

# Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment

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## Conventional Wisdom About Transnational Litigation in U.S. Courts

- “Growing torrent” of transnational cases in last 30 years (Koh 2008).
- “Dramatic increase in litigation involving foreign plaintiffs” (Diaz 2005).
- “American companies have faced a tidal wave of lawsuits attempting to import foreign controversies into U.S. courts” (U.S. Chamber of Commerce 2014).
- “As a moth is drawn to the light, so is a litigant drawn to the United States” (Lord Denning 1983).

# The Transnational Forum Shopping Claim

1. High levels of transnational litigation in U.S. courts.
2. Increasing levels of transnational litigation in U.S. courts.
3. Primarily due to foreign plaintiffs “forum shopping” into U.S. courts.

...but never any supporting data to support this claim beyond anecdotes.

## A Growing Number of Skeptics

- An evolving global forum shopping system that is increasingly multipolar? (Whytock 2011)
- U.S. in period of “litigation isolationism”? (Bookman 2015)
- Are U.S. courts becoming a “paper tiger”? (Bonomi & Schefer 2018)
- Time to reassess how well the conventional wisdom reflects reality? (Burbank 2012)

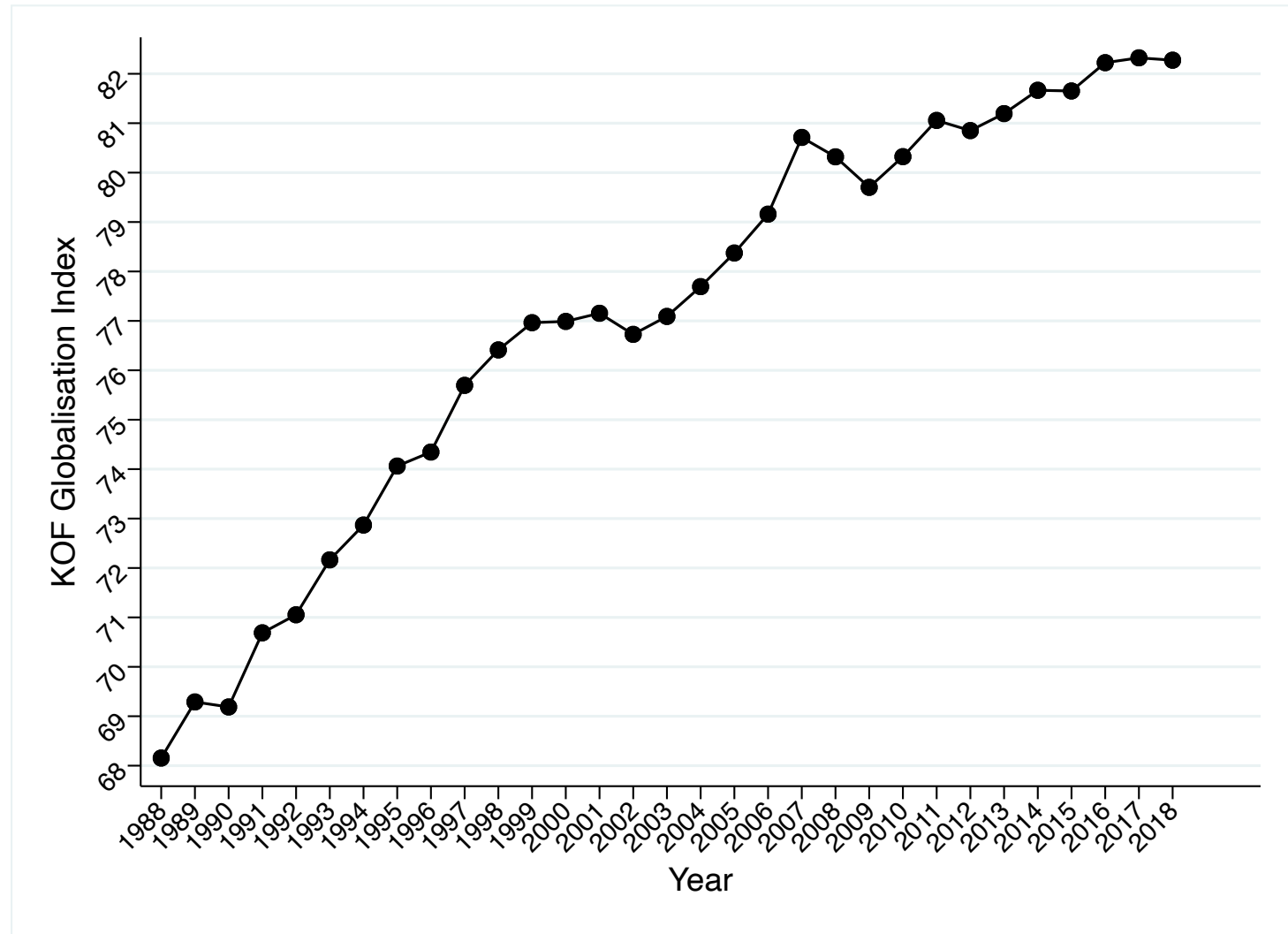
# Plan for Reassessing the Transnational Forum Shopping Claim

1. The Theory and Significance of the Transnational Forum Shopping Claim
2. Reassessment of the Claim's Underlying Theory
3. Empirical Reassessment: Transnational Litigation Trends in the U.S. District Courts
4. Broader Implications

# The Claim's Underlying Theory

## Globalization → more transnational disputes

*Swiss Economic Institute KOF Globalization Index (1988-2018)*



## The Claim's Underlying Theory

- U.S. legal system distinctly advantageous for plaintiffs compared to other legal systems:
  - Procedural advantages: permissive personal jurisdiction, class actions, liberal discovery, civil jury trials, American rule of attorney's fees, contingent fees, etc.
  - Substantive law advantages: strict liability, punitive damages, etc.
  - Private international law: pro-forum law and pro-plaintiff bias

## The Claim's Underlying Theory

- U.S. courts “extremely attractive to foreign plaintiffs” (U.S. Supreme Court, *Piper Aircraft Co. v. Reyno*, 1981).
- Therefore, disproportionately large share of growing volume of transnational litigation goes to U.S. courts.
- Quite plausible!



# The Transnational Forum Shopping Claim's Significance

- Transnational litigation scholarship: Does it accurately depict its subject?
- Litigation: lawyers invoke the transnational forum shopping claim to argue for dismissal.
- Courts: judges invoke the claim when granting or affirming dismissals.
- Law Reform: litigants and interest groups invoke it to argue for limits on court access.

# Theoretical Reassessment: Three Reasons to Doubt the Transnational Forum Shopping Claim

- Changes in the U.S. Legal System: Procedural and Substantive
- Changes in Other Legal Systems
- Changes in Transnational Dispute Resolution

