beyond the reach of smaller litigants.

The third source of experimentation and innovation can be regional or specialized arrangements between states. While there are a number of such arrangements that bear on our subject, they have tended to be between states with similar legal systems and reflect previous practice of the states involved. Some smaller, innovative, and functional approaches to new problems involving states from different legal families would be a useful testing ground to develop concepts and, perhaps, specific rules. In these scenarios, compared to starting with a global instrument, the stakes are lower and there is the opportunity for greater precision. However, these smaller arrangements may pose practical challenges in terms of institutional resources. Such agreements require time, effort, innovative thinking on the part of state ministries, and acceptance (at least on a provisional basis) by interested publics. States must be convinced that such approaches are worth the effort involved in creating them. Otherwise, states will continue to be drawn like moths to the flame of big, top-down, global instruments which hold out an often illusory promise of solving a wide array of problems in

one fell swoop—even though there are good reasons to treat such projects with caution in an era of transition.

The fourth source of experimentation and innovation can be states trying to create global instruments under the auspices of international organizations. Such projects should be undertaken only if they meet certain criteria:

I. The project will solve an identifiable real-world problem, not simply fill a hole in a dogmatic, *a priori* structure.
II. There is a likelihood of reaching a text that, on its face, will generally yield good results in resolving that problem.
III. The text can be understood and efficiently operated by generalist lawyers and judges.
IV. The rules are not easily subject to strategic manipulation by lawyers, which generally favors more sophisticated lawyers retained by more powerful parties.
V. The instrument will be readily acceptable to states.

The final criterion, acceptability to states, is especially crucial. Most states are reluctant to engage in treaty-making that will create rules and obligations with which they are unfamiliar. Yet, in a period of transition, we cannot move forward with eyes firmly fixed on the rearview mirror. The gathering of empirical evidence through smaller initiatives may provide some level of acquaintance, and, hence, of acceptance for new concepts and rules.

There are other constraints and conditions on global treaty-making in the absence of empirical understanding that should be noted. First, treaties must be made adaptable to adjust to new realities and new understandings, both in structure and in institutional contexts. Because of the rate of change in global mobility, treaty provisions that may be based upon inadequate concepts or rules must be amenable to surgical removal from the instrument in which they are embedded and easy replacement with a more adequate text. Treaty architecture should accommodate pull-out features. An example of this may be found in Articles 5 and 6 of the Judgments Convention, which contain criteria of eligibility for recognition or enforcement of judgments.[16] The criteria of eligibility in Articles 5 and 6

16. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters art. 5–6, July 2, 2019, https://perma.cc/DA9W-EHQR [hereinafter Judgements Convention].

already are inadequate to the real world, and will become less and less adequate, for reasons discussed above. Fortunately, the treaty architecture is such that these criteria can be re-visited and replaced as a group when there is a consensus on adequate replacement.[17] Of course, this situation also requires that international organizations will have the institutional flexibility to allow re-examination and revision of specific treaty provisions that are inadequate to current conditions.

Another desideratum of any global treaty-making in this area is that it not discourage experimentation. A particular example of how *not* to do this is found in Article 23.3 of the Judgments Convention.[18] Article 23.3 is directed at the narrow possibility that two States that have ratified the Convention will enter into a subsequent agreement that might result in not giving Convention effect to a judgment coming from a third State that also has ratified the Convention. The rationale for this provision shifted during discussions. The initial justification for the proposal was concern over the possibility of two states joining to deprive a third of a treaty entitlement. One may wonder how often this situation arises. In my experience, government chanceries do not have the time to devise, adopt, and implement treaties in order to derogate treaty rights of third states in the area of recognition and enforcement of judgments.

Helpfully, the proponents shifted rationale and explained in the diplomatic plenary that the real problem involved was that the major proponent is unable to keep track of its treaty obligations and might inadvertently enter into a subsequent treaty that would lead to contravention of a treaty obligation under the Judgments Convention. While this admission is an admirable exercise in transparency in warning treaty partners of a potential proclivity for transgressing its treaty obligations, perhaps the problem is best addressed by internal corrective measures. Furthermore, even if the unlikely situation materializes, Article 23.3 is unnecessary. A third State which views itself as injured has other mechanisms to vindicate rights rather than front-ending an unnecessary and not readily comprehensible prohibition into this treaty. If the situation does occur, Article 21 of the Judgments Convention provides a mechanism for review

17. Vienna Convention on the Law of Treaties, May 23, 1969, 1115 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980), arts. 39–41.

18. Judgements Convention, art. 23.3.

of the operation of the Convention.[19] In addition, the law of treaties provides protections to injured third states, including measures of retorsion.[20] Finally, and most fundamentally, Article 23.3 gets the fundamental policy question wrong. Given the deficiencies in this text and the need to gauge empirically how possible rules might work in the modern world, it is inadvisable to employ somewhat opaque language to inhibit countries from trying small-scale experiments over time that might make sense, even if there is an occasional over-extension which may be remedied in other fashions.

