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***THE NEW MULTIPOLARITY IN TRANSNATIONAL
LITIGATION: FOREIGN COURTS, FOREIGN
JUDGMENTS, AND FOREIGN LAW***

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THE NEW MULTIPOLARITY IN TRANSNATIONAL LITIGATION: FOREIGN COURTS, FOREIGN JUDGMENTS, AND FOREIGN LAW

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I. INTRODUCTION

Transnational litigation is global in the sense that it involves parties of more than one nationality or activity with connections to more than one country's territory.¹ But conventional wisdom seems to suggest that the transnational litigation system is essentially unipolar, or perhaps bipolar, with the United States and the United Kingdom acting as the leading providers of courts and law for transnational disputes.²

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1. See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 *CORNELL L. REV.* 481, 486 (2011) (defining "transnational litigation" as litigation having connections to more than one country, and noting that these connections may be territorial when the activity or its effects touch the territory of more than one country, or based on legal relationships between a country and the actors engaged in or affected by that activity, such as citizenship).

2. Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 *LOY. L.A. L. REV.* 1257, 1262 n.23 (2007) (noting that "English courts may provide certain tactical and procedural advantages to parties, at least when compared to nations other than the United States" and that "like U.S. courts, the courts of England may be particularly attractive for transnational litigants"); Tim Taylor, *Worldwide Marevas in the Real Wide World*, 86 *L. SOC'Y GAZETTE* 22, 23 (1989) (noting "attractions of London as a forum for international litigation"); James W. Quinn, *Our Underfunded State Courts—An Issue that Urgently Needs Attention*, *METROPOLITAN CORPORATE COUNSEL* (Apr. 2008), at 16, available at <http://www.metrocorpocounsel.com/pdf/2008/April/16.pdf> (noting that "New York and London compete as venues for international litigation"); U.S. DEPARTMENT OF COMMERCE, *THE U.S.*

Our overarching conjecture is that this unipolar (or bipolar) era—if it ever existed at all—has passed, and that transnational litigation is entering an era of ever increasing multipolarity. If this intuition is correct, then it will be increasingly important for U.S. judges and lawyers to be comfortable handling a wide range of conflict-of-laws problems, and prepared to consult closely with their colleagues abroad.

In this Article, we develop three aspects of this conjecture, corresponding to three dimensions of the new multipolarity in transnational litigation. In Part I, we discuss the growing relative importance of non-U.S. forums for transnational litigation. In Part II, we highlight the potential proliferation of foreign judgments brought to the United States for recognition or enforcement. And in Part III, we consider the pervasiveness of foreign law issues that are likely to confront U.S. judges and lawyers, and the accompanying challenges of making determinations of foreign law.

Before proceeding, a disclaimer: this Article contains forward-looking statements. In the spirit of the conference theme—*2021: International Law Ten Years from Now*—we are sharing some of our thoughts about the future of transnational litigation. Although such an exercise is necessarily conjectural, we hope we have distilled some plausible intuitions about what transnational litigation will look like ten years from now.

II. MULTIPOLARITY IN FORUM SELECTION

It is widely assumed that the United States is the premier destination for transnational litigation. As Lord Denning famously quipped, “As a moth is drawn to the light, so is a litigant drawn to the United States.”³ In a similar vein, transnational litigation expert Russell Weintraub calls the United States a “magnet forum,” a forum that “attract[]s the aggrieved and injured of the world.”⁴ According to

LITIGATION ENVIRONMENT AND FOREIGN DIRECT INVESTMENT: SUPPORTING U.S. COMPETITIVENESS BY REDUCING LEGAL COSTS AND UNCERTAINTY 6 (noting “strong preference for United Kingdom law as the governing law for international contracts”) available at http://www.investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_jia_main_001171.pdf

The Atlantic Star, [1973] 1 Q.B. 364, 382 (C.A. 1972), rev'd, [1974] A.C. 436 (H.L.) (“You may call this ‘forum shopping’ if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.”) (Lord Denning); see also *infra* notes 3-5 and accompanying text.

3. Smith Kline & French Labs. Ltd. v. Bloch, [1983] 1 W.L.R. 730, 733 (C.A. 1982).

4. Russel J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT'L L.J. 463, 463 (2002).

another scholar of transnational litigation, the United States is “a forum shopper’s delight.”⁵

Our first conjecture is that the United States is no longer as attractive to litigants as it supposedly once was, and that other countries will increasingly draw litigants to their courts through a combination of *ex ante* forum selection agreements and *ex post* forum shopping. This is the first way in which transnational litigation is becoming increasingly multipolar.

Trends in transnational litigation in U.S. courts provide some support for this conjecture. The Administrative Office of the U.S. Courts (AO) collects data on every case filed in the U.S. district courts each year. While this data does not provide much detail about each case, it allows one to determine whether subject-matter jurisdiction is based on alienage—that is, when the suit is between a U.S. citizen and a foreign citizen. The data also allows one to determine whether the case is a tort case or a contract case. By combining these two pieces of information, one can roughly track the number of transnational tort and contract claims filed in the U.S. district courts each year.⁶

As Figure 1 shows, alienage suits have been on an overall decline, notwithstanding a one-year spike in transnational tort claims in 2000.⁷ 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. And the decline in transnational tort claims suggests that the world’s tort plaintiffs are, for one reason or another, not as likely to forum shop into the United States as they supposedly once were.