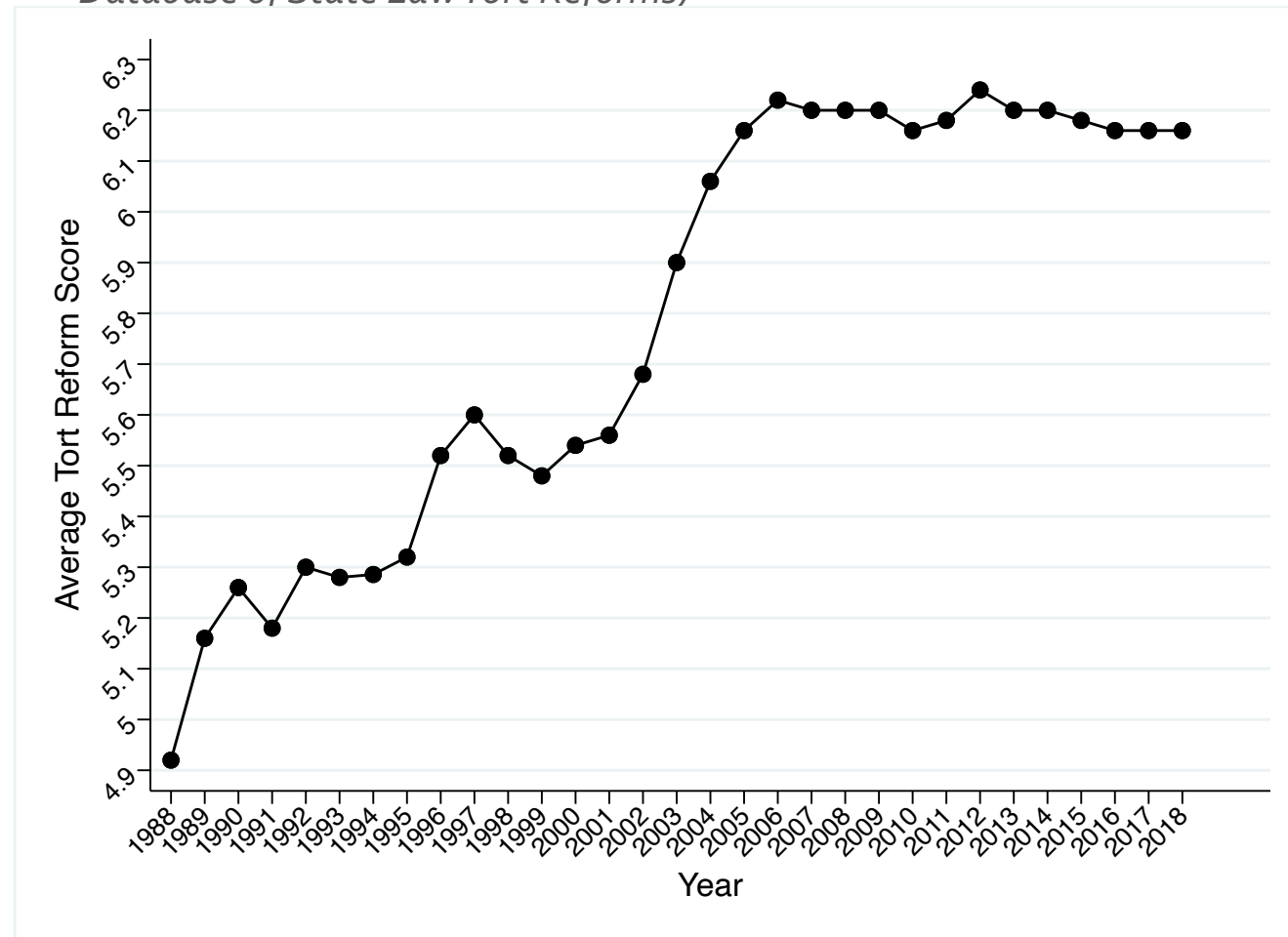
## Theoretical Reassessment: “Restrictive Turn” in Civil Procedure (Spencer 2013)

- Supreme Court progressively narrowing personal jurisdiction: *Helicopteros* (1984), *Asahi* (1987), *Nicastro* (2011), *Goodyear* (2014), *Daimler* (2014), *BMS* (2017)
- Robust forum non conveniens doctrine: *Piper* (1981), *Sinochem* (2007)
- Discovery: amendments to Rule 26 (1983, 2000, 2015)
- Heightened pleading standards: *Twombly* (2007) and *Iqbal* (2009)
- Summary judgment trilogy: *Celotex*, *Anderson*, *Matsushita* (1986)
- Restrictions on class actions: Class Action Fairness Act (2005) and stricter federal certification requirements (*Wal-Mart* 2011, *Comcast* 2013)
- Vanishing trial (2%)

# Theoretical Reassessment: Spread of "Tort Reform"

Restrictive Changes to Tort Law (e.g. caps on noneconomic, punitive and total damages; limits on contingency fees; comparative fault; etc.)

*Nationwide Average Number of Reforms (0-10) 1988-2018 (Source: Avraham Database of State Law Tort Reforms)*



# Theoretical Reassessment: Private International Law

- Empirical evidence from international tort cases casts doubt on the premise that American choice-of-law methods are biased in favor of forum law and plaintiffs (Whytock 2009).

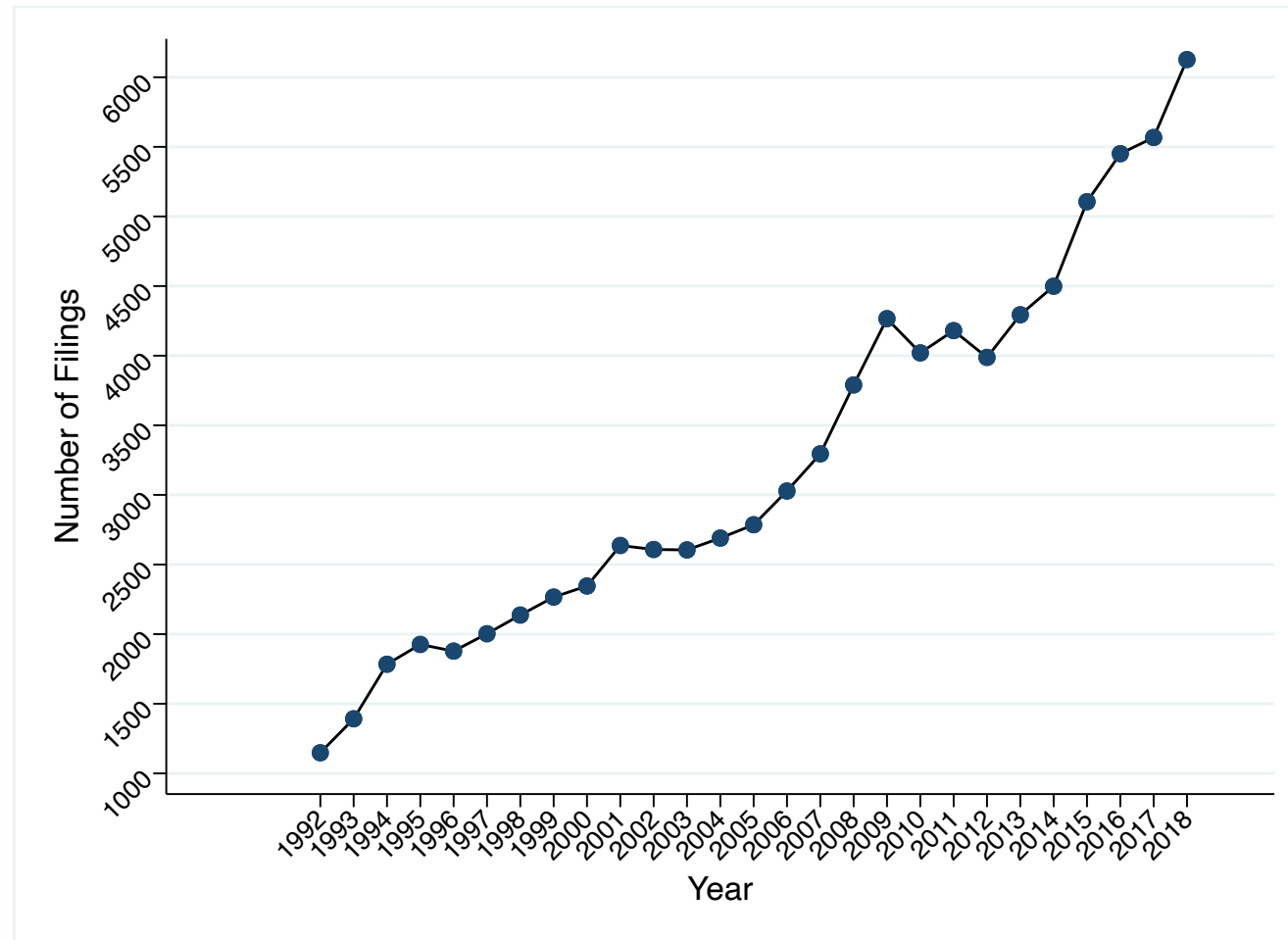
## Theoretical Reassessment: Changes in Other Legal Systems

- Spread of U.S.-style litigation features (e.g. aggregate litigation, and to lesser extent punitive damages, contingent fees, discovery, etc.—but not yet systematic cross-national data (Kelemen & Sibbit 2004; Behrens et al. 2009).
- “Forum selling” ( Bechtold, Frankenreiter & Klerman 2019) and international commercial courts (Bookman 2020; Erie 2020; Requejo-Isidro 2019).
- Growing importance of non-U.S. forums, an era of ever increasing “multipolarity” in transnational litigation (Quintanilla & Whytock 2011)

# Theoretical Reassessment: Growth of Transnational Arbitration

Increasingly widespread alternative to litigating transnational disputes in national courts (Strong 2013)

*Caseload of 11 Leading International Commercial Arbitral Institutions (1992-2018)*



## Theoretical Reassessment: Summary

Contrary to the transnational forum shopping claim, and despite globalization, there are reasons why one might *not* expect increasing levels of transnational litigation and forum shopping by foreign plaintiffs in U.S. courts.