Another measure that might be helpful would be a group, perhaps established by an interested international organization, to provide guidance and some standardization of terms that are intended to have autonomous meanings in transnational litigation instruments. At present, there is a profusion of terms with no international law definition, no definition in the specific treaties in which they occur, and different and often conflicting meanings in different legal systems—or no meaning at all if they are unknown to a particular system. To give them a true international sense, countries whose legal systems do not use these terms must try to learn their sense, while countries that do have these terms in their national law must unlearn them if they are serious in fulfilling their obligation to give such terms a sense not tied to a given domestic legal order.[21]

As may be gathered from the above observations, large, top-down global conventions must be approached with caution at this juncture. However, there is ample space for smaller, more focused, global instruments that would solve actual problems. Examples might be a non-binding instrument on international judicial communication and cooperation (an increasingly pressing issue in an increasingly interconnected world) or a continuation of the Choice of Court Agreement Convention[22] to comprehensively address the problems posed by choice of court agreements in the context of related actions.

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19. *Id.* art. 21.

20. Vienna Convention, *supra* note 17, arts. 34–38.

21. A statement of contemporaneous interpretation issued in a diplomatic plenary by the participating States also would be helpful, but these are time-consuming exercises in busy plenary sessions.

22. Hague Convention on Choice of Court Agreements, Jun. 30, 2005, 44 I.L.M. 1294.

All of this, of course, must fit within state structures for transnational litigation. From the perspective of any given state in a state system of juridically equal sovereigns with a multitude of connections across borders, we can divide the world into three zones. The first is a zone of its own sovereignty, over which it has plenary control.[23] At the other end of the spectrum is a zone of sovereignty of other states, into which the first state and its instruments cannot properly intrude.[24] Finally, there is a sort of global commons, taken not necessarily as a physical space (although it can be) but as a space created and constituted by the relationships arising from global movement. This is a sphere in which all states have equal rights of action, but also equal constraints on actions that might obstruct or bar rightful actions of other states.

Considerations of the sphere of internal state sovereignty and the mounting challenges of global mobility suggest that older notions need to be re-examined. For example, the jurisdiction to adjudicate, expressed in general terms, creates an unflagging obligation to adjudicate a dispute regardless of the consequences for internal dockets or external effects of the adjudication on other states.[25] However well this doctrine of non-abstention works in disputes purely internal to the sovereign, such as disputes over water rights between constituent states, in the context of transnational litigation it can lead to disproportionate inconvenience to local litigants, significant costs to states to adjudicate disputes of marginal interest to that forum state, and real risks of unrecognizable judgments and international friction.

Furthermore, we need re-invigorated notions of justiciability. Quite simply, there are certain disputes that can be cast into the form of litigation but that a national court cannot, and should not, attempt to adjudicate. As other threshold doctrines, such as immunity or act of state, become more specific

23. This paper will not address the attributes of that sovereignty, or of control, plenary or otherwise.

24. Again, this paper will not address the content of an intrusion, or when it might be proper.

25. *See, e.g.*, Colo. River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976) ("This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.").

and more limited, the prospect arises of courts finding no general, residual constraint from blundering into the no-fly zone. Disputes that require a national court to award sovereignty over contested territory are a good example.[26] A justiciability (or non-justiciability) doctrine keyed to features of the international legal order may act as guard-rails to curb the results of narrow, woodenly applied rules of litigation road.

These observations also have implications for doctrines often labeled as "*forum necessitatus*," insofar as they appear to require the existence of some court somewhere that will be available to adjudicate any dispute cast in litigable form on the merits (whatever that phrase may mean). In transnational litigation, there simply may be disputes that, however presented, are not amenable to adjudication through litigation in traditional national courts.[27] To assist courts in these evaluations, it actually might be useful to have an international group, made up of government officials, judges, and practitioners, which can articulate standards (or even rules) that demarcate an international no-fly zone for national court adjudication. This should not be an exercise in some form of nation-centered comity, but a set of constructions that look to the nature of the international system and of the public law that undergirds it.

Finally, the area of a global legal commons will call for both enhanced cooperation and acceptance of certain constraints on national court action. This is an area that is best left to others to work out. However, I tender some very preliminary observations.

The interaction of states in a global commons must be derived from the facts of the international system, especially its connected nature, and fundamental principles of the legal order that accompanies the system, especially the juridical equality and independence of each sovereign state within the system. Conduct in the legal commons will involve rules and standards of cooperation, assistance, and withdrawal. Generally, one state should not project its power beyond its borders into a global commons or in ways that affect the interests of other states unless there is a general consensus in treaty or custom

26. *See, e.g.*, Buttes Gas & Oil v. Hammer [1981] 3 WLR 787 (HL) (discussing the difficulties of domestic courts adjudicating boundary controversies and territorial issues.).

27. Some of these disputes may, however, be amenable to solution through other mechanisms, which should be explored.

that such an exercise of power is acceptable. National jurisdiction is an exercise of state power, and properly may be systematically constrained—or at least given no encouragement—by the international legal system if its exercise impinges on these systemic or particular national interests. Each state within the international system has a general interest that commonly accepted constraints not be violated by certain projections of national jurisdiction and a more specific interest (and even responsibility) that its citizens (and, perhaps, residents) not be subject to exercises of jurisdictional power by other states in ways not sanctioned by treaty or custom. But each state also has an interest in cooperative action of mutual and general benefit in a rapidly changing and connected world.

## VI. Conclusion

The facts of global mobility, present and future, present new challenges to transnational litigation that current structures and doctrines are not handling well and are unlikely to handle well in the future. We need fresh thinking and a re-examination of current practices, rooted in global realities, and with due attention to the needs of the smaller actors who are emerging on the global stage.