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## **Transnational Private Litigation as Transnational Governance**

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### **I. Introduction**

To many internationalists, national private laws, if relevant at all, are viewed as tools for facilitation of international commerce and transactions. This view of the international function of national private laws is all the more present in light of reforms to private international law (the rules related to jurisdiction of courts, choice of applicable law, and enforcement of judgments, in private legal disputes that have connections to more than one law jurisdiction) in many jurisdictions that have increased party autonomy over forum selection and governing law, promoted the use of arbitration for dispute resolution, and aided enforcement of contracts and property rights across borders. This paper explores whether with greater awareness by legal and non-legal actors of a progressive potential in private law, transnational litigation of private law claims in national courts could constitute part of a pluralist regime for the governance of transnational economic activity, one that mixes international governmental treaties and institutions, state public laws, transnational non-governmental actors, and local private actors.

In particular, this paper explores whether transnational private litigation has a “critical” role in global governance in disturbing existing practices and promoting concerns that are not going to be achieved by regular politics in the international order. The thesis explored in this paper is that a number of key transnational goals, such as concerns about regulation, restitution and redistribution, are unlikely to occur through the normal course of international politics. In contemporary impoverished world politics, transnational litigation is a plausible second-best strategy. This is not to idealize the transnational litigation process. Examples abound in domestic politics of contexts where litigation is clearly a harmful practice. But given the current state of global politics and with respect to certain kinds of goals in an era of globalization, transnational litigation can play a useful role in global governance.

The critical functions of transnational litigation for global governance might be several. Sometimes transnational litigation will achieve *substantive ends* such as damage awards that provide retribution, compensation, restitution or redistribution to deserving victims of harmful transnational conduct, such as environmental harms. Besides actual awards, litigation can contribute to *transnational processes* that assist in realizing such goals; for example, in producing information about and placing shaming pressure on private actors, or through constituting, sustaining and energizing transnational networks. Of broader interest is whether the practice of transnational litigation can perform a *critical ideational*

*function*, by generating challenges to dominant normative frameworks of world politics. In this ideational function, litigation not only provides information and policy opinions to the interested parties, but also to transnational networks and broader publics. In such a role, transnational litigation may produce both spectacular episodes and regularized practice in domestic societies that, especially given contemporary global communications,<sup>1</sup> may help to challenge and to partly reconstruct the ideational and perhaps the emotive-sentimental foundations of global governance.<sup>2</sup>

## II. Transnational Litigation: Anticipations

Litigation to most observers is hardly the most obvious venue for meaningful social governance or social change. With the spread of constitutionalism, awareness of how significant social change can be advanced through courts has increased. In particular, the role of human rights litigation has promoted the notion that litigation can be a technique for countering or advancing problematic or stalemated majoritarian politics. Although private law litigation seems still further removed from governance concerns than does constitutional litigation, recent examples of transnational litigation based on private law do mark the current international legal terrain, and suggest that litigation could become a significant part of a pluralistic system of global governance.<sup>3</sup>

For example, tort actions have been commenced against business actors for conduct in foreign jurisdictions. Often, claims are made against a company in the home jurisdiction of the company or its parent. Most famously, the Bhopal litigation saw Indian plaintiffs sue Union Carbide in the courts of New York for injuries suffered in the explosion at a Union Carbide subsidiary's chemical plant in India.<sup>4</sup> Although, infamously, the New York court refused to assume jurisdiction for reasons of *forum non conveniens*, the court did impose a number of conditions on its stay, including that Union Carbide submit to the jurisdiction of the Indian courts and consent to the broad discovery procedures available under US rules of civil procedure. All of this provided a basis for negotiations overseen by the Indian Supreme Court that resulted in a \$500 million settlement, relatively large by previous Indian standards, although small by potential US civil jury standards.

Similar actions have been brought against various Western, especially US corporations,

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<sup>1</sup> E.g. direct action and other branding tactics; see N. Klein, *No Logo: Taking Aim at the Brand Bullies* (1999), M. Derry, *Culture Jamming: Hacking, Slacking and Sniping in an Empire of Signs* (1993), and the journal *Adbusters*.

<sup>2</sup> R. Rorty, "Human Rights, Rationality, and Sentimentality", in S. Shute and S. Hurley, *On Human Rights: The Oxford Amnesty Lectures 1993* (1993).

<sup>3</sup> See generally, C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001).

