

Professor Paul Stephan on Court on Court Encounters

Professor Paul Stephan (the University of Virginia School of Law) recently published “Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters” in the Virginia Law Review. This is an important new article on the question of transjudicial communication and global governance, especially as it challenges the predominant scholarly position. From the Introduction:

The Article proceeds in five Parts. It first describes the various contexts in which court-on-court encounters take place and the analytic choices that confront the courts. It then reviews work by scholars who believe engagement and dialogue among courts motivated by collective promotion of the global rule of law explain what courts do. Third, it offers, as an alternative model of judicial encounters, a contract theory that emphasizes the choices made by actors within an exchange context. These actors include both private persons (firms as well as individuals and states (which can contract directly with private persons or enter into a kind of contract through international agreements, express and implicit). Fourth, it reviews the evidence of judicial behavior, looking mostly at U.S. practice but also considering other national courts in both common-and civil-law jurisdictions, as well as international tribunals—both permanent and ad hoc. This evidence indicates that contract theory provides a more robust explanation for judicial practice, especially by national courts, than does the dialogue theory described in the second Part. The Article also explains why contract theory provides a normatively more appealing justification for judicial choices than do the rival theories. A conclusion identifies broader implications.