

**The Dickson Poon School of Law**

Somerset House East Wing  
Strand, London, WC2R 2LS



# ***Comity: The American Development of a Transnational Concept***

*Thomas Schultz & Niccolò Ridi*

King's College London Dickson Poon School of Law  
Legal Studies Research Paper Series: Paper No. 2017-28

# COMITY: THE AMERICAN DEVELOPMENT OF A TRANSNATIONAL CONCEPT

Thomas SCHULTZ\* / Niccolò RIDI\*\*

- I. Introduction
- II. The Problem of Comity: Definitions and Methodology
- III. The History of Comity in American Legal Thinking
  - A. Comity Enters the United States
    - 1. The Sister Notions of Comity and Sovereignty
    - 2. Comity in the United States: Livermore, Kent and Story
- IV. The Judicial Evolution of Comity
  - A. “Legislative” or “Prescriptive” Comity: Restraint and Recognition
    - 1. Comity and the Recognition to the Law and the Acts of Other States
    - 2. Using Comity to Limit the Reach of American Law
  - B. Comity and the Recognition of Foreign Judicial Acts
  - C. Adjudicatory Comity, or “the Comity of Courts”
    - 1. The Origins of Adjudicatory Comity in Admiralty Courts and the Use of *Forum non Conveniens*
    - 2. Comity as a Coordination Device for Pending or Potential Parallel Proceedings
    - 3. Anti-Suit Injunctions
  - D. “Executive” or “Sovereign-Party” Comity
    - 1. Comity and the Act of State Doctrine
    - 2. Sovereign Immunity
    - 3. The Privilege of Suit
- V. United States Experience and the Global Dimension of Comity
  - A. Comity Doctrines and Comity Reasoning
  - B. The Problem of Deference to the Executive
  - C. Beyond the Domestic: the “Comity of Courts” as a Global Ordering Principle
- VI. Conclusion

---

\* Professor of Law, King’s College London; SNSF Research Professor of International Law, Graduate Institute of International and Development Studies, Geneva; Editor-in-Chief, Journal of International Dispute Settlement; Of Counsel, Penvern & Corniglion.

\*\* LLB (Florence); LLM (Cantab); Doctoral Candidate (Modern Law Review Scholar) and Visiting Lecturer, King’s College London; Research Fellow, Graduate Institute of International and Development Studies, Geneva. niccolo.ridi@kcl.ac.uk; niccolo.ridi@graduateinstitute.ch.

## I. Introduction

Throughout much of the world, the concept of comity has played a fundamental role in shaping modern private international law. Sometimes labelled as a “principle”, sometimes as a “doctrine”, it provided the foundation and informed the evolution of several rules of conflict. Its importance, however, gradually faded as the field of private international law slid into the preserve of the national legislator.<sup>1</sup> Scholarly attention to the subject followed suit, and private international lawyers have, by and large, dismissed it as a historical relic in the name of which courts would sometimes fine-tune the reach of their national substantive law and jurisdictional rules, refrain from questioning the lawfulness of another sovereign state’s acts, and restrict themselves from issuing such judgments and orders when to do so would have amounted to an unjustifiable interference.<sup>2</sup> Comity, however, never really vanished: as Lord COLLINS of Mapesbury put it, “comity may be a discredited concept in the eyes of the text-writers, but it thrives in the judicial decisions” – in particular, in those of American courts.<sup>3</sup> This conclusion is not entirely surprising: comity has long been acknowledged as a foundational principle of American conflict of laws.<sup>4</sup> It had a complex and haphazard evolution in the continent, which is partly to blame for modern assessments of the concept as imprecise and confusing.<sup>5</sup> Yet, while the term has come to be employed to refer to a variety of practices, these practices share “certain methods, values, and justificatory rhetoric”.<sup>6</sup>

The purpose of this study is to contribute to the elucidation of the notion of comity as it is understood in the United States – the jurisdiction where the greatest importance is attached to the concept. While other studies have examined this topic, they have mostly neglected to consider the phenomenon in a broader dimension and thus properly appraise the peculiarity of the American understanding of comity.<sup>7</sup> It is submitted that this is particularly important insofar as the American understanding has affected the development of legal doctrines

---

<sup>1</sup> T. SCHULTZ/ D. HOLLOWAY, *Retour sur la comity*. Deuxième partie: La *comity* dans l’histoire du droit international privé, *Clunet* 2012, p. 593.

<sup>2</sup> A. BRIGGS, *The Principle of Comity in Private International Law*, *Recueil des Cours* 2012, p. 85–86; T. SCHULTZ/ N. RIDI, *Comity and International Courts and Tribunals*, *Cornell Journal of International Law* 2017, forthcoming.