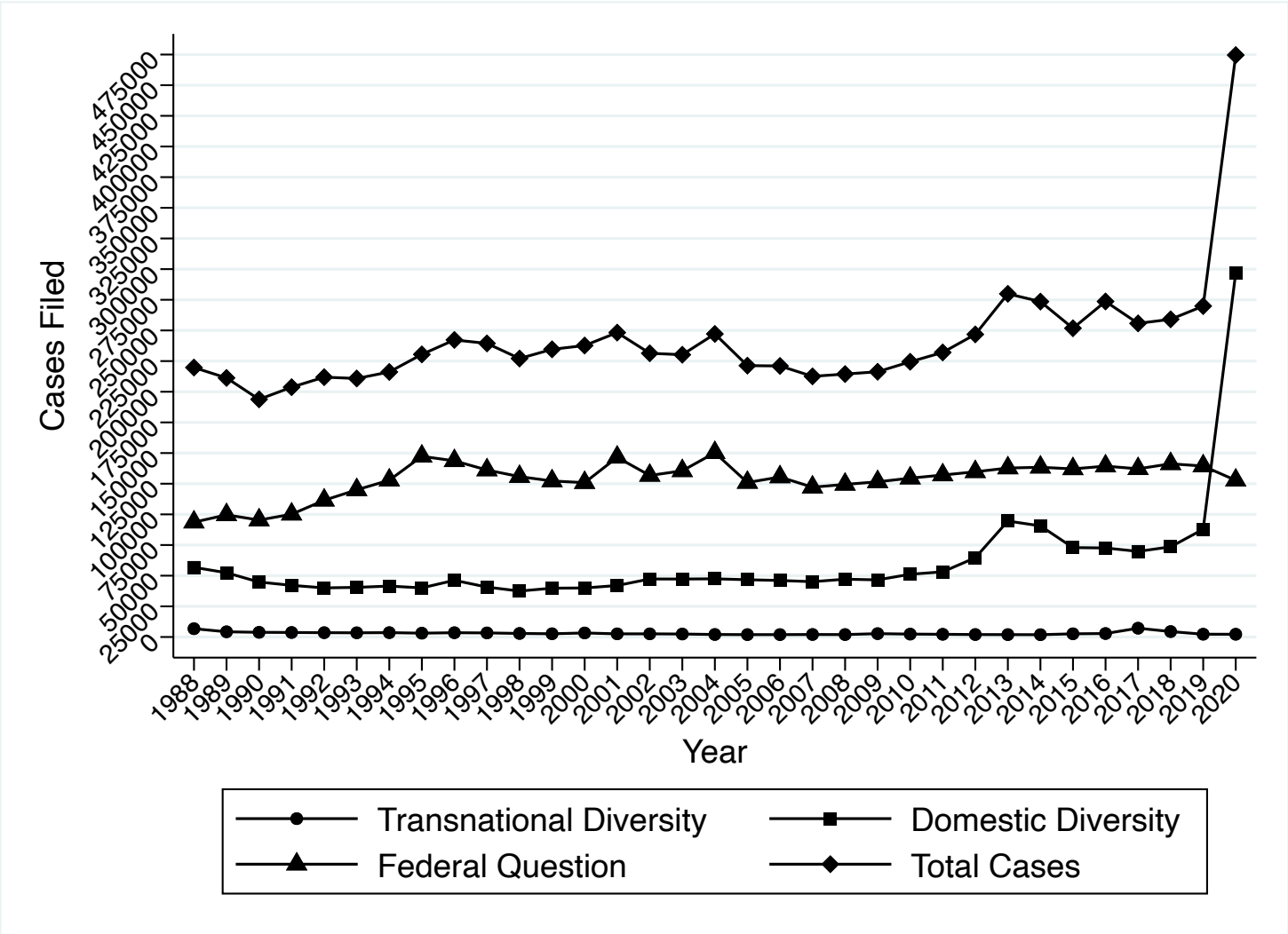


# Empirical Reassessment: Data

- Federal Judicial Center Integrated Data Base (IDB)
- Data on all civil cases filed in the U.S. District Courts 1988-2020 (N=8 million+)
- Advantages: comprehensive, quality controlled, and allows identification of “transnational” cases (non-U.S. plaintiff or defendant)
- Disadvantages:
  - Limited information about each case
  - Data on nationality of litigants available only when subject matter jurisdiction based on §1332 diversity of citizenship (not §1331 federal question)
  - Lack of data on state courts.

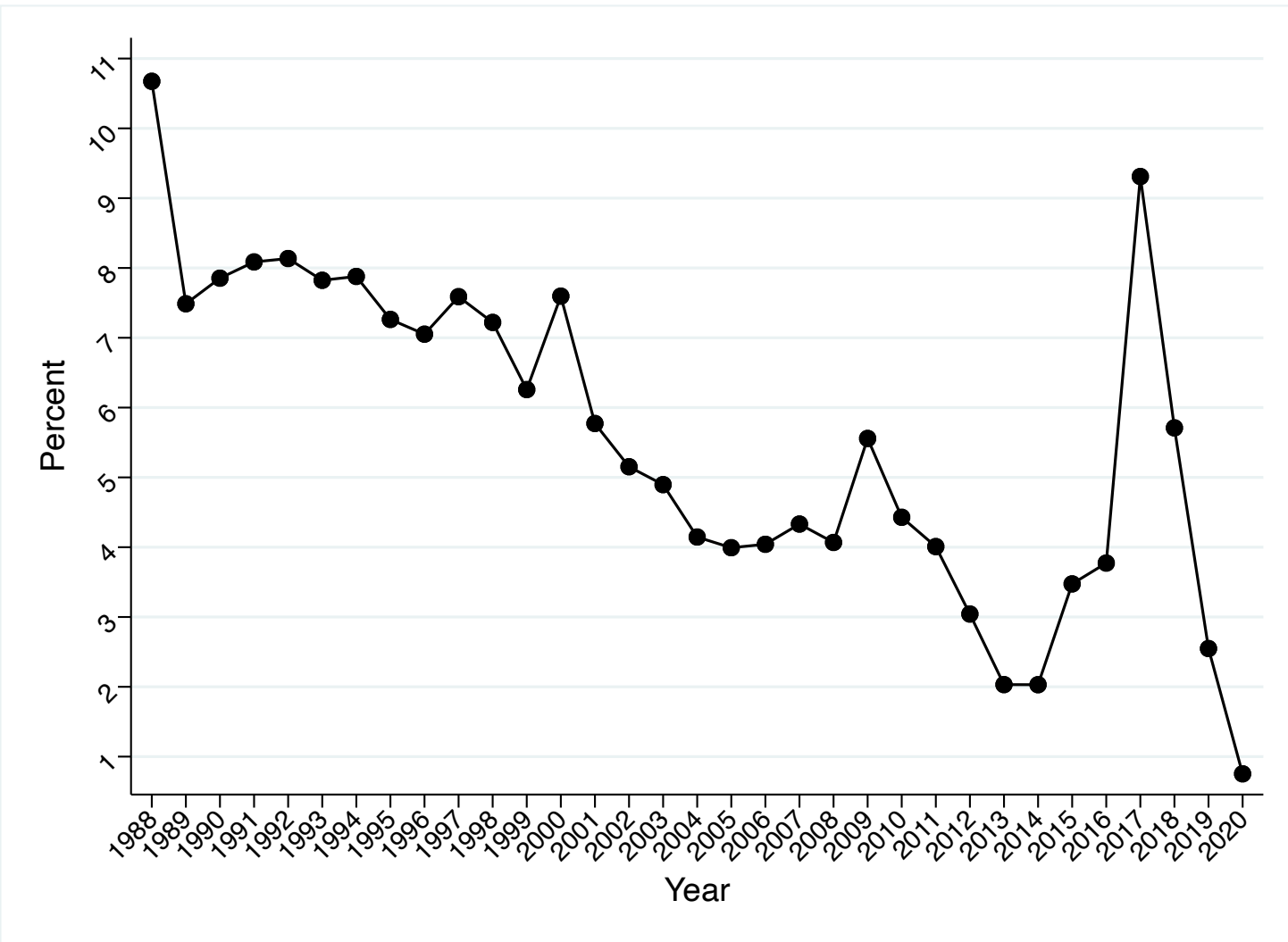
# Empirical Reassessment: *High Levels of Transnational Litigation?*