<sup>4</sup> *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986), aff'd 809 F.2d 195 (2d Cir. 1987). The Second Circuit ruled that a suit against Union Carbide by Indian victims and the Indian government of the Bhopal chemical disaster was *forum non conveniens* in the New York courts, i.e. that New York was not the most appropriate forum for the action and instead should be heard in the courts of India. This conclusion was reached in spite of the submissions of the Indian government who agreed that the suit was better heard in the U.S. court. For critical commentary, see U. Baxi, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (1986).

in their home jurisdiction for tort harms arising from their foreign business conduct. In the US, a number of suits have used the US Alien Tort Claims Act as a basis for their claims.<sup>5</sup> ATCA permits domestic private law suits by private parties in US courts against defendants for violations of the “law of nations”. Claims, for example, are being pursued against Unocal and other oil companies for their activities in the Yadana oil project and oil pipeline in Burma, in particular for alleged complicity in forced labour, displacement and torture by the Myanmar government.<sup>6</sup> Similar claims are working their way through the US courts against Texaco Oil for alleged environmental and health harm resulting from its activities in Ecuador.<sup>7</sup> Earlier suits against US mining company Freeport-McMoran had been brought both under ATCA and under standard private law for alleged environmental harms at an Indonesian mine, as well as corporate complicity in acts of torture and inhumane treatment under detention by Indonesian military officials and private security forces.<sup>8</sup>

More recently, claims have been made in US courts for compensation against foreign corporations for alleged forced labour during war time. These suits, which again were based on ATCA, were brought by various US plaintiffs against various German and other corporations (such as Ford Motor Co.).<sup>9</sup> Although much of this litigation seemed unlikely to succeed, it combined with broader political and reputational concerns to lead to the German Foundation “Remembrance, Responsibility and the Future”, a compensation fund reached through a complex transnational process involving plaintiffs, private industry and various governments.<sup>10</sup> The various suits were either withdrawn (a condition for compensation under the Foundation arrangements) or dismissed by US courts, which specifically identified deference to the transnational process that led to the Foundation agreement to support dismissal.<sup>11</sup> Similar litigation continues, for example, against French banks for alleged participation in seizure of Jewish assets during the Vichy regime.<sup>12</sup>

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<sup>5</sup> See e.g. C. Scott, “Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights” in A. Eide, et al. (eds), *Economic, Social and Cultural Rights*, 2d ed (The Hague, Kluwer, 2001); B. Stephens, “Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts” in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (2000).

<sup>6</sup> *Doe v. Unocal*, 963 F.Supp. 880 (C.D. Cal., 1997).

<sup>7</sup> *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994); *Aguinda v. Texaco, Inc.* 945 F. Supp. 282 (S.D.N.Y. 1996)

<sup>8</sup> *Beanal v. Freeport-McMoran, Inc.*, 969 F.Supp. 362 (E.D. La. 1997); *Alomang v. Freeport-McMoran Inc.* 718 So.2d 971 (La.App. 4 Cir. 1998). Amongst the claims in the *Beanal* case were causes of action for human rights and environmental violations of the “law of nations” pursuant to ATCA, while the *Alomang* case limited all of its causes of action to basic personal injury claims.

<sup>9</sup> See e.g. *Princz v BASF Group, et al.*, Civ. No. 92-0644 (D.D.C. 18 September 1995); *Iwanowa v Ford Motor Co and Ford Werke AG*, 67 F Supp 2d 424 (D.N.J. 1999); *Burger-Fischer v Degussa AG*, 65 F Supp 2d 248 (D.N.J. 1999)

<sup>10</sup> See the description of this process in *In re Nazi Era Cases Against German Defendants Litigation*, 129 F Supp 2d 370 (D.N.J. 2001). For commentary on the Foundation, and in particular some doubts concerning whether the settlement was helpful to broader concerns, such as addressing historical memory; see L. Adler and P. Zumbansen, “The Forgetfulness of the Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich”, 39 *Harv. J. Legislation* 1 (2001)

<sup>11</sup> *In re Nazi Era Cases*, *ibid.*

<sup>12</sup> *Bodnor v Banque Paribas*, 114 F Supp 2d 117 (E.D.N.Y. 2000).

This form of litigation need not rely only on the existence of a statute such as the ATCA. Private law suits can proceed in almost any jurisdiction for harms abroad.<sup>13</sup> For the most part, the main barriers are the preliminary concerns of domestic courts under domestic rules of private international law, as to whether they are the right venue for the suit (jurisdiction) and as to what law should be applied even if a court accepts jurisdiction (choice of law). For example, an NGO was formed in Quebec to bring suit against the Quebec based mining company, Cambior Inc., on behalf of Guyanese plaintiffs for injuries allegedly suffered as a result of a massive cyanide accident at the Omai gold mine operated by a subsidiary of Cambior in Guyana. Although Quebec civil law provided a substantive basis for such claims, the Quebec court declined to hear the suit on its merits based on controversial jurisdictional determinations that considered Guyanese courts to be a more appropriate forum to hear the case.<sup>14</sup> Recent jurisdictional decisions in Britain suggest that such transnational litigation suits may become more common outside of the United States.<sup>15</sup>