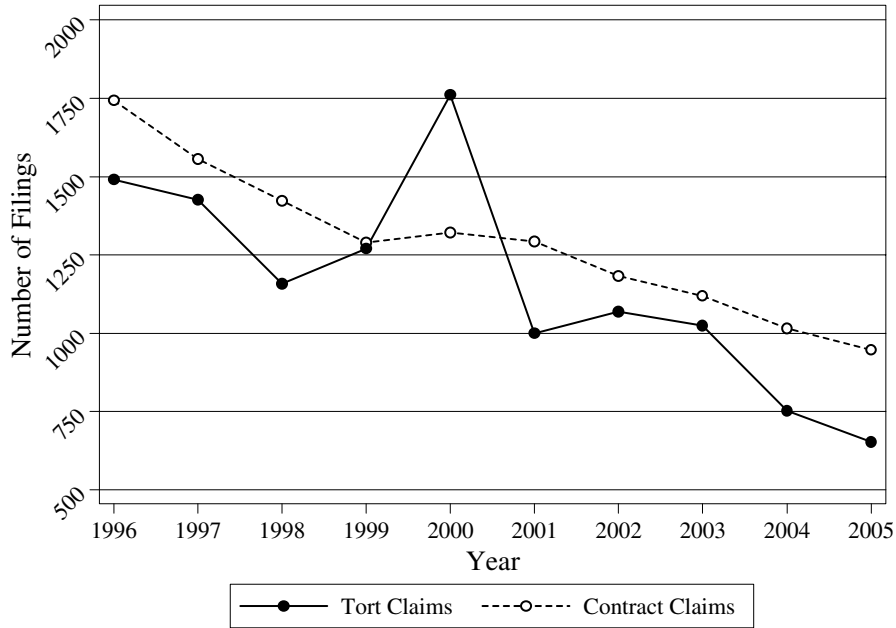
What might explain this decline? One plausible explanation is that both tort plaintiffs and commercial actors are increasingly select-

5. ANDREW S. BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 28 (2003).

6. For a detailed discussion of this data, see Whytock, *supra* note 1, at 507-10. This data does not include transnational suits other than alienage suits. For example, it does not identify diversity cases between citizens of different U.S. states arising out of activity with connections to one or more foreign countries; cases involving foreign citizens as additional parties; or transnational suits over which there is federal question, admiralty, or bankruptcy jurisdiction, or jurisdiction based on the Alien Tort Statute or the Foreign Sovereign Immunities Act. Moreover, because the AO data includes only filings in U.S. federal courts, it cannot capture transnational litigation in U.S. state courts. Although the AO data therefore leaves open the possibility that the decline in alienage filings extends to other types of transnational litigation in U.S. courts, it also leaves open the possibility that one or more of these other types of transnational litigation may be increasing even as alienage litigation is decreasing. *Id.* at 515-16.

7. Analysis of the AO’s nature-of-suit codes indicates that this uptick consisted principally of a cluster of asbestos product-liability claims filed in 2000.

FIGURE 1 ALIENAGE FILINGS IN THE U.S. DISTRICT COURTS (1996-2005)



ing non-U.S. forums for litigating their disputes.⁸ This explanation is consistent with recent observations by transnational litigation practitioners. According to Eugene Gulland, a senior transnational litigation partner at Covington & Burling, “[r]ecent foreign court decisions . . . suggest a more aggressive tendency to prefer non-U.S. forums and apply non-U.S. law to disputes involving U.S. companies.”⁹ He argues that “actions in foreign courts are a source of increasing risk to U.S. corporations that operate abroad.”¹⁰ Similarly, according to Gibson, Dunn & Crutcher managing partner Ken Doran, corporations face an “increasing threat [of] lawsuits filed in jurisdictions around the world.”¹¹ This increased multipolarity in forum selection may be due to changes in the U.S. legal system that make it

8. There are other plausible explanations. For example, the decline could be due to changes in choice-of-law and court access decision making by U.S. courts; a shift away from litigation and toward arbitration or other forms of dispute resolution; or a shift from federal to state courts. Whytock, *supra* note 1, at 530-31.

9. Eugene Gulland, *All the World's a Forum*, NAT'L L. J., Feb. 11, 2002, at 2.

10. *Id.* at 1-3.

11. *Gibson Dunn Launches Transnational Litigation and Foreign Judgments Practice Group*, PRESS RELEASE, GIBSON DUNN (Dec. 15, 2010), <http://www.gibsondunn.com/news/Pages/GibsonDunnLaunchesTransnationalLitigationandForeignPracticeGroup.aspx> (quoting Ken Doran). See also Michael D. Goldhaber, *Alien Territory*, THE AMERICAN LAWYER, Feb. 1,

less attractive to transnational litigants. Alternatively, it may be due to changes in other countries' legal systems that make them more attractive to litigants. For example, R. Daniel Kelemen and Eric Sibbitt have argued that the American legal style is spreading globally.¹² And as transnational litigator Mark Behrens and his co-authors recently wrote, a growing number of countries are recognizing aggregate litigation and moving away from prohibitions on contingency fee arrangements and punitive damages—trends that are likely to attract plaintiffs.¹³

All of this suggests that in 2021, foreign countries may play as important a role as ever in transnational litigation relative to the United States as they draw litigants to their courts through a combination of *ex ante* forum selection agreements and *ex post* forum shopping. This is the forum-selection dimension of the new multipolarity in transnational litigation.

III. THE RISE OF FOREIGN JUDGMENTS

This leads us to our second conjecture: In 2021, more foreign country judgments than ever will be brought to the United States for recognition or enforcement. This second dimension of multipolarity follows from the first: if there is more litigation in foreign courts, there will be more foreign court judgments—and whenever those judgments involve U.S.-based defendants or other defendants with significant assets in the United States, plaintiffs are likely to seek enforcement here.