## Transnational Diversity Cases and Other Types of Cases (1988-2020)



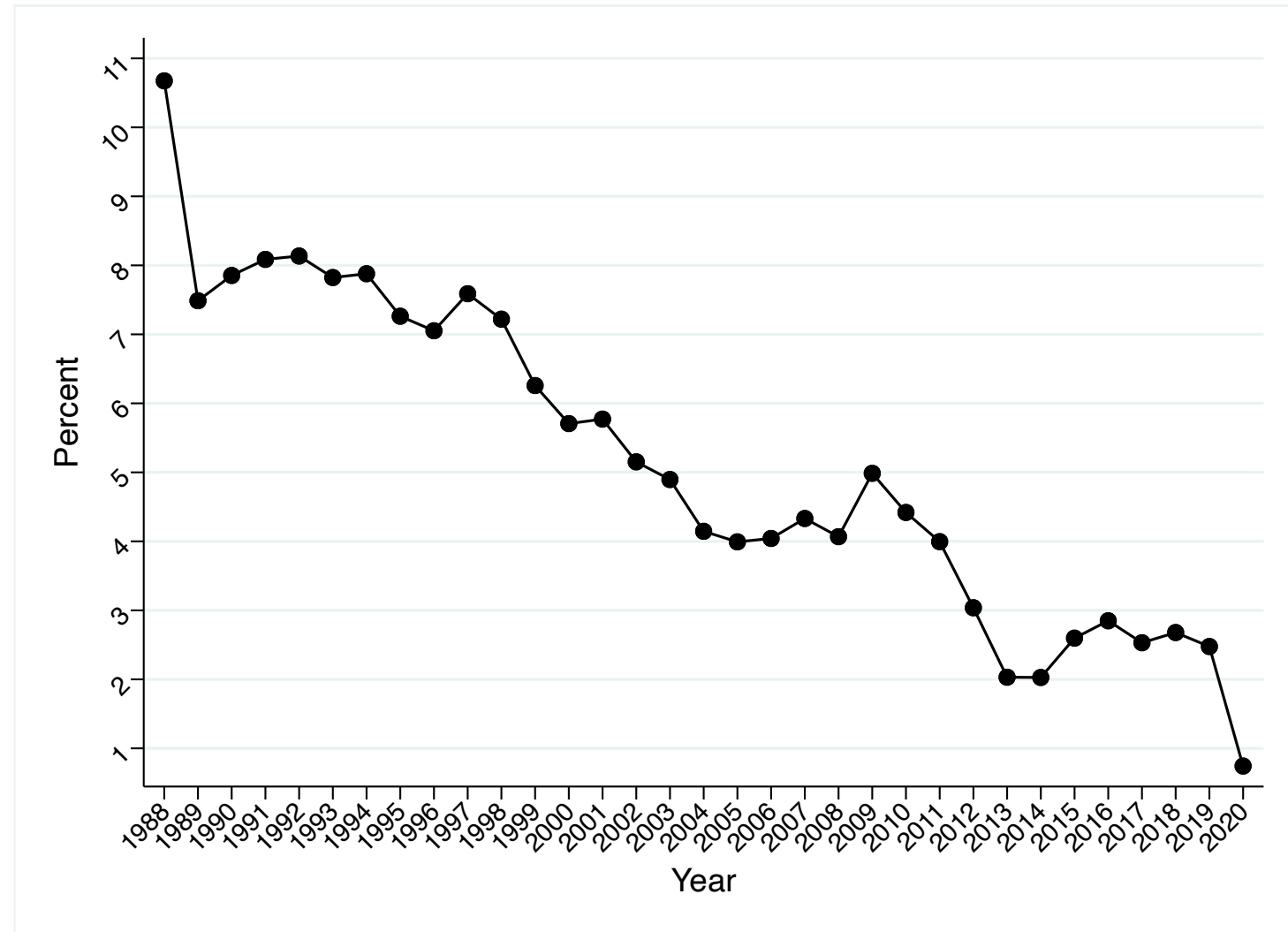
# Empirical Reassessment: *High Levels of Transnational Litigation?*

## Transnational Diversity Filings as Percent of Total Diversity Filings (1988-2020)



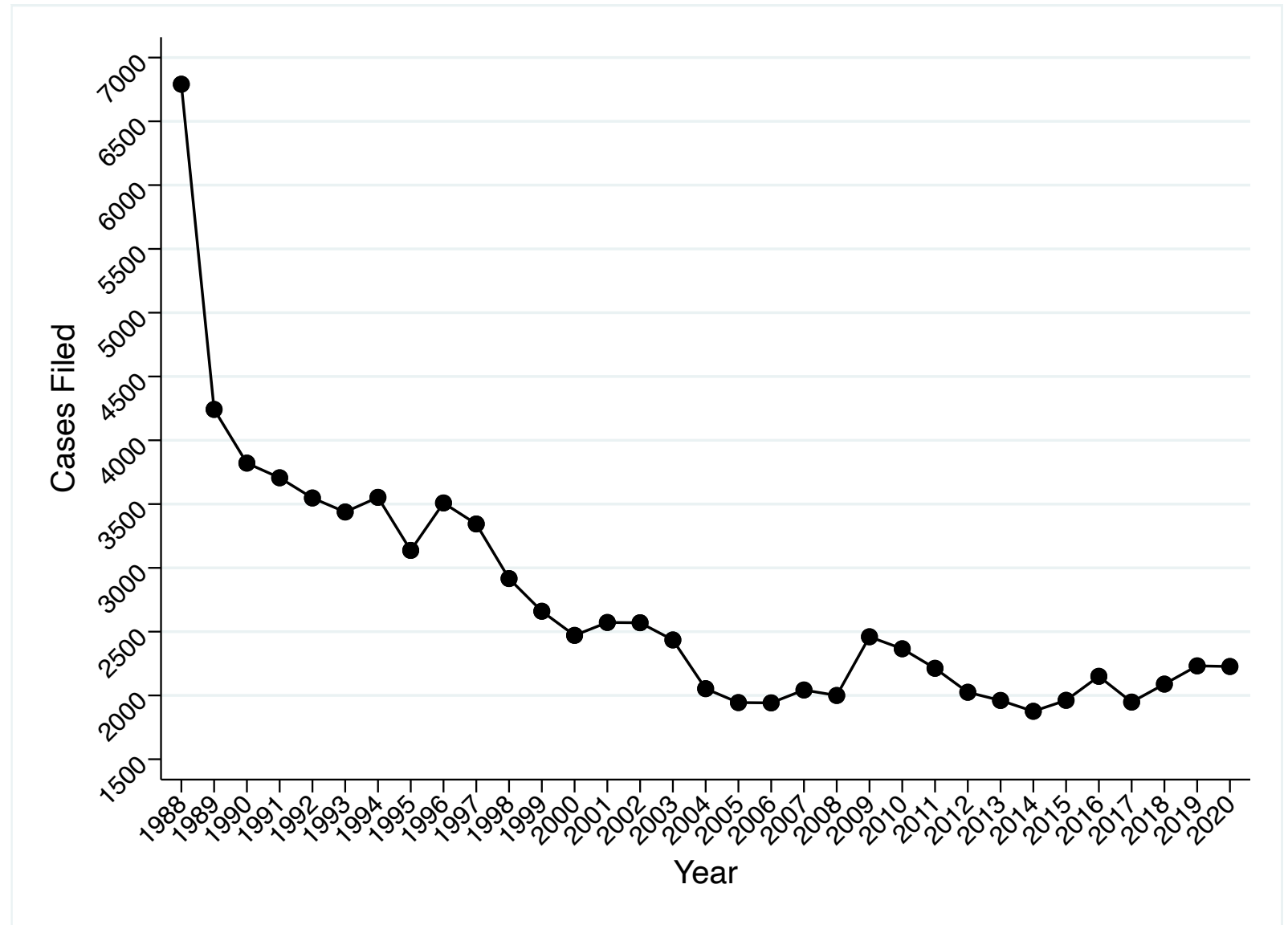
Empirical  
Reassessment:  
*High Levels of*  
Transnational  
Litigation?