### III. The Substantive Concerns of Transnational Litigation

The application of private law through national courts is not an obvious tool of global governance. But private law suits heard in national courts are important parts of the institutions of democratic governance in many societies. In the international context, some substantive concerns that are not currently dealt with well in international governance may be better addressed by private law claims in national courts, in a transnational context. Substantive advantage may relate to at least two important features of transnational litigation:

- (1) In important ways, litigation is a better way of directly accessing and making claims against *certain actors*. In particular, such litigation provides a means of making claims against other private actors, such as multinational corporations. While human rights claims or appeals to public regulators to regulate corporate actors in their foreign conduct are possible, the practical impediments are often severe. In both design and practice, state accountability for regulating private actors can be limited. Moreover, civil damage awards, including awards of punitive damages, are potentially far larger than the maximum or realistic levels of fines imposed by state officials.
- (2) Litigation can also be a more effective tool for making *certain kinds of claims*. For example, litigation is used in many domestic systems for claims such as compensation for mass accidents through tort litigation, restitution for unjust

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<sup>13</sup> On the distinction between direct and surrogate claims, see Scott, *supra*, note 3, at 62.

<sup>14</sup> *Recherches Internationales Quebec v. Cambior Inc.*, [1998] QJ No.2334 (Quebec Superior Court, 14 August 1998).

<sup>15</sup> *Connelly v RTZ Corp plc* [1997] 4 All ER 335 and *Lubbe v. Cape plc* [2000] 4 All ER 268 (suit against British parents of South African companies for asbestos related harm to workers). On similar developments in non-US jurisdictions, see Scott, *supra* note 5.

enrichment; misrepresentation and unconscionability concerns in contract; and allegations of breach of trust and fiduciary duties.

I am interested in whether transnational litigation may also serve a broader *regulatory* function with respect to transnational economic actors. As is well understood in the domestic context, regulation of private conduct could be achieved through compensation to particular injured individuals, but also through the consequent social deterrence.<sup>16</sup> In the international context, the need for such processes of regulation is even more pronounced. It is commonly observed that the de-centralized international system leads to problems such as regulatory gaps, free-rider problems, and regulatory competition. In the global system such a regulatory deficit seems augmented with the weakening of traditional sovereign forms of public regulation in the face of increased transnational economic activity, and the difficulty of addressing such concerns through impeded international treaty processes. Transnational litigation could partly address such international regulatory gaps. In particular, national courts and national private laws (and the private international law linking them) may be able to leverage their role as a necessary “touchdown” point for international economic transactions (as the supporting venue for contract enforcement, property protection, and dispute resolution) into a transnational regulatory role.<sup>17</sup>

In addition to regulatory purposes, private law claims may be an effective tool for individual or small group claimants to seek compensation for harm that is either restorative or corrective. Although such private law claims may have a social deterrence function, many of these claims do not involve such general benefits for society, but rather are *distributive* claims. That these claims are based on justice, and not based on positive sum cooperative gains, is widely understood to be in the nature of private law: for example, tort law.<sup>18</sup> Tort, but also contract law, have a variety of purposes, including corrective justice and paternalistic-protective functions, that involve decisions concerning distribution among individuals.<sup>19</sup> In the domestic context, private law claims can sometimes provide a more accessible and effective point of access for disadvantaged groups or individuals than either legislative or administrative processes. This may even more be so in transnational contexts, where public international regimes to hear such claims are incomplete or otherwise unresponsive to claims involving distributive aspects. I will return to that issue below.

#### IV. The Procedural Benefits of Transnational Litigation

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<sup>16</sup> G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970).

<sup>17</sup> R. Wai, “Transnational Liff-off and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization”, (2002) 40 *Columbia Journal of Transnational Law* 209.

<sup>18</sup> For example, any understanding of tort law as corrective justice; see E. Weinrib, *The Idea of Private Law* (1992).

<sup>19</sup> E.g. D. Kennedy, “Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power”, 41 *Maryland L. Rev.* 563 (1982).

In addition to substantive objectives, transnational litigation provides some distinctive procedural contributions because of the particular nature of such transnational legal process.<sup>20</sup>

First, there are the obvious advantages associated with well-established practices that can assist disadvantaged parties in litigation. For example, contingency fee arrangements, pro-bono public interest representation, jury trials and punitive damage awards are all features of US courts that could well benefit foreign litigants in making claims. As Lord Denning famously observed, “[a]s a moth to the light, so a litigant is drawn to the United States.”<sup>21</sup> Such assistance, even when it might involve profits for the undeserving such as lawyers, also means that forms of claim can be made in national courts that otherwise might be invisible because impractical.

Second, there may be advantages associated with the litigation process that are beneficial to particular plaintiffs, regardless of whether a final verdict is given in their favour. Litigation can lead to discovery of important information as a result of mandated discovery of documents or examination of witnesses. Information so disclosed might otherwise have been shielded from outsider scrutiny. Information might be provided that is immediately useful or potentially useful for other purposes. Information released in the course of litigation can also be helpful to other groups; in this sense, it can contribute to “corporate social transparency”.<sup>22</sup> In addition, media coverage that sometimes accompanies trials can lead to further publicity concerning defendant practices,<sup>23</sup> and be a method of seeking settlement.