As early as 2007, transnational litigation experts Gary Born and Peter Rutledge noted the growth of foreign judgment enforcement actions in U.S. courts resulting from “increasingly frequent efforts by courts and legislatures around the world to impose substantial judgments against companies perceived to have the wherewithal to pay them.”¹⁴ And at least one U.S.-based international law firm has cre-

2011, <http://www.law.com> (noting trend of “developing nations emerging as viable forums for human rights and environmental complaints”).

12. R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT'L ORG. 103 (2004).

13. Mark A. Behrens, Gregory L. Fowler & Silvia Kim, *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165, 193-94 (2009). The increasingly widespread availability of third-party litigation financing may be yet another factor contributing to a growing tendency to select non-U.S. forums. See Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. (forthcoming 2011) (on file with the Southwestern Journal of International Law).

14. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1078 (4th ed. 2007).

ated a new practice group focused on representing clients in foreign judgment enforcement actions.¹⁵

Unfortunately, there is very little data available to determine the extent of this growth. To get a better sense of this trend, and where it might take us in 2021, we collected some of our own data for one federal judicial district known for handling many transnational suits: the Southern District of New York.¹⁶ First, we looked for every opinion involving a foreign judgment in the Southern District reported in Westlaw between 1990 and 2009.¹⁷ Second, since only a relatively small portion of court opinions are reported in Westlaw, we calculated the Westlaw publication rate as a percentage of total actions filed in the Southern District and used the publication rate to estimate the total number of opinions involving foreign judgments.¹⁸ Third, we extrapolated out to the year 2019, using the average percentage increase in opinions involving foreign judgments for the five-year periods ending in 2004 and 2009.¹⁹

The results are presented in Figure 2. What this shows is an overall increase in the number of cases involving foreign judgments, and estimated totals that are quite significant. While we did not gather data on other districts, we would suspect that the trends would be similar, even if the absolute numbers might not be as high as in the Southern District of New York. But if these trends are correct, we would expect business-oriented litigation reform advocates to shift their focus from fighting against forum shopping to fighting against easy enforcement of foreign judgments. We therefore expect that in 2021, foreign judgment enforcement will not only be of great importance to

15. *Gibson Dunn Launches Transnational Litigation and Foreign Judgments Practice Group*, *supra* note 11, <http://www.gibsondunn.com/news/Pages/GibsonDunnLaunchesTransnationalLitigationandForeignPracticeGroup>.

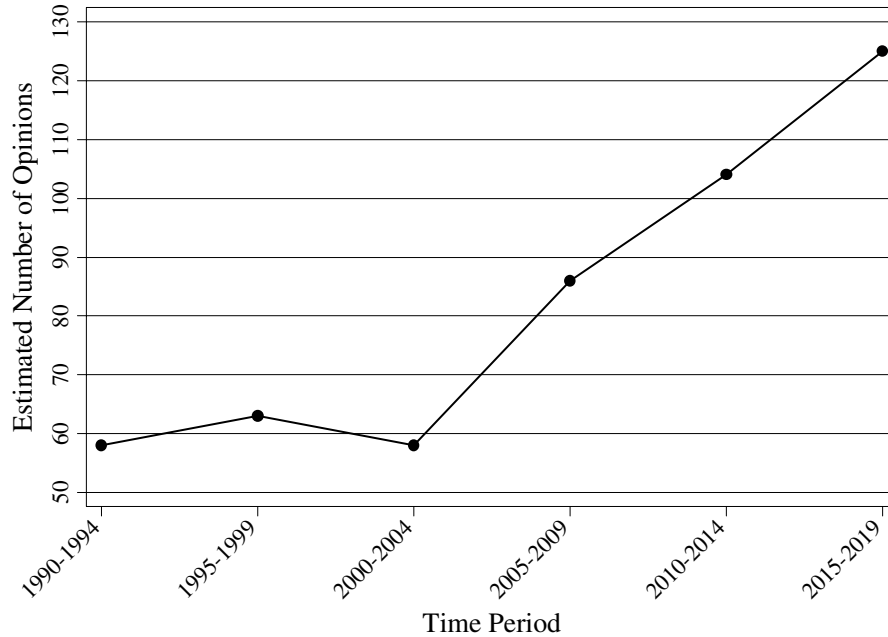
16. *See, e.g.*, *In re Ski Train Fire in Kaprun Austria*, 499 F. Supp. 2d 437 (S.D.N.Y. 2007); *Rogers v. Brasileiro*, 741 F. Supp. 2d 492 (S.D.N.Y. 2010).

17. We found 17 such Southern District of New York opinions published in Westlaw in 1990-1994, 19 in 1995-1999, 18 in 2000-2004, and 25 in 2005-2009. Due to the difficulty of identifying all relevant opinions, we may underestimate the total number of such opinions.

18. The number of Southern District of New York opinions published in Westlaw/total number of actions filed (with publication rates in parentheses) were as follows: 13,147/44,893 (29%) in 1990-1994; 15,661/52,055 (30%) in 1995-1999; 16,659/53,618 (31%) in 2000-2004; and 17,451/60,149 (29%) in 2005-2009.

19. The percentage increases in the estimated number Southern District of New York opinions involving foreign judgments for the five-year periods ending in 2004 and 2009 were -8% and 49% respectively, for an average of 20%. Of course, because our projections are based on the assumption of 20% increases in the five-year periods ending 2014 and 2019, actual results may be different—perhaps substantially so.