Transnational Diversity Filings as Percent of Total Diversity Filings (1988-2020, Without Spikes)



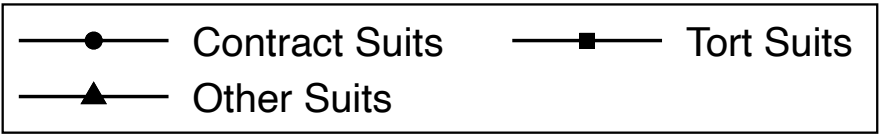
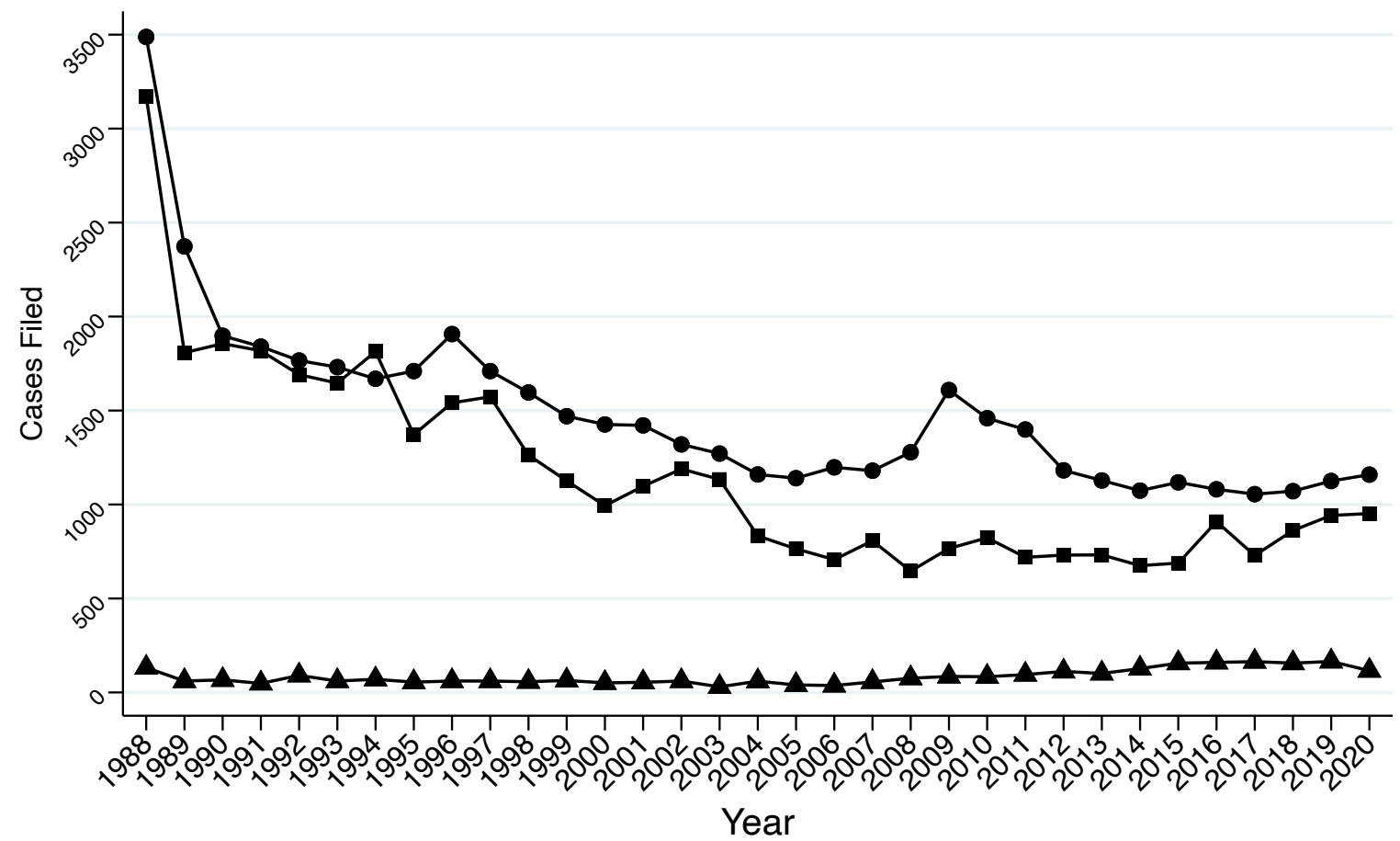
Empirical  
Reassessment:  
*Increasing*  
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Litigation?

Transnational Diversity Filings (1988-2020, Without Spikes)