Beyond the particular dispute, litigation campaigns can provide a basis for building or strengthening transnational networks. One form of transnational network that clearly grows as a result of transnational litigation is a growth of direct contact among relevant governmental actors, including among judges.<sup>24</sup> In addition, litigation can lead to contacts and alliances among public interest lawyers, academics and activists from different jurisdictions. Most important, networks of NGO groups can be developed through legal campaigns that may lead to further cooperation, legal or otherwise.<sup>25</sup> In

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<sup>20</sup> The recent work of Kathryn Sikkink has begun to look at the specific links between legal rules and transnational advocacy networks, although so far the focus has been more on what such networks can bring to the development and enforcement of legal norms, than the potential benefits of litigation of existing norms for networks themselves. See M. Keck & K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (1998) and e.g. K. Sikkink, “Transnational Advocacy Networks and the Social Construction of Legal Rules”, in Y. Dezalay & B. Garth, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Order* (2002).

<sup>21</sup> *Smith Kline & French Laboratories Ltd. v. Bloch* (1983), 2 All ER 72 at 74 (C.A.).

<sup>22</sup> C. Williams, “The Securities and Exchange Commission and Corporate Social Transparency”, 112 *Harv. L. Rev.* 1197 (1999).

<sup>23</sup> This function of litigation can even operate where corporate actors are plaintiffs; e.g. the McLibel trial in Britain. See J. Vidal, *McLibel: Burger Culture on Trial* (1997)

<sup>24</sup> A.-M. Slaughter, “The Real New World Order”, 76 *Foreign Affairs* 183 (1997) at 186-189; A.-M. Slaughter, “A Typology of Transjudicial Communications”, 29 *U. Richmond L. Rev.* 99 (1994).

<sup>25</sup> Keck and Sikkink, *supra* note 20.

this latter respect, transnational litigation reinforces other transnational ties that challenge the idea of world politics as principally about state-to-state relations.<sup>26</sup>

### V. Critical Ideational Functions

Beyond procedural benefits to particular plaintiffs, we can imagine transnational private litigation making distinctive contributions to the processes of transnational *governance*. In this respect, we can understand transnational private litigation as occupying a particular space in the processes of transnational politics less directed to particular substantive outcomes and more directed to disturbing dominant logics in other governance processes.

In this view, transnational litigation, for example, might be viewed as one way of countering the transnational “liftoff” of international business transactions. Scholars such as Gunther Teubner have described how international business actors can increasingly take on the character of autonomous normative orders, in which norm generation, regulation and dispute resolution are resolved without recourse to traditional state systems.<sup>27</sup> International business actors, whether organized into a multinational enterprise that internalizes conflicts within an overarching corporate entity, or legally independent actors which nonetheless work together in a network of repeat dealing, common values, and institutions associated with a common trade, can to a significant degree take on the character of an autopoietic social system.<sup>28</sup> Litigation, however, can play a role in maintaining the introduction of external norms into the lives and practices of such business actors. This may occur partly through the use of litigation as a tool by countervailing networks of social activists such as labour actors or human rights actors.<sup>29</sup> So long as private business actors need to rely on state systems for at least some functions, litigation can be a tool to ensure that such systems remain, at least at the levels of norms, rooted in some other forms of social system.

Transnational litigation might be able to introduce other policy values (sometimes through new policy actors) into negotiations or decision-making in other venues, domestic or international. It may be that, in this way, other forms of social relations, such as negotiations, operate “in the shadow” of private litigation.<sup>30</sup> This may have occurred, for example, in the context of the Third Reich forced labour cases, which essentially re-

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<sup>26</sup> As has been noted for some time in both the legal and international relations literatures; see e.g. P. Jessop, *Transnational Law* (1956) and R. Keohane and J. Nye, *Transnational Relations and World Politics* (1974).

<sup>27</sup> G. Teubner (ed.), *Global Law without a State* (1997).

<sup>28</sup> G. Teubner, “Breaking Frames: The Global Interplay of Legal and Social Systems”, 45 *Am. J. Comp. L.* 149 (1997)

<sup>29</sup> Teubner, *supra* note 27.

<sup>30</sup> R. Mnookin & L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce”, 88 *Yale L.J.* 950 (1979).

opened inter-state diplomatic settlements made in the immediate post-WWII political context.<sup>31</sup>

As already suggested, transnational litigation might be a venue for the operation of countervailing networks of transnational civil society groups and social movements.<sup>32</sup> Litigation can also serve as a local and relatively accessible venue for initiating, concentrating, focusing and expressing normative outrage.