<sup>3</sup> L. COLLINS, *Comity in Modern Private International Law*, in J. FAWCETT (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North*, Oxford 2002, p. 95.

<sup>4</sup> J.R. PAUL, *Comity in international law*, *Harvard International Law Journal* 1991, p. 78; J.R. PAUL, *The Transformation of International Comity*, *Law and Contemporary Problems* 2008, p. 19.

<sup>5</sup> M.D. RAMSEY, *Escaping “International Comity”*, *Iowa Law Review* 1997, p. 893.

<sup>6</sup> J.R. PAUL (note 4), at 21.

<sup>7</sup> J.R. PAUL (note 4); D.E.I. CHILDRESS, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, *U.C. Davis L. Rev.* 2010, p. 11; W.S. DODGE, *International Comity in American Law*, *Columbia Law Review* 2015, p. 2071.

elsewhere, and stimulated further reflection on the role of the concept, especially when employed by prominent American scholars.<sup>8</sup> This has in turn prompted the revitalisation of comity as a tool capable of alleviating problems of a global nature.<sup>9</sup>

## **II. The Problem of Comity: Definitions and Methodology**

Nearly all common law courts refer to comity, but there is comparatively little agreement as to what exactly comity is and how it should operate, leading many commentators to be dismissive of the notion.<sup>10</sup> Even among those who are not, views tend to diverge significantly and definitional attempts seem to be doomed at the outset: indeed, one of the most important work on the subject avoids the problem by first explaining what comity is *not*.<sup>11</sup> Such definitions are important: what use could be made of a notion that “invites intuitive adjudication, and hence litigation-inspiring *ex ante* unpredictability”?<sup>12</sup> Such was the wariness towards the indeterminacy of the concept that the reporters of the Third Restatement on Foreign Relations Law preferred to avoid the word altogether.<sup>13</sup>

Most American scholars still anchor the discussion to the definition of comity offered in the early landmark case *Hilton v Guyot*. As Justice GRAY put it, comity

“in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws”.<sup>14</sup>

---

<sup>8</sup> Above all A.-M. SLAUGHTER, *A New World Order*, Princeton 2004, p. 67.

<sup>9</sup> See for example Y. SHANY, *The competing jurisdictions of international courts and tribunals*, Oxford 2003; E. D’ALTERIO, From judicial comity to legal comity: A judicial solution to global disorder?, *International Journal of Constitutional Law* 2011, p. 394.

<sup>10</sup> J. FAWCETT *et al.* (eds), *Cheshire, North & Fawcett: Private International Law*, Oxford 2008, p. 5. See also generally L. WEINBERG, Against Comity, *Geo. LJ* 1991, p. 53; M.D. RAMSEY (note 5).

<sup>11</sup> A. BRIGGS (note 2), at 87, 180.

<sup>12</sup> M.D. RAMSEY (note 5).

<sup>13</sup> Restatement (Third) of Foreign Relations Law of The United States § 403; A.F. LOWENFELD, Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case, *American Journal of International Law* 1995, p. 52; J.R. PAUL (note 4), at 29.

<sup>14</sup> *Hilton v Guyot*, 159 U.S. 113, 163-64.

Hilton's definition remains largely accepted and is quite possibly the most celebrated and influential,<sup>15</sup> though some have offered slight amendments: KOH, for example, accepts the above definition, but clarifies that comity "flows from the respect that one sovereign is obliged to give to the sovereign acts of a coequal nation-state", adding that the notion has been increasingly interpreted by American courts "as a reason why they should refrain from independent determination of cases under the law of nations".<sup>16</sup> This definition has the merit of framing the issue in the broader perspective of a discourse on sovereignty and the allocation of regulatory authority, which is, after all, the context in which the principle was developed.<sup>17</sup>

Focusing on what comity does is more helpful than assessing what it is – and comity, to be sure, appears to have some use. According to BRIGGS, "legal thinking in the United States... has found the principle of comity to be of assistance in getting the judge to the point where a case is decided".<sup>18</sup> A cursory overview on any major database reveals that mentions of the principle are easily in the thousands – too many to join with the mourners of the principle's alleged demise. Of course, mentions offer partial answers: sometimes courts refer to "other" comity doctrines (beyond the scope of the present article), which are wholly domestic in nature and arise from the complex relationship between state and federal institutions that inform the law of the United States.<sup>19</sup> This study, instead, focuses on the uses of comity in cases where "cross-border elements are in need of careful treatment".<sup>20</sup> It will thus focus on federal decisions, much more likely to regard disputes with cross-border elements, and thus truly international in nature. Such inevitable constraints, however, must not be perceived as a limitation in a study concerned with the elucidation of a legal concept in a system where federal judges have long been identified as the main interpretive community.<sup>21</sup>

---

<sup>15</sup> N.J. CALAMITA, Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings, *University of Pennsylvania Journal of international Economic Law* 2006, p. 626.