FIGURE 2 ESTIMATED NUMBER OF OPINIONS INVOLVING FOREIGN JUDGMENTS IN U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (1990-2009, 2010-2019 PROJECTED)



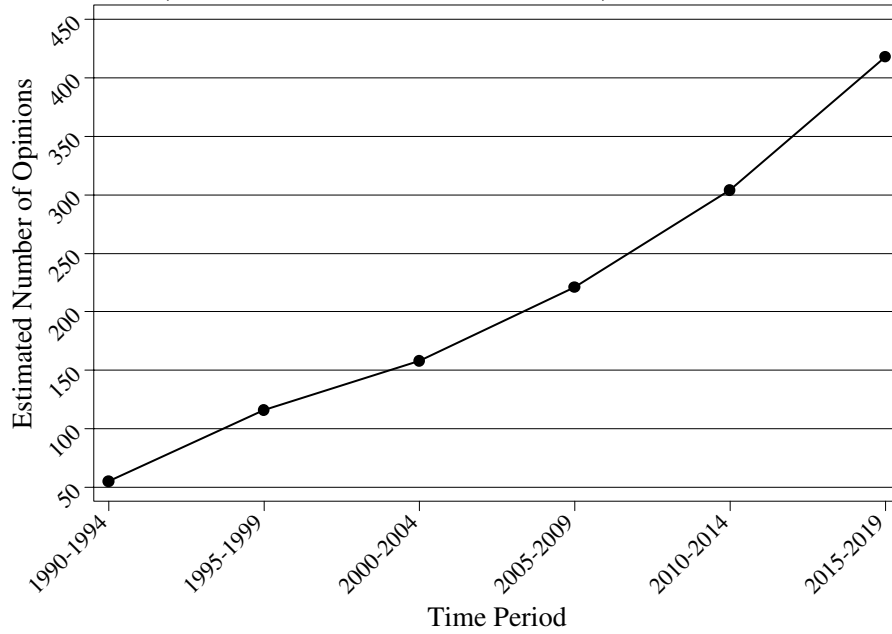
practitioners, but also a subject of significant debate in the world of legal policy.

IV. THE PERVASIVENESS OF FOREIGN LAW ISSUES

We expect U.S. courts to remain an important transnational litigation destination, even as transnational litigation becomes increasingly multipolar. But transnational litigation in U.S. courts is itself likely to be increasingly multipolar in terms of applicable law. Our third conjecture is that in 2021, U.S. judges and lawyers will encounter issues involving the law of foreign countries more often than ever. And, as foreign law issues proliferate in U.S. proceedings, so will debates over the appropriate methods for determining that law.²⁰

20. The rise of foreign law issues in U.S. courts is not a new phenomenon. See generally Louise Ellen Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, 34 J. MAR. L. & COM. 97 (2003). We simply expect this trend to reach new heights over the next 10 years.

FIGURE 3 ESTIMATED NUMBER OF OPINIONS WITH REFERENCES TO RULE 44.1 IN U.S. DISTRICT COURT FOR SOUTHERN DISTRICT OF NEW YORK (1990-2009, 2010-2019 PROJECTED)



A. *Foreign Law in U.S. Courts*

Like our other two conjectures, this third conjecture finds some support in empirical trends. First, U.S. judges appear to be signaling an increased willingness to apply foreign law. According to the conventional wisdom, U.S. judges are biased in favor of the law of the forum.²¹ Such a parochial approach would entail relatively little need to determine foreign law. But a recent empirical analysis suggests that U.S. judges are not as biased in favor of forum law as they supposedly once were. In published choice-of-law decisions in transnational tort cases, U.S. district court judges apply foreign law at an estimated rate

21. See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 334 (2006) (noting, without endorsing, “widely held assumption” that courts applying modern methods have very strong pro-forum-law biases); Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping*, *International and Domestic (Revisited)*, 37 *TEX. INT’L L.J.* 559, 560 (2002) (“Both the empirical evidence and the existing scholarly consensus . . . indicate that there is a strong tendency under all modern conflicts systems to apply forum law.”).

of 44.5%.²² If U.S. judges are indeed increasingly willing to apply foreign law in transnational litigation, then judges and lawyers will increasingly need to determine that law.

A second trend reinforces the conjecture that U.S. judges and lawyers will encounter foreign law issues with increasing frequency. Rule 44.1 of the Federal Rules of Civil Procedure governs the determination of foreign law in the U.S. federal courts. Rule 44.1 provides: “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.” Presumably, federal judges will refer to Rule 44.1 in many, if not most, cases in which a determination of foreign law is required. The number of references to Rule 44.1 thus provides a rough proxy for the prevalence of foreign law issues in the U.S. federal courts.

Figure 3 presents estimates of the number of references to Rule 44.1 in the U.S. District Court for the Southern District of New York from 1990 through 2009, using the same techniques that we used to estimate the prevalence of foreign judgment issues in that district.²³ Figure 3 also projects the number of Rule 44.1 references from 2010 through 2019, using the average percentage increases for the five-year periods ending in 2004 and 2009.²⁴ The estimated number of Rule 44.1 references has steadily increased from 1990 through 2009 and, if past trends continue, the number will be even greater in the decade to come. These results suggest that foreign law issues are indeed of growing importance in the U.S. federal courts—at least in the Southern District of New York.

22. Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 765 tbl.2 (2009). See also SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 338 (2006) (concluding that “courts do not unduly favor the law of the forum”). As one might expect given the central role of territoriality and personality in choice-of-law doctrine, U.S. district court judges appear more likely to apply foreign law when the parties are mostly or all foreign citizens or when the activity giving rise to the dispute occurred mostly or entirely outside U.S. territory. Whytock, *supra*, at 772.

23. We found 16 Southern District of New York opinions published in Westlaw referring to Rule 44.1 in 1990-1994, 35 in 1995-1999, 49 in 2000-2004, and 64 in 2005-2009.