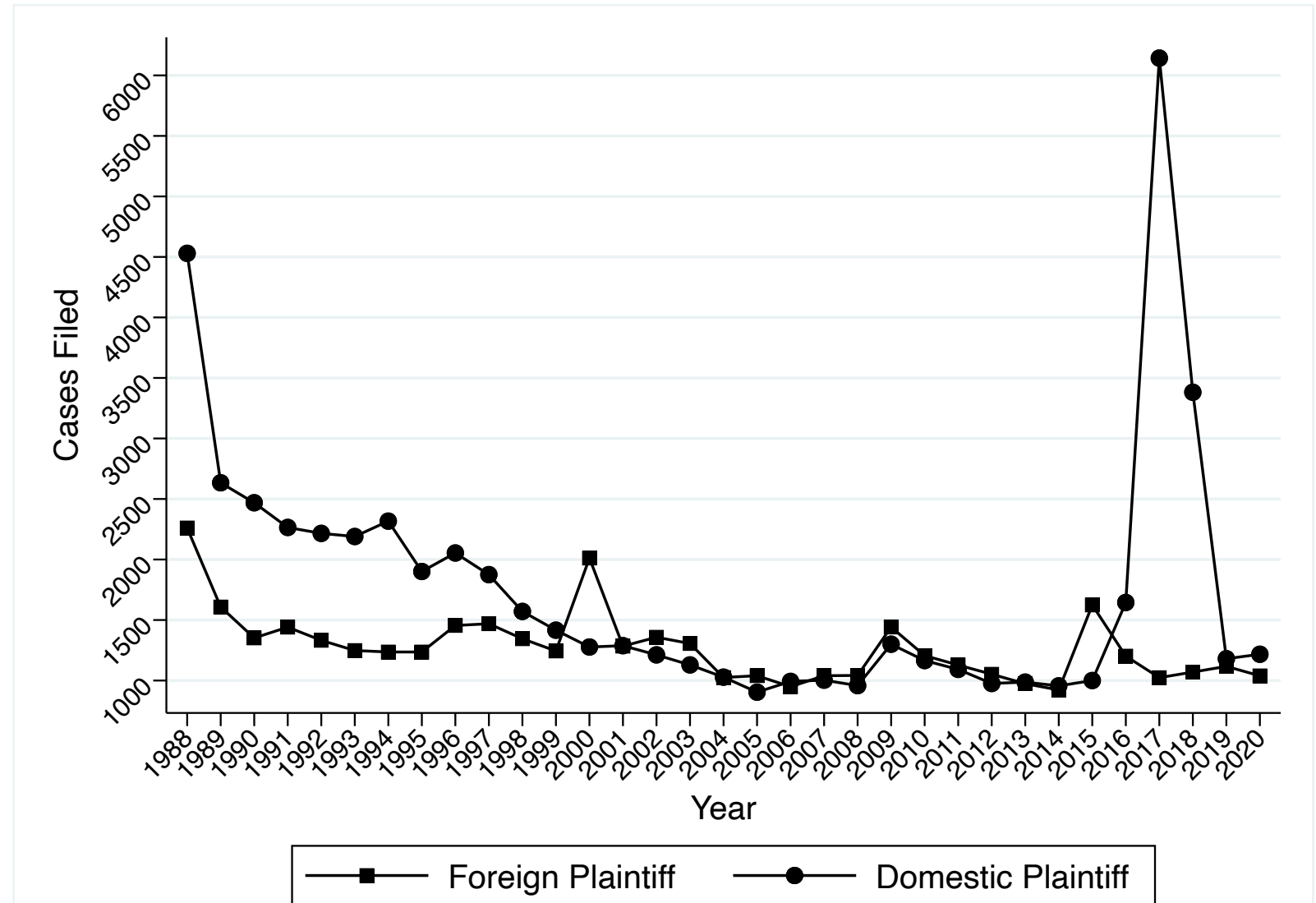
# Empirical Reassessment: *Increasing* Transnational Litigation?

## Types of Transnational Diversity Filings (1988-2020, Without Spikes)



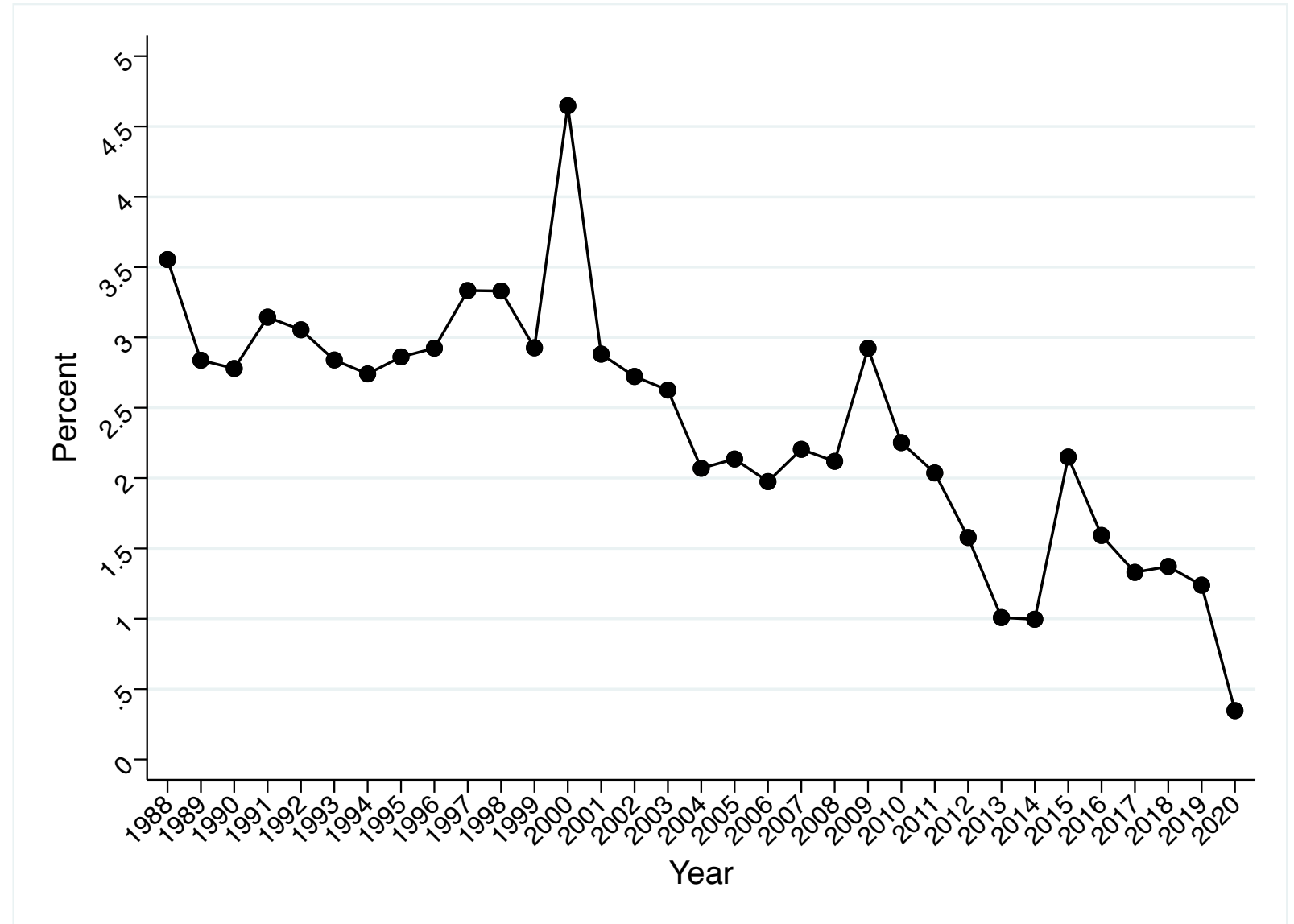
Empirical  
Reassessment:  
Forum  
Shopping by  
*Foreign*  
*Plaintiffs?*

Transnational Diversity Filings by Citizenship of Plaintiff (1988-2020)



Empirical  
Reassessment:  
Forum  
Shopping by  
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*Plaintiffs?*