<sup>16</sup> H.H. KOH, *Transnational litigation in United States courts*, New York 2008, p. 19.

<sup>17</sup> "Comity arises from the horizontal arrangement of state jurisdictions": J.R. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford 2012, p. 485; W.S. DODGE (note 7), at 31.

<sup>18</sup> A. BRIGGS (note 2), at 78.

<sup>19</sup> On the topic, see M. WELLS, The Role of Comity in the Law of Federal Courts, *North Carolina Law Review* 1981, p. 59; G. SEINFELD, Reflections on Comity in the Law of American Federalism, *Notre Dame Law Review* 2014, p. 1309.

<sup>20</sup> A. BRIGGS (note 2), at 89. We do not mean to play down the importance of comity in the relations between the federate states: see J. STORY, *Commentaries on the conflict of laws, foreign and domestic: in regard to contracts, rights, and remedies, and especially in regard to marriages, divorces, wills, successions, and judgments*, Boston 1834, § 9. Early reflection on the role of comity in this context is considered to properly explain the history of the principle.

<sup>21</sup> C.R. SUNSTEIN, Interpreting Statutes in the Regulatory State, *Harvard Law Review* 1989, p. 413.

### III. The History of Comity in American Legal Thinking

#### A. Comity Enters the United States

##### 1. *The Sister Notions of Comity and Sovereignty*

Comity is closely related with sovereignty: the history of the concept is thus tightly intertwined with the development of the Westphalian system.<sup>22</sup> The consecration of the principles of territorial sovereignty and freedom from interference made personal statuses irrelevant in the face of the territorial law of the state.<sup>23</sup> Sovereign independence and non-interference served as the building blocks of the new world order,<sup>24</sup> but proved to be at variance with the transnational relations that formed the backbone of seventeenth-century European society and commerce.<sup>25</sup>

These transnational relations, commercial and otherwise, were perceived as exceptionally important in the newly-independent Netherlands, and it was there that the concept of comity was developed to mitigate the effects of strict territoriality. Jurists such as the VOETS and Ulrich HUBER developed theories to provide an answer to the question of which law should govern a specific private legal relationship.<sup>26</sup> Their focus, however, was not so narrow: indeed, they did not seek to present their work as mere suggestions to Dutch courts, but rather as a new model with universal validity.<sup>27</sup>

The doctrine was first elaborated in a rather primitive form by Paulus VOET in 1661.<sup>28</sup> It was conceived as a technique for mitigating the adverse effects of the inherent territoriality of statutes: in other words, the doctrine posited that, through courtesy, effect and recognition could be given to transactions concluded outside the borders of the state concerned. VOET appeared to suggest that the operation of the principle was completely discretionary, and mostly restricted to ruling out the exclusive territorial application of the forum State's law.<sup>29</sup> Four decades later, Johannes VOET emphasized that the extension of statutes beyond the territorial

---

<sup>22</sup> K. LIPSTEIN, *Principles of the Conflict of Laws: National and International*, The Hague 1981, p. 8; T. SCHULTZ/ D. HOLLOWAY, *Retour sur la comity*. Première partie, *Clunet* 2011, p. 863; T. SCHULTZ/ D. HOLLOWAY (note 1), at 571, 574. T. SCHULTZ/ N. RIDI (note 2).

<sup>23</sup> H.E. YNTEMA, *The Comity Doctrine*, *Michigan Law Review* 1966, p. 10.

<sup>24</sup> H.G. MAIER, *Resolving Extraterritorial Conflicts, or There and Back Again*, *Virginia Journal of International Law* 1984, p. 10.

<sup>25</sup> R. DE NOVA, *Historical and comparative introduction to conflict of laws*, Leiden 1966, p. 435 *et seq.*; T. SCHULTZ/ N. RIDI (note 2).

<sup>26</sup> A. NUSSBAUM, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, *Columbia Law Review* 1942, p. 190.

<sup>27</sup> R. DE NOVA (note 25), at 449.

<sup>28</sup> P. VOET, *De statutis eorumque concursu liber singularis*, Amsterdam 1661, p. 156.