Finally, and most basically, successful transnational litigation might be able to bring to the attention of and then normalize broader transnational practices in domestic societies that are otherwise insulated from global concerns and foreign interests. Repeated examples of transnational litigation might have broader effects in thinking among business actors, governmental officials, legal actors and the broader public about their responsibility for transnational social goals such as regulation or restitution. A first step in such a link into broader political process for transnational litigation depends on it making use of some distinctive features of domestic adjudication as a political decision-making process.

## VI. The Uses of Domestic Adjudication in Global Governance

Obviously law is politics and legalism is an ideology.<sup>33</sup> Why might a litigation be able to achieve transnational goals, at least initially, in a way that other political techniques cannot?

Court-based adjudication has some familiar characteristics that mark law as a distinct arena for political change: the focus of litigation on individual, discrete claims; the relative distance of the adjudicator from the flux and immediate pressures of majoritarian politics; the normative character of law as a communicative realm of argumentation and justification. These features can provide a relatively useful politics where other forms of politics to achieve governance, regulation and distribution are closed. It is these features that are used to justify the independence of a judicial process in the separation of political powers and as the key institution in the protection of constitutional protection of individual and minority rights. Does the distinctive politics of adjudication also translate into the possibility that adjudication by national courts of transnational disputes has the possibility to follow a different logic than the dominant logics of world politics as well?

A turn to national court adjudication may have moderation effects, empowerment effects, and legitimation effects, with respect to transnational governance concerns such as regulation, restitution or redistribution.<sup>34</sup> These might not always be beneficial, but at least one would expect that the political results will be different. Why this might be so

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<sup>31</sup> Such results may not be generalizable to situations where governments and business were less sensitive to this form of pressure..

<sup>32</sup> See Teubner, *supra* note 28.

<sup>33</sup> E.g. J. Shklar, *Legalism: Law, Morals, and Political Trials* (1964).

<sup>34</sup> D. Kennedy, *A Critique of Adjudication: Fin-de-siecle* (1997).

may, for example, related to the central position of the judge. Judges have certain backgrounds, sentiments or ideologies that are perhaps more liberal and internationalist than the population.<sup>35</sup> But I think as well, with obvious limits, that any decision-maker will likely to be more sympathetic to foreign claims than the regular population because of the nature of the adjudication function. The typical national judge is isolated from regular political pressures, and charged with the task of doing justice. Of course such judges face local political pressures, but they are also somewhat insulated from immediate discipline. Moreover, and perhaps most importantly, such judges are required to engage and listen carefully to the both the arguments and the evidence presented by both sides. In contrast, the vast majority of domestic decision-makers and the general population do not encounter injustices abroad, because of geographical and other forms of distance. Even with modern communications, both the control of media by a limited number of actors and the flattening simulacrum of media such as television tend to re-establish distance that technologically has become smaller. Faced with particular claims made by particular people, most members of domestic polities will be more sympathetic than they are when the injustices or problems are too vast and not salient. Juries too hearing in local courts a case with transnational aspects may make more sympathetic decisions. Moving out still further to other legal actors, such as counsel, lawyers, bureaucrats, and others, one can ask how processes of law and ideologies of legalism can impact more broadly beyond narrowly “judicial” actors in taking foreign issues and concerns seriously.

## VII. Limits and Challenges: Contexts of Transnational Litigation

Clearly, litigation as a strategy of global governance faces constraints and difficulties. Most obviously, if international or domestic systems are completely dominated by power considerations, there is little room for strategies based on law. Law will simply reflect and be directed towards legitimating dominant power, and legal processes and the rule of law will simply be the procedures for the enforcement of the dominant order.

Transnational litigation therefore has a critical governance potential only in an intermediate zone of power configurations. Legal processes can function as norm contestation in venues where domestic and international political situations offer opportunities.<sup>36</sup> An international domain that is not closed completely, but where the majority or controlling elite is likely to be cool or indifferent, is a classic terrain for legalistic strategy. Moreover, many states in the current international system have liberal institutional structures that include a commitment to the use of courts and law as a location for real conflicts and regulatory and restitution claims.<sup>37</sup>

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<sup>35</sup> See D. Kennedy, “The International Style in Postwar Law and Policy”, [1994] *Utah L. Rev.* 7. It may be that judges share in national traditions of internationalism, or that judges share in cosmopolitan education and professional cultures.

<sup>36</sup> S. Khagram, J. Riker, K. Sikkink, “From Santiago to Seattle: Transnational Advocacy Groups Restructuring World Politics”, in Khagram, Riker and Sikkink (eds.), *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (2002).

<sup>37</sup> A.-M. Slaughter, “International Law in a World of Liberal States” 6 *European J. Int’l L.* 503 (1995).

Although few would argue that total domination is present in the domestic and international systems, there clearly are concerns about the value of transnational litigation related to the current context of world politics.