24. The percentage increases in the estimated number of Southern District of New York opinions referring to Rule 44.1 for the five-year periods ending in 2004 and 2009 were 36% and 40% respectively, for an average of 38%. Because our projections are based on the assumption of 38% increases in the five-year periods ending in 2014 and 2019, actual results may be different.

B. Determining Foreign Law

The adoption of Rule 44.1 ended an earlier debate over whether foreign law is a question of fact or law: it is a question of law.²⁵ But it did not resolve another debate: Upon what types of materials should a determination of foreign law be based? Rule 44.1 leaves this question unanswered, allowing the court to consider “any relevant material or source, including testimony, whether or not submitted by a party.” For some time, U.S. courts seemed satisfied with a methodologically eclectic approach to determinations of foreign law, drawing on a combination of translations of primary sources, various secondary sources such as treatises and other scholarly work, as well as expert testimony.²⁶ But the use of expert testimony as an aid in making foreign law determinations came under attack in *Bodum USA, Inc. v. La Cafetière, Inc.*, recently decided by the U.S. Court of Appeals for the Seventh Circuit.²⁷ We suspect that this newly invigorated debate over the proper method of determining foreign law—and the appropriateness of expert testimony in particular—will persist in the years to come.

1. The Debate: The Bodum Case and the Role of Experts

In *Bodum*, the court had to determine an issue of contract interpretation under French law, and both parties submitted expert affidavits supporting their positions on the issue.²⁸ Judges Easterbrook and Posner took the opportunity to criticize the use of expert testimony in determinations of foreign law. Easterbrook argued that experts are expensive, “partisan,” and in any event generally unnecessary.²⁹ When the applicable foreign law has “not been translated into English or glossed in treatises or other sources,” experts may play a useful role; but otherwise, judges should rely on “translations of statutes and decisions [and] secondary literature, such as treatises and scholarly commentary.”³⁰ “Because objective, English-language descriptions of

25. See FED. R. CIV. P. 44.1 (“The court’s determination [of foreign law] must be treated as a ruling on a question of law.”). As Wright and Miller explain, “Prior to the adoption of Federal Rule 44.1, foreign law was regarded as a fact and the party claiming that foreign law was applicable was required to prove it by competent evidence.” CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9A FED. PRAC. & PROC. CIV. § 2444 (3d ed. 2010).

26. See *id.* (describing the “basic mode of proving foreign law” as “[w]ritten or oral expert testimony accompanied by extracts from various kinds of foreign legal materials”).

27. See *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 628-29 (7th Cir. 2010).

28. *Id.* at 627-28.

29. *Id.* at 628-29.

30. *Id.* at 628.

French law are readily available,” Easterbrook concluded, “we prefer them to the parties’ declarations.”³¹

Judge Posner agreed, writing a concurring opinion “to express emphatic support for . . . the court’s criticism of a common and authorized but unsound judicial practice. That is the practice of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses”³² Noting that such expert witnesses “are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client,” Posner argued that using them to determine foreign law “is excusable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn.”³³

Judge Wood wrote a concurring opinion disagreeing with her “colleagues’ assertion that expert testimony is categorically inferior to published, English-language materials.”³⁴ According to Wood, determining foreign law is “notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country’s law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not.”³⁵ “There will be many times,” she argued, “when testimony from an acknowledged expert in foreign law will be helpful, or even necessary,” to surmount difficulties like these.³⁶ Existing methods “suffice to protect the court against self-serving experts in foreign law, just as they suffice to protect the process for any other kind of expert.”³⁷

2. A Comparative Perspective

Might comparative law shed some light on this debate? In both England and France, expert testimony plays an important role in foreign law determinations. With rare exceptions, in the English courts, the only way to prove foreign law is through an expert in the foreign

31. *Id.* at 629.

32. *Id.* at 631 (Posner, J., concurring). For an earlier critique by Judge Posner of the use of expert testimony to determine foreign law, see *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495-96 (7th Cir. 2009).

33. *Bodum*, 621 F.3d at 633-34 (Posner, J., concurring).

34. *Id.* at 638 (Wood, J., concurring).

35. *Id.* at 638-39.

36. *Id.* at 639.

37. *Id.*

law, who is subject to cross-examination in the same way as any other fact witness.³⁸ A conclusion as to foreign law is treated as a finding of fact, but one that is left to the court alone and which can be reviewed on appeal, but under a somewhat deferential standard.³⁹ And on disputed points the judge is free to reach her own conclusions, even if at variance with both of the dueling experts.⁴⁰

The approach is similar in France and the other systems influenced by the Napoleonic Code. A so-called *certificat de coutume* is one of the primary ways that private litigants advance their interpretations of foreign law.⁴¹ These are expert opinions, usually from law professors, and they typically include the supporting authorities.⁴² At the same time, there are differences from the English approach. On the one hand, Anglo-American style cross-examination is not widely practiced, so the French approach may lack what can be an important tool for restraining excessive partisanship by experts.⁴³ On the other hand, French tribunals—unlike English courts—have an affirmative duty to establish the foreign law for themselves, a duty that would seem to invite the kind of independent research recommended in *Bodum*.⁴⁴ Interestingly, however, in France, a trial court's conclusions on foreign law are deemed to be within the court's sovereign fact-finding power and are therefore rarely subject to reversal on appeal.⁴⁵

This very brief comparative discussion has at least two implications for the U.S. approach. First, were the use of expert testimony aberrational among the world's major legal systems, that in itself might make the practice suspect—but, to the contrary, the United States is in good company in this regard. Second, the U.S. approach arguably entails more robust safeguards than the English and French approaches against the sorts of abuses that concern critics of expert testimony. In addition to the availability of cross-examination of ex-

38. See, e.g., *Glencore Int'l AG v. Metro Trading Inc.*, [2001] 1 All E.R. (Comm.) 103 (Eng.); see generally DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS § 9-013 (14th ed. 2006).