<sup>29</sup> C. RYNGAERT, *Jurisdiction in International Law*, Oxford 2008, p. 150.

domain of a state was not constrained by any particular rule.<sup>30</sup> In his view, comity served the purpose of preserving “the primacy of the statute real, subject to such concessions as might be made by one nation to another”.<sup>31</sup> Its application, in turn, remained discretionary.<sup>32</sup>

It would be injudicious to read the discretionary element as evidence of a rejection of the old, universalist – or “international” – approach to questions of conflict of laws.<sup>33</sup> Ulrich HUBER’s *De conflictu legum*, by far the most influential work on the topic, provides arguments against any such claim. One of the leading jurists of his day, HUBER devoted significant attention to the topic of the application of foreign law and formulated an elegant solution using three “axioms”, the normativity of which remains a controversial issue. He wrote:

“(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond. (2) All person within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof. (3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such governments or of its subjects”.<sup>34</sup>

The third axiom has long represented a controversial point. It is not clear what kind of discretion HUBER envisaged for a sovereign and its courts, or what was the nature and cogency of the obligation – if any – to apply foreign law. The controversy, however, has been likely overstated.

First, HUBER never employed the word *comitas*, but restricted himself to choosing an adverbial – and possibly less charged – form, *comiter*, also adopted by Paulus VOET.<sup>35</sup> The Dutch language edition does not even mention any such term, but employs the allegorical image of governments extending a hand to each other.<sup>36</sup> As MCLACHLAN observed, comity constituted in this context the cornerstone of the building: the idea was not to replace law and rules with a form of courtesy, but to use comity as “the basis for the elaboration of a detailed set of positive rules, grounded in practical reality”.<sup>37</sup> Reading comity as the conceptual basis of a rather

---

<sup>30</sup> J. VOET, *Commentarius ad Pandectas*, The Hague 1698.

<sup>31</sup> H.E. YNTEMA (note 23), at 24.

<sup>32</sup> T. SCHULTZ/ D. HOLLOWAY (note 1), at 579.

<sup>33</sup> R. DE NOVA (note 25), at 449-450. For an analysis of the issues concerning the questions concerning the unity of private and public international law see A. MILLS, *The confluence of public and private international law: justice, pluralism and subsidiarity in the international constitutional ordering of private law*, Cambridge 2009.

<sup>34</sup> E.G. LORENZEN, Story’s Commentaries on the Conflict of Laws: One Hundred Years after, *Harvard Law Review* 1934, p. 403.

<sup>35</sup> See for example P. VOET (note 28), at 143, 168; While HUBER’s work was published before J. VOET’s *Commentarius*, he was undoubtedly familiar with the work of Paulus VOET. See H.E. YNTEMA (note 23), at 29 *et seq.*

<sup>36</sup> T. SCHULTZ/ D. HOLLOWAY (note 3), at 580.

<sup>37</sup> C. MCLACHLAN, *Lis Pendens in International Litigation*, Leiden 2009, p. 223.

sophisticated set of rules allows to overcome the problem. The modern idea of the doctrine as necessitating exercises of discretion by a court do not follow directly from the essence of the principle.

Second, HUBER's conception of international law was fundamentally a GROTIAN one:<sup>38</sup> his third axiom spells out an international usage – if not an international<sup>39</sup> – whereby “the effects of competent foreign laws are everywhere admitted, except when prejudicial to the forum State or its citizens, through the reciprocal indulgence of the sovereign authorities in each State”.<sup>40</sup> Reliance on the *jus gentium* allowed HUBER to universalize his maxims and qualify them as descriptive of current practices, with the normative consequences that followed. In this regard, DICEY's discussion of the application of foreign law having little to do with courtesy between sovereigns fails to make the grade as a subtle critique of HUBER.<sup>41</sup>

This was not, however, the way HUBER's ideas were received in the common law world, where his writings eventually made an impact, due to unique circumstances, on the minds of students and practitioners of the law.<sup>42</sup> The scholar's name became a shorthand to invoke to make a point on the supremacy of the forum's law, in a corruption of the doctrine that was to a great extent a corruption of his legacy.

## **2. Comity in the United States: Livermore, Kent and Story**

An early – and influential – assessment of the doctrine of comity in the United States was offered by LIVERMORE, who described it as an expression that was “grating to the ear when it proceeds from a court of law”. According to WATSON, LIVERMORE, an influential attorney of civil-law Louisiana, was resentful towards the Anglo-American reliance on the Dutch jurists.<sup>43</sup> LIVERMORE saw the application of foreign law as conducive to maintaining friendly intercourse, and “the general good”, pursuing in the private sphere the same objective that the law of

---

<sup>38</sup> There is no question that HUBER was familiar with GROTIUS, whom he cites in *De Conflictu Legum* too. See E.G. LORENZEN (note 34). See also T. SCHULTZ/ D. HOLLOWAY (note 1), at 578.

<sup>39</sup> Note the GROTIAN expression *tacito populorum consensu* in § 1 of *De Conflictu Legum*. See the Latin wording in E.G. LORENZEN, Huber's *De Conflictu Legum*, in E.G. LORENZEN