#### A. The Imperialism of US Legalism?

First, a turn to litigation is suspect in the current world context because litigation and legalism as a form of politics is so closely identified with the United States. Acceptance of the value of transnational litigation seems to involve yet a further example of the dominance of US norms, ideologies and practices. Nonetheless, transnational litigation might still be attractive to those interested in critical approaches to governance.

First, it seems foolish to deny the relevance of US modes of regulation given that US entities and US power are so important a presence in an integrated world system now. Given that problems for governance are projected by US power, it is useful to attend to the tools of regulation and governance that operate in the US context. NGOs have grasped this as a matter of strategy, and academic studies should recognize it too. So, for example, activists have used branding techniques that rely on the power of the market; including branding itself as the highest form of the commodification of identity, as a tool to raise pressure on economic entities.<sup>38</sup>

Second, partly as a result of US policies and the Bush administration's turn to unilateralism, dreams of supranational regulation and governance seem more and more distant. To use David Kennedy's term, the "metropolitan" dream of something like an EU for the world, a strong form of government programs of social welfare and public regulation, seems simply unattainable.<sup>39</sup> This turn against old-style regulation at the supranational is further weakened by attacks on public regulation domestically.

Third, and partly the result of the second, the international system now is rather like the United States domestic order: a medieval accumulation of private and public entities, with overlapping domains and practices. Most of all, the international system is plagued by the lack of the underlying consensus required for more collective forms of regulation and distribution.<sup>40</sup> In this situation, much is devolved to various sovereign or private entities to regulate, including via contests in the domain of private law. In such a political terrain, transnational private litigation of conflicts might be a necessary tool, one that should be more fully explored in non-US jurisdictions.<sup>41</sup>

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<sup>38</sup> Klein, *supra* note 1.

<sup>39</sup> D. Kennedy, *supra* note 35.

<sup>40</sup> As for example, with the decline of consensus among major states concerning the embedded liberalism of the Keynesian social welfare state after WWII; see J. Ruggie "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order", (1982) 36 *Int'l Organization* 379 and R. Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime", (2002) 96 *Am J Int'l L.* 94.

<sup>41</sup> W. Dodge, "Extraterritoriality and Conflict-of-Laws Theory", 39 *Harv. Int'l L.J.* 101 (1998).

## B. The Constrained Values of Private Law

A second concern about transnational litigation as a vehicle for social change in the global order is that private law seems to draw on too narrow a range of possibilities or concerns.

Clearly, national private laws reflect various forms of advantage and power. Many of the rules of contract or property law, for example, facilitate the rights and advantages of the economically and socially powerful in society. For example, the protections for intellectual property in the TRIPS Agreement in the Uruguay Round of the WTO can be understood as a simple protection for the economic interests of the developed world, or at least private interests that are based almost completely in the developed world.

However, private law also serves other purposes including paternalistic protection, distributive concerns, regulation and deterrence. Legal realists and critical legal studies approaches to private law have long emphasized how most forms of private law in liberal societies are filled with contradictions, gaps and ambiguities, which mean that a number of different policy concerns are served and are arguable within any system of private law.<sup>42</sup>

Moreover, it is increasingly common for national private law systems to face disputes to which these other purposes of private law can be applied in transnational contexts. Partly, globalization of production and exchange means that it is harder to distinguish between domestic and foreign conduct, and even to disentangle domestic and foreign actors.<sup>43</sup> Moreover, national private laws and national courts are one of the constitutive foundations for the facilitation of international economic activity. Many international economic transactions are based on the existence of a set of background private laws to enforce contracts, protect property claims, and to resolve disputes. This framework means that, although the use of *lex mercatoria* and commercial arbitration may be increasing, much international business activity still “touches down” in national legal systems. In dealing with international transactions and transnational conduct, all aspects of the policy purposes of private law could be considered: not just facilitation of commerce and economic efficiency, but also issues of protection, distribution and compensation.

## C. The Constraints of Internationalist Policy Discourses from International Law

Transnational litigation offers some distinctive advantages over the operation of public international law and institutions with respect to governance concerns such as regulation.

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<sup>42</sup> See e.g. Kennedy, *supra* note 19; D. Kennedy, “Form and Substance in Private Law Adjudication”, 89 *Harv. L. Rev.* 1685 (1976); R. Abel, “Torts” in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (3d ed., 1998).

<sup>43</sup> R. Reich, “Who is US?”, *Harvard Business Rev.* 53 (Jan-Feb 1990); Note, “Constructing the State Extraterritorially: Jurisdictional Discourse, The National Interest, and Transnational Norms”, 103 *Harv. L. Rev.* 1273 (1990).

In particular, the possibilities of transnational litigation can compare favourably with two other legal strategies: (1) public international law; (2) international human rights law.

### (1) Public International Law

Public international law and institutions are limited in their ability to address governance concerns such as effective regulation, restitution, or compensation. Because of its origins in consensual international treaties or international custom, public international law is severely limited in its content.