39. See, e.g., *Macmillan Inc. v. Bishopsgate Invest. Trust plc* (No. 4), [1998] EWCA (Civ) 1680 (Eng.); see generally 8(3) HALSBURY'S LAWS OF ENGLAND, CONFLICT OF LAWS 23, para. 28 (Lord Mackay of Clashfern ed., 4th ed (reissue) 2003); DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS § 9-010 (14th ed. 2006).

40. See, e.g., *Bumper Dev. Corp. v. Commissioner of Police* [1991] 1 W.L.R. 1362 (C.A.) 1369-70 (Eng.); see DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS § 9-017 (14th ed. 2006).

41. See, e.g., P. Mayer & V. Heuzé, *DROIT INTERNATIONAL PRIVÉ* § 188 (10th ed. 2010).

42. *Id.*

43. *Id.*

44. *Id.* §§ 191-192.

45. *Id.* § 193.

perts,⁴⁶ foreign law determinations are reviewable de novo on appeal in the U.S. federal courts.⁴⁷ As Judge Wood suggests in her concurring opinion in *Bodum*, these safeguards should at least partially alleviate some of Judge Easterbrook's and Judge Posner's concerns about the use of expert testimony in determinations of foreign law.

3. Getting Foreign Law Right: Simple and Contextual Positive Law Approaches

More than comparative analysis is needed to move the debate forward. Judge Easterbrook's and Judge Posner's opinions in *Bodum* imply that expert testimony generally is not necessary for judges to make determinations of foreign law correctly, while Judge Wood's opinion implies that experts will often—perhaps usually—be necessary to get foreign law right. *But what does it mean to get foreign law right?* The *Bodum* opinions do not directly grapple with this question. Yet, without an answer, one cannot gauge the extent to which expert testimony might improve foreign law determinations. What follows is a sketch of some of our ruminations on what it means to get foreign law right, and the implications for how judges should approach foreign law determination in general and the use of experts in particular.⁴⁸

Two possible approaches to foreign law determination stand out: a “Simple Positive Law Approach” and a “Contextualized Positive Law Approach.”⁴⁹ Both models are positivist in the narrow sense that

46. In Quintanilla's experience, cross-examination of legal experts does not have to be conducted using the blistering techniques often used in U.S. jury trials. One common approach used by international arbitral panels is “hot-tubbing,” where both sides' experts appear together at the same time and are questioned simultaneously by the tribunal itself and by counsel for the parties. This invites dialog, helps zero-in on the truly disputed issues, and often, makes most of the disagreements go away. But for an American-trained cross-examiner used to being in control, it can be terrifying until he or she has done it a time or two.

47. See *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998) (“[P]ursuant to Fed.R.Civ.P. 44.1, a court's determination of foreign law is treated as a question of law, which is subject to de novo review.”); *Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 713 (5th Cir. 1999) (“The content of foreign law is a question of law and is subject to de novo review.”); *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co. Ltd.*, 475 F.3d 783, 790 (6th Cir. 2007) (“Interpretations of foreign law present a question of law, to which de novo review applies.”).

48. We focus here on commercial cases where the parties themselves have stipulated that non-U.S. law will govern some aspect of their relationship. Other situations, such as foreign law applied to transnational tort cases based on a choice-of-law analysis, may raise different considerations.

49. Another approach would focus on party expectations. Where the parties have expressly agreed to have their relationship governed by foreign law, the justification for applying that law is based at least partly on the public policy in favor of freedom of contract and respect for the parties' shared intentions. From there it arguably follows that the basic goal in applying foreign law is to do so in a way that reflects what the parties themselves expected. However, this approach is unlikely to be very useful in practice. For one thing, the parties negotiating an agree-

they assume that getting foreign law right is about getting the *lex lata* right—that is, it is about correctly ascertaining the foreign country’s positive law as it actually is, not how that law ought to be (the *lex ferenda*). This positive law focus would seem to be consistent with the attitudes of both judges and litigants in commercial cases in which the parties have selected foreign law to govern their contractual relationship. When determining foreign law, U.S. judges presumably do not see their task as developing that law in ways they think more just or more efficient. Some judges may see this as part of their job vis-à-vis American law. But they are less likely to have this perspective vis-à-vis foreign law. Instead, we suspect that U.S. judges see their role as enforcing the parties’ bargain. And even if the parties do not have clear expectations about the content of specific rules of foreign law when they agree to the law of a particular foreign country, they almost certainly have a general expectation that they are agreeing to the positive law of that country—not some variant imagined by U.S. judges or by scholars as an improvement on that law.

What, then, is the difference between the Simple Positive Law Approach and the Contextualized Positive Law Approach? Roughly speaking, the former is aimed at ascertaining foreign law in books while the latter is aimed at ascertaining foreign law in action.⁵⁰ The Simple Positive Law Approach seeks to discern the content of foreign law based solely on the text of binding rules or guiding principles (depending on how the specific foreign legal system works). It would then distill those rules or principles and apply them to the facts. Under this approach, expert testimony may be helpful or even necessary to avoid some of the comparative law pitfalls identified by Judge Wood in her *Bodum* concurrence, or to provide information on foreign law when translations or treatises are unavailable. However, in many cases, expert testimony might not be crucial for such determinations.

ment often will have developed few concrete expectations about the specific content of the designated foreign law or how it relates to the issues that may arise between them. Similarly, as many a litigator laments, the transactional lawyers who typically negotiate and draft choice-of-law clauses are usually not driven by systematically developed substantive views on the law they are selecting. The tendency is to push for the law that they themselves or the clients are, in general, most familiar with, and sometimes the choice is the product of nothing more than tit-for-tat negotiating: “I’ll agree to a U.S. forum, but only if you agree to my country’s law.” For these reasons, an approach that equates getting foreign law right with the parties’ expectations about that law is unlikely to be a fruitful approach.

50. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (distinguishing between “law in books” and “law in action”).

In contrast, the Contextualized Positive Law Approach, beyond distilling particular principles of the foreign law, attempts to ascertain how those principles are actually applied in concrete situations in the foreign country. The goal—similar to that of U.S. federal court determinations of state law in diversity cases—is to determine how a court of the foreign country would interpret and apply its own law, and to follow that determination even if a U.S. court taking a Simple Positive Law Approach would reach different conclusions.⁵¹ Expert testimony would seem especially important under the Contextualized Positive Law Approach. Judges may be experts on law, as Judge Posner points out in his *Bodum* concurrence,⁵² but they are less likely to be well versed in actual foreign legal practice, not to mention the foreign legal culture that may influence that practice. Therefore, the use of expert testimony will often be essential to get foreign law right in the contextualized sense.

An example is a case recently litigated by coauthor Quintanilla. In Country X, there is a rule that, before a party can terminate an at-will contract, that party must give reasonable notice sufficient to allow the counterparty to prepare for life after the contract. As a matter of positive law, there is no written formulation of the rule that is more precise than that. A U.S. judge taking a Simple Positive Law Approach would apply that principle to the facts or read that principle to the jury as a jury instruction. In contrast, a judge taking a Contextualized Positive Law Approach would be interested in obtaining additional information—for example, as an empirical matter, how much time do courts in Country X actually require in analogous situations? Is there a clear weight of respected scholarly commentary in Country X about the underlying rationale of the rule that might help the court apply it to the facts at hand in a way that would match the treatment of those facts in Country X? This approach might constrain the judge's discretion and, at least in theory, could help the U.S. court reach a result that would be more consistent with the result that would be produced by a court in the foreign country.

Which approach is more desirable? We cannot hope to answer this question within the confines of this Article. However, the Contextualized Positive Law Approach may have at least one significant

51. See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 19 FED. PRAC. & PROC. JURIS. § 4507 (2d ed. 1996) (noting that when required to apply state law, a federal court “must determine issues of state law as it believes the highest court of the state would determine them,” even if the federal court concludes that the rule of law ascertained in this manner is “anomalous, antiquated, or simply unwise”).

52. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010).

advantage over the simple approach: It would more effectively promote at the international level the twin aims of the Erie doctrine: “discouragement of forum-shopping and the avoidance of inequitable administration of the laws.”⁵³ By striving to apply the law of a foreign country in the same manner that a court of that same foreign country would apply it, U.S. courts can reduce the incentives a litigant may have to forum shop into the United States in search of a legal determination that is more favorable to its case. Moreover, this approach helps avoid the unfairness that can occur when “the character or result of a litigation materially . . . differ[s] because the suit had been brought” in a U.S. court rather than a foreign court.⁵⁴

4. Practical Implications for Judges and Lawyers

At a practical level, our intuition is that U.S. judges generally will want to avoid applying foreign law in a way that is wholly out of step with how that law would, as an empirical matter, be applied in the foreign country—whether due to a sense that a foreign country knows its own law best, an impulse in favor of the outcome-neutrality values embodied in the Erie doctrine,⁵⁵ or a Holmesian equation of law with “[t]he prophecies of what the courts will do in fact.”⁵⁶ In other words, we suspect that U.S. judges will generally lean in favor of a Contextualized Positive Law Approach and, in turn, will generally benefit from expert information about how foreign law is actually applied in the foreign country of origin—even when the simple “black letter” positive law can be gleaned from published sources. Therefore, we expect the use of expert testimony to remain a common practice in 2021 and beyond, notwithstanding the Easterbrook and Posner opinions in *Bodum*.

At the same time, we suspect that even judges sympathetic to a contextualized approach will sometimes retreat to the Simple Positive Law Approach when available sources allow this. This is likely when the expert testimony arranged by the parties relies on unsubstantiated

53. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

54. *Cf.* 380 U.S. at 467 (noting this unfairness in the context of U.S. federal courts versus U.S. state courts).

55. *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 19 FED. PRAC. & PROC. JURIS. § 4504 (2d ed. 1996) (citing *Guaranty Trust Company of New York v. York*, 326 U.S. 99, 109 (1945)) (explaining that “Justice Frankfurter stated that the proper policy under Erie was to ensure, ‘so far as legal rules determine the outcome of a litigation,’ that the outcome of federal court adjudication of diversity cases ‘should be substantially the same’ as the result that would have obtained in a state court”).

56. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

assertions about foreign legal culture or foreign legal practice, or when each side's expert testimony is equally well supported. It is also likely in situations where the positive law is applied in the foreign country in ways that offend the judge's sensibilities, either in a subjective and undisclosed manner, or in situations where the contextualized approach would produce a determination that would cause U.S. application of foreign law to violate domestic public policy.