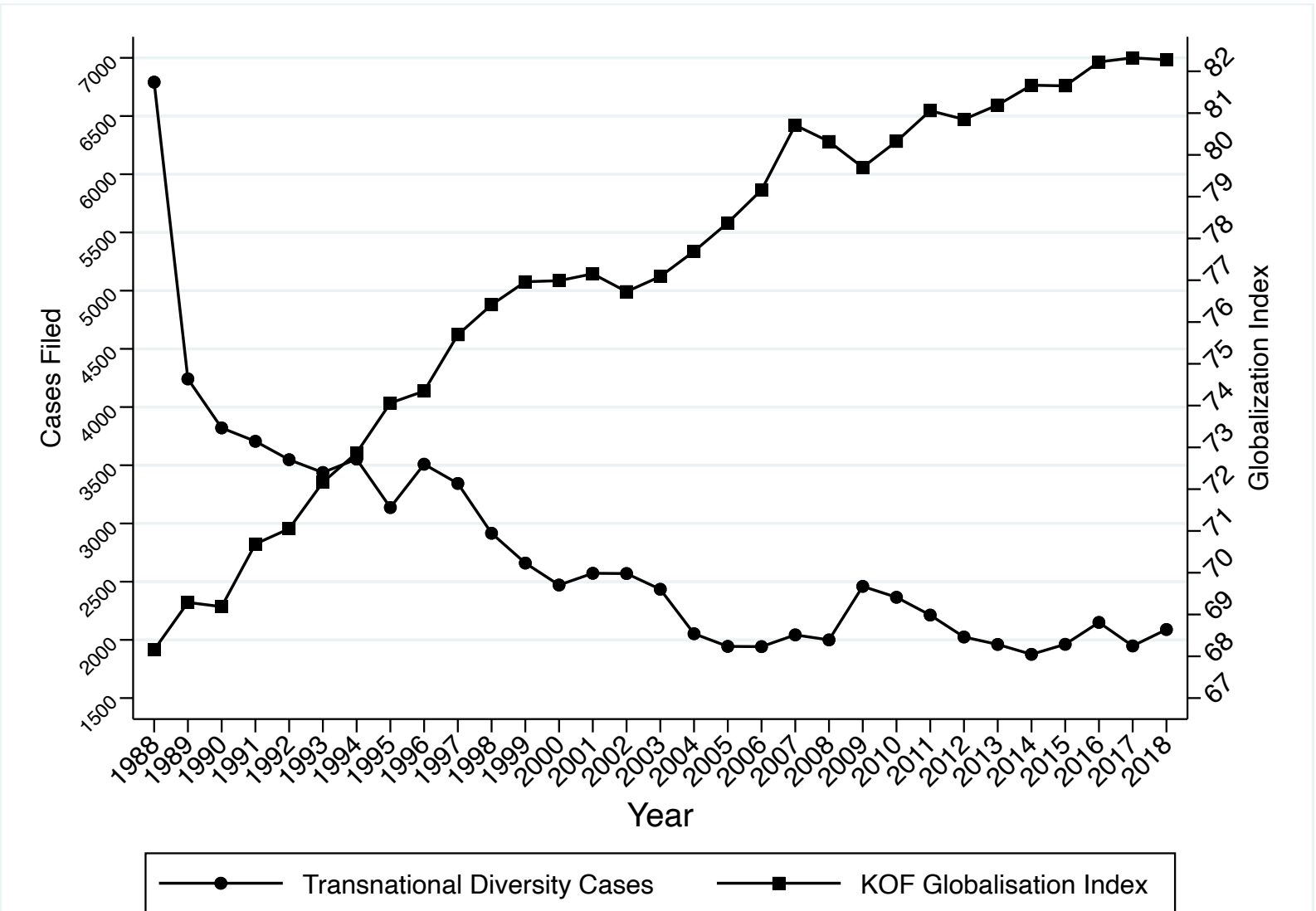
Foreign Plaintiff Transnational Diversity Filings as Percent of Total Diversity Filings (1988-2020)