International law and institutions have been dominated by policy discourses of sovereign consent, cooperative benefit cooperative benefits and mutual advantage.<sup>44</sup> This severely constrains the scope of problems and kinds of remedies that public international regimes address. The dominant policy discourses of internationalism in international law rely heavily on policy justifications familiar from disciplines such as international relations and economics. International law and international institutions seem least problematic when they can be viewed as the solution to problems of coordination under conditions of anarchy. So actors in these regimes are most comfortable with policy issues that seem to involve mutual advantage and cooperative benefits for each sovereign state; for example, liberal free trade under the WTO is strongly premised on the economic benefits that supposedly flow to each sovereign state from specialization and trade under theories of comparative advantage. This narrow focus on policy concerns that can be justified as “cooperative” makes it difficult for international institutions and law to pursue more “conflictual” goals such as restitution or distribution. Even cooperative goals such as effective regulation are suppressed because they seem to be too “political” and involve difficult conflicts among state as to the best domestic regulatory regime.

Transnational litigation, in contrast to most of international law, traditionally and frankly involves transnational relations that involve “real conflicts”<sup>45</sup> and therefore distributive consequences. As well as having different policy traditions, domestic court judges may simply be in a better institutional position to address distributive claims and real conflicts than judges in openly international venues. Judges in venues such as the WTO Dispute Settlement Body are required to constantly be aware of the need for sovereign-state compliance and general support for the institutions itself. The “institution-building” concerns of most international bodies is not generally replicated in national court systems in many jurisdictions where transnational litigation claims will be made.

### (2) International Human Rights Law

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<sup>44</sup> E.g. R. Wai, “The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism”, in Scott, *supra* note 3, at 225-239.

<sup>45</sup> J. Singer, “Real Conflicts”, 69 *Boston Univ. L. Rev.* 1 (1989).

Private law claims may also be more effective than international human rights law even though human rights law would seem to be precisely concerned with issues such as protection, restitution, and distributive justice.

Partly international human rights is constrained like most international law by the need to arrive at the lowest common denominator and to have either consensus or coercion to achieve substantive norms at the international level. Mostly, however, the limits on international human rights relate to its weak enforcement regime, the principal mechanism by which states have ensured that they are insulated from such claims.<sup>46</sup> International human rights advocacy has mostly focused on public forms of regulation (like the UN treaty processes) and on various forms of direct action such as consumer boycotts and divestment pressure.<sup>47</sup> For now, however, the weakness of enforcement mechanisms for international human rights necessitates some attention to the potential power of litigation.

The weakness of enforcement affects domestic human rights law as well as international human rights law, and is one of the reasons that in countries like the United States, discrimination claims are as likely to lead to civil suits as human rights complaints to any public body. Recent corporate scandals in the United States are a reminder that, for all the rhetoric concerning corporate integrity and responsibility (the turn to ethics), and some light changes in regulatory process (eg SEC or FASB incremental reforms), the threat that most seems to disturb corporate actors (although not perhaps productively) is the threat of shareholder suits and other forms of litigation.<sup>48</sup>

The ideal for most human rights lawyers is that there would be both public and private law processes that would be coherently informed by international human rights law.<sup>49</sup> It may be that when using transnational litigation for concerns such as corporate accountability, international human rights law can be a helpful tool in countering some misguided understandings of national courts and introducing some overlooked concerns.<sup>50</sup> For example, arguments based on international human rights laws could be a helpful basis to overcome the numerous procedural impediments to transnational litigation. In the United States, for example, international law including international human rights law can form the basis for a claim under the Alien Tort Claims Act. But, equally, there may be ways in which the introduction of human rights claims may be dysfunctional, for individual claims and more broadly for the possibility of a broader global politics. For example, it may be that the human rights claims that are likely to be advanced and promoted in transnational venues could be what Upendra Baxi has called

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<sup>46</sup> It can be argued that one concern about actually making international human rights claims effective through procedures of many kinds is that sovereign states only agreed in the treaties to the substantive rights while attached to weak enforcement procedures; see e.g. J.Alvarez, 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime', 7 *Widener L. Symposium J.* (2001)

<sup>47</sup> See Klein, *supra* note 1.

<sup>48</sup> "From Investor Fury, A Legal Bandwagon", *New York Times*, 15 September 2002, BU1.

<sup>49</sup> See Scott, *supra* note 3.

<sup>50</sup> C. Scott & R. Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Normativity into and from Private Litigation", in C. Joerges, I.-J. Sand & G. Teubner (eds.), *Constitutionalism and Transnational Governance* [forthcoming, Hart Publishing, Oxford].