How, then, should lawyers go about preparing for a Rule 44.1 determination of foreign law? Clearly, an expert's *ipse dixit* will not suffice. Rather, a fully developed and well-supported presentation of the rules and principles is needed. Code provisions, case law, and treatise excerpts—all properly translated—are essential. Then, an expert declaration can be used as a tool to synthesize that material into a persuasive whole. Coauthor Quintanilla's approach is for the lawyer to work with the expert to produce the equivalent of a mini law review article precisely focused on the foreign legal issues that matter to the client. It should be footnoted with the same kind of rigor one would expect in a law review article, and the tone should be as neutral as possible without letting the declaration devolve into an abstract commentary. We suspect that this type of approach can indeed influence judges' foreign-law determinations, and at the very least can provide a judge with a helpful primer on the relevant principles of foreign law and how they are applied in the foreign country.

Beyond primary sources, secondary sources, and expert testimony, another method that could help U.S. judges get foreign law right would be the certification of questions of foreign law to foreign courts.⁵⁷ Such a transnational certification process could create delays, and would depend on the foreign court's cooperation. Yet these practical difficulties are not necessarily insurmountable. And whether one espouses the Simple Positive Law Approach or the Contextualized Positive Law Approach, it is hard to think of a method that can do more than certification to help U.S. judges get foreign law right. Therefore, the possibility of such an approach would be worth exploring.

In sum, *Bodum* offers an important wake-up call for both judges and lawyers to reflect on the ends and means of foreign law determi-

57. See Doug M. Keller, *Interpreting Foreign Law Through an Erie Lens: A Critical Look at United States v. McNab*, 40 TEX. INT'L L.J. 157, 183-84 (2004) (discussing the possibility of certifying questions of foreign law); William H. White, Jr., *Foreign Law, Politics and Litigants in U.S. Courts: A Discussion of Issues Raised by Transportes Aereos Nacionales, S.A. v. De Brenes*, 27 U. MIAMI INTER-AM. L. REV. 161, 191-92 (1995) (same).

nations. But we think the bottom line is this: despite *Bodum*, experts will (and should) continue to play an important role in foreign-law determinations in the years to come.⁵⁸ In most cases, lawyers who fail to present expert testimony will do so at their peril.⁵⁹

V. CONCLUSION

Our overarching conjecture is that, as we move toward 2021, transnational litigation will be increasingly multipolar. Ten years from now, the courts of more countries than ever will be making important contributions to transnational dispute resolution; more foreign court judgments than ever will be brought to the United States for enforcement or recognition; and foreign-law issues will be more pervasive in U.S. courts than ever. The United States will remain an important destination for transnational litigation, but it will be only one such destination among a growing number of others. U.S. law will continue to exert a significant influence over transnational activity, but in relative terms, this influence may decrease as the influence of other countries' laws increase and as other countries begin to develop procedures analogous to those once available only in the United States.

Is this a good thing? For interest groups such as the U.S. Chamber of Commerce's Institute for Legal Reform, these developments might seem like a wish come true. Such groups have vigorously advocated policies to discourage foreign plaintiffs from suing multinational corporations in U.S. courts, arguing that these plaintiffs are exploiting the United States' pro-plaintiff legal environment in ways that have adverse economic consequences for U.S. business.⁶⁰ But the success of these advocacy efforts may be a pyrrhic victory, as it is far from clear that U.S.-based multinationals will fare any better in foreign

58. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 58 AM. J. COMP. L. manuscript at 100 (forthcoming 2011), available at <http://ssrn.com/abstract=1737558> ("As erudite as the [. . .] exchange [in *Bodum*] is, and despite the admirable stature of these three judges and their record of influence on other courts, the reader should not be left with the impression that this case signifies a major shift in the treatment of foreign law. Most judges do not have the time, the knowledge, or the scholarly predilection to undertake their own research on foreign law.")

59. See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9A FED. PRAC. & PROC. CIV. § 2444 (3d ed. 2008) (observing that "district court judges expect adequate expert testimony on foreign law and that the failure to produce it may be quite damaging to a litigant's case").

60. See Institute for Legal Reform, *Global Forum Shopping Fact Sheet*, INST. FOR LEGAL REFORM, http://instituteforlegalreform.com/component/ilr_featured_tools/29/item/GFS/8.html (last visited June 28, 2011) (claiming that forum shopping causes uncertainty for corporations operating within U.S. markets, discourages foreign investors from doing U.S. business, and disrupts mergers and partnerships with U.S. corporate interests).

courts than in U.S. courts.⁶¹ Moreover, from an international perspective, while countries once overshadowed by the United States in transnational dispute resolution may stand to benefit from the new multipolarity, the United States may experience a corresponding decline in its influence over the governance of transnational activity.⁶²

If these broader implications are somewhat mixed and murky, the direct implications for U.S. judges and lawyers seem clear: It will be increasingly important for them to remember what they learned in their conflict of laws course in law school—jurisdiction, forum non conveniens, choice of law, recognition and enforcement of foreign judgments—and to become skilled at applying this learning in transnational settings. It will also be increasingly important for U.S.-based lawyers to consult with colleagues in other countries to develop and carry out sound global litigation strategies. In our opinion, the new multipolarity will make transnational litigation practice more challenging—and also more interesting—than ever.

61. See generally Michael D. Goldhaber, *Forum Shopper's Remorse*, CORP. COUNS. (Apr. 1, 2010), available at <http://www.corpcounsel.com> (describing potential perils of defendants opting to litigate abroad instead of in U.S. courts); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 112 COLUM. L. REV. (forthcoming 2011) (discussing tendency of defendants to move to dismiss suits in favor of foreign courts on forum non conveniens grounds in search of pro-defendant legal environments, only to experience unexpectedly pro-plaintiff outcomes).

62. For a systematic analysis of the role of domestic courts in global governance, see Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 69 (2009).