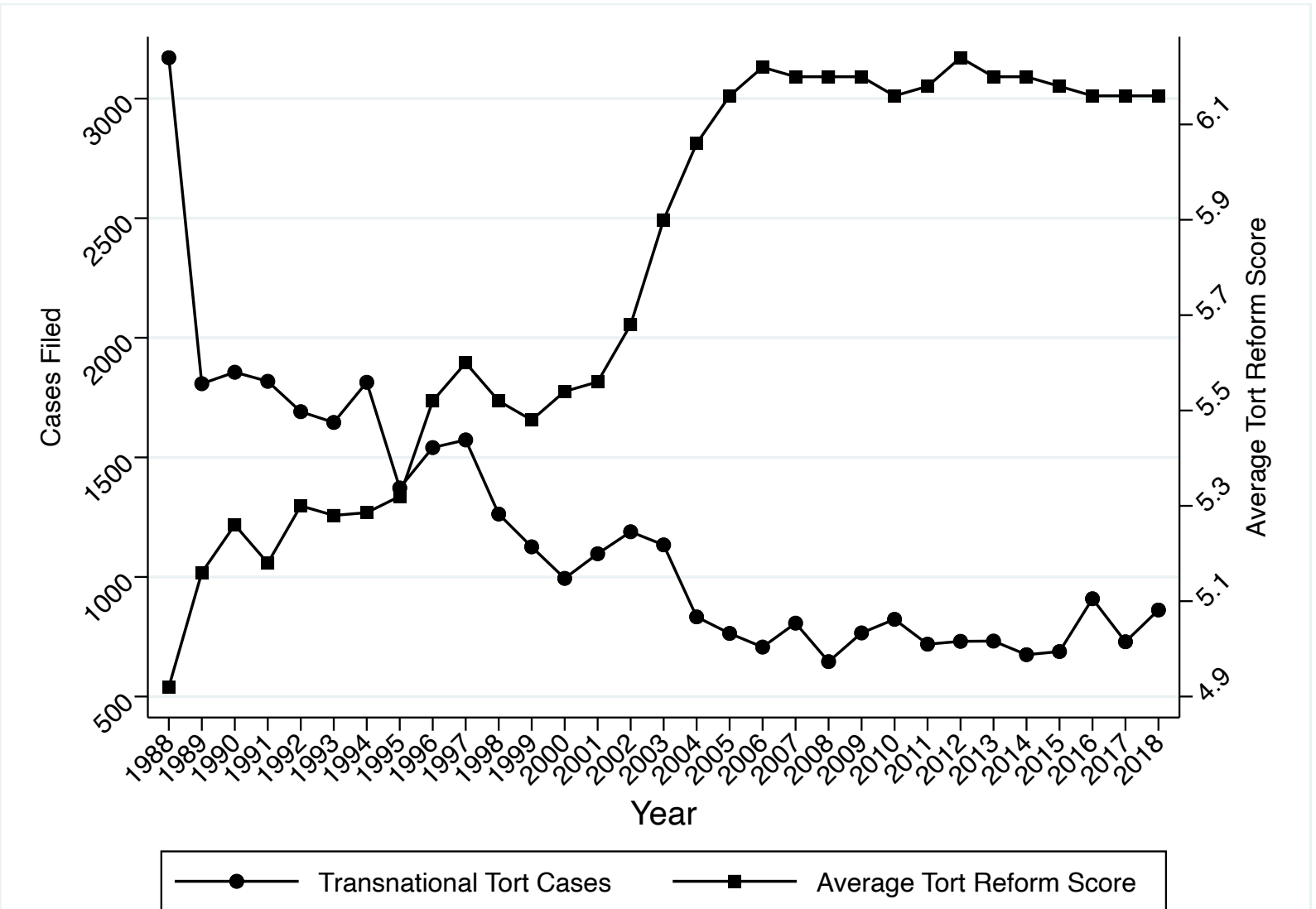
# Context

## Transnational Diversity Filings (Without Spikes) and KOF Globalization Index (1988-2018)



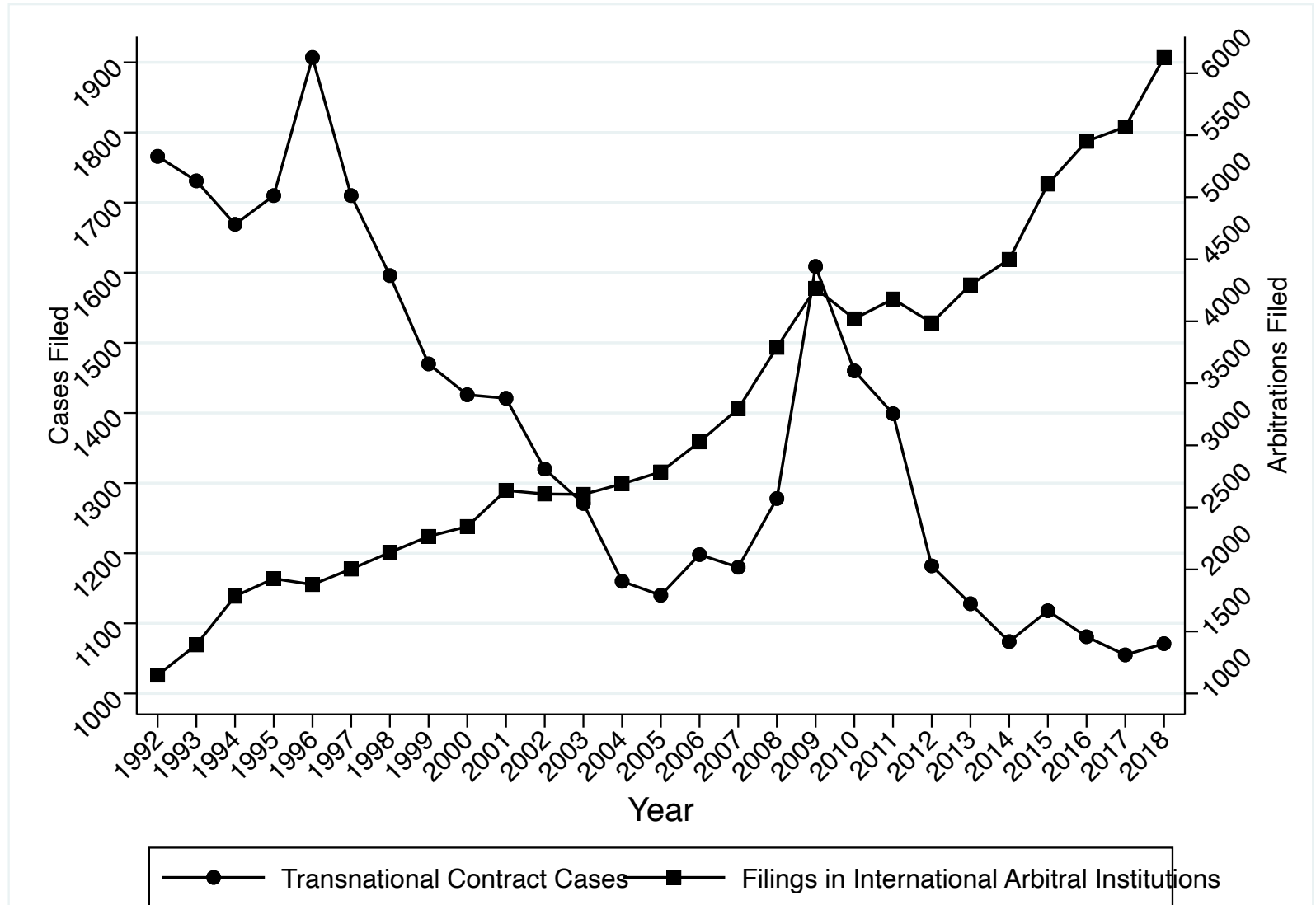
# Context

## Transnational Tort Filings (Without Spikes) and Tort Reform Index (Nationwide Average) (1988-2018)



# Context

**Figure 15: Transnational Contract Suits and Caseload of International Arbitral Institutions (1992-2018)**

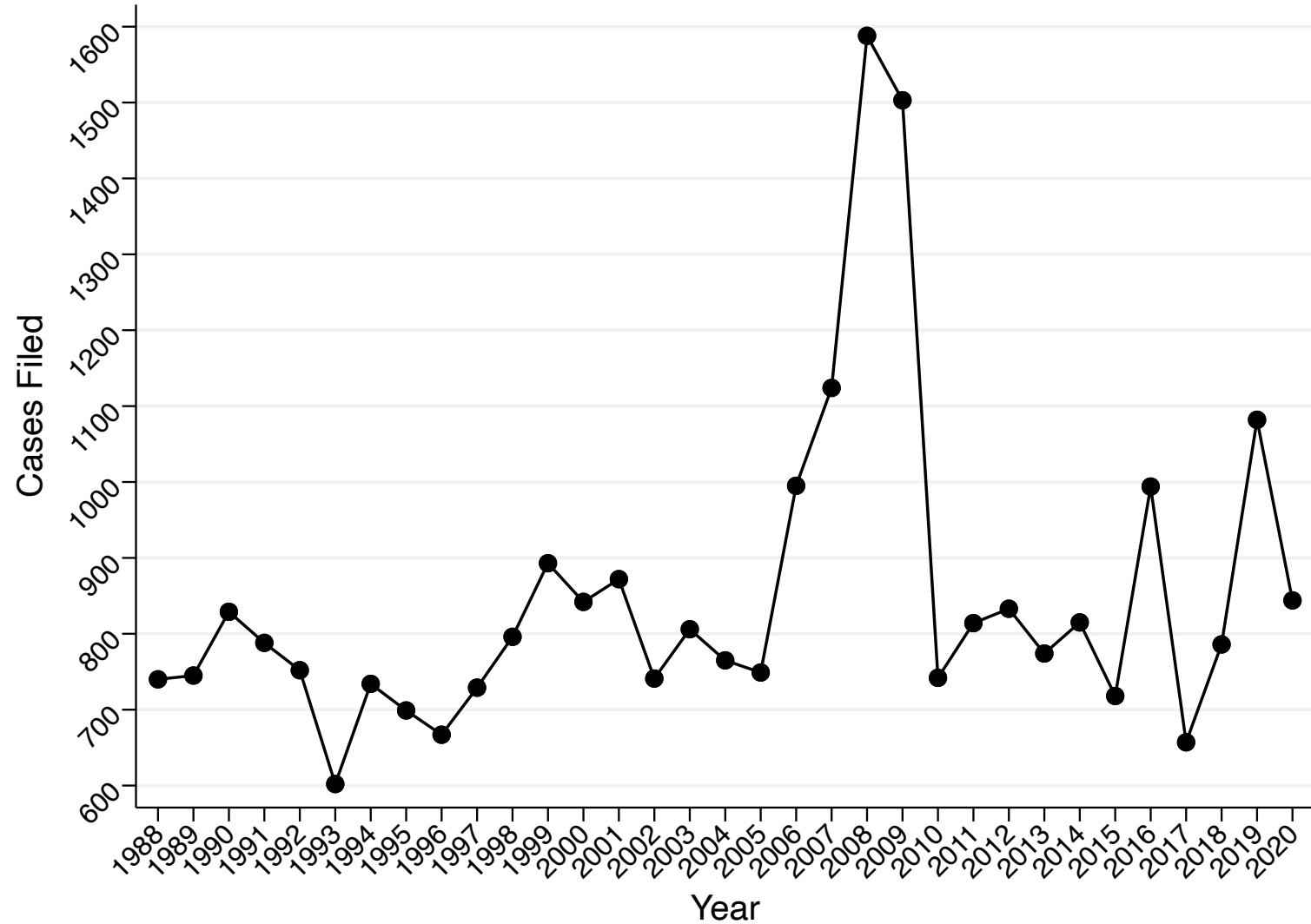


# Transnational Federal Question Litigation?

- Restrictive turn in federal civil procedure may also affect levels of transnational federal question filings.
- Plus stricter limits on extraterritorial application of U.S. law (Aramco 1991, Morrison 2010, Kiobel 2013, RJR 2016)
- Limited data in the IDB: foreign resident plaintiff?

# Transnational Federal Question Litigation: Some Clues

## Federal Question Filings by Foreign Resident Plaintiffs (1988-2020)



# Transnational Federal Question Litigation: Some Clues

## Percent of Federal Question Filings by Foreign Resident Plaintiffs (1988-2020)



## Conclusion: Broader Implications

- Law and policy: the transnational forum shopping claim is an unsound basis for law reform and court decisions and should no longer be invoked
- Research: need data on transnational federal question litigation, state court transnational litigation, and data on transnational litigation in non-U.S. legal systems
- The multipolar transnational litigation system and U.S. legal influence
- Questions about persistence of conventional wisdom: scholars, lawyers and interest groups, lack of empirics
- Transnational litigation scholarship: must not be U.S.-centric, must understand transnational litigation in global perspective

## For More Information

- Christopher A. Whytock, Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment, 19 Journal of Empirical Legal Studies, Vol. 19, No. 1, pp. 4-59 (2022), <https://doi.org/10.1111/jels.12306>
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