“trade-related, market-friendly” human rights such as intellectual property rights or foreign investor rights.<sup>51</sup> However, the risk of such misuse of human rights doctrine may be countered through other strategies, such as deployment of countervailing international human rights norms.<sup>52</sup>

### VIII. Recovering the Potential Governance Role of Private International Law

What policy ideas concerning the role of private law in the international system need to be in place for national private laws to become a useful venue for transnational governance? Above all national legislators and courts must be careful not to adopt the narrow internationalist conception that characterizes public international law in key areas of private law related to transnational litigation.

National courts and legislators private international law has become increasingly concerned with the same concerns of consent, cooperation and comity that are found in internationalist regimes such as the international trade regime.<sup>53</sup> This focus has led doctrinal changes that make it difficult to achieve the potential of transnational litigation for goals such as regulation. Examples include doctrines that urge courts to decline jurisdiction over foreign matters (such as the *forum non conveniens* doctrine used in the *Bhopal* and *Cambior* cases); doctrines that courts should respect and defer to contractual choices concerning the forum for dispute resolution and the applicable governing law; and rules that promote the use of international commercial arbitration relatively free from interference of national courts.

The influence of these policy frameworks is only partly the result of binding public international law treaties.<sup>54</sup> Instead, reform seems more to flow from a shared internationalist policy consciousness among domestic legal actors. Reforms to the domestic rules of private international law rely on policy discourses of internationalism familiar from international law areas such as international trade regulation. So, for example, reforms to restrict the broad jurisdiction of national courts over legal disputes

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<sup>51</sup> U. Baxi, “Voices of Suffering and the Future of Human Rights”, 8 *Transnat’l L. & Contemp. Probs.* 125 (1998) at 163-170

<sup>52</sup> See R. Wai, “Countering, Branding, Dealing: Using Social Rights In and Around the International Trade Regime”, *European Journal of International Law* (forthcoming 2003, No.1)

<sup>53</sup> I make this argument with respect to Canadian private international law in R. Wai, “In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law”, [2001] 39 *Canadian Yearbook of International Law* 117.

<sup>54</sup> In the European context, significant treaties include the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1262 U.N.T.S. 1653; the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1659 U.N.T.S. 13; and the Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1605 U.N.T.S. 59. Outside of these European conventions, there are few significant international conventions in private international law. The most notable exception is the area of international commercial arbitration; most of the major trading states have committed themselves to support the use of arbitration through the operation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 (1959) and/or the UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985, 24 I.L.M. 1302 (1985)

for harm suffered in foreign jurisdictions are justified for economic reasons of facilitating international commerce by restricting state barriers to flows of goods and services and reducing transaction costs by means of standardization and harmonization of rules of private international law and underlying substantive law.<sup>55</sup> Policy justifications for reform that learn from international relations emphasize the idea of harmonized national standards and practices as a tool to avoid cooperative game problems such as the prisoners dilemma.<sup>56</sup> These reforms frequently rest on ideas of international comity – due restraint in extraterritorial application of domestic processes or laws with respect to foreign conduct because of a concern to promote broader inter-state cooperation. Finally, policy justifications are also drawn from a loose account of cosmopolitan ethics: a call for openness to foreign influences, including goods and services; pluralism in values; and a concern for foreign interests.

The spread of a partial and misguided sense of internationalism might lead national courts and legislatures to close off effective transnational litigation from achieving goals such as distribution, restitution, or regulation. If transnational litigation is to play the role I describe here, national courts will first of all need to recognize and realize that the internationalist focus on consent and cooperative benefits need not and should not be dominant in private international law. To achieve transnational litigation as a critical part of global governance requires the critical evaluation of the spread of internationalist discourses into private international law, and a demonstration of why normal processes of litigation familiar in domestic context should be permitted internationally as well. The limited set of policy concerns of international law regimes such as the WTO regime is not required, but rather a choice made by various domestic legal actors based on partial policy conceptions of the international order.

## IX. Conclusion

It may be that transnational litigation is a harmful distraction of political energies from more useful techniques for social change.<sup>57</sup> Litigation is costly in money and time, and it often has a narrow, individualistic focus that only indirectly relates to the largest collective problems. At this stage of world politics, however, there hardly seems an excess of strategies to advance concerns such as regulation or restitution, and so it seems more likely that litigation strategies do not rule out the simultaneous pursuit of multiple strategies including international law and institutions, national public regulation, NGO activism, consumer boycotts, and voluntary codes. In particular, transnational litigation seems to offer a vehicle in substance and process to contribute to these other strategies, and to build up a normal practice in domestic systems of attending to and protecting some global concerns.

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<sup>55</sup> E.g. R. Brand, “Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law”, in J. Bhandari & A. Sykes, (eds.), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (1997).

<sup>56</sup> See e.g. L. Brilmayer, *Conflict of Laws* (2d ed, 1995) chapter 4.

<sup>57</sup> David Kennedy has provocatively mapped out these concerns with respect to international human rights strategies; D. Kennedy, “The International Human Rights Movement: Part of the Problem?”, 3 *E.H.R.L.R.* 245 (2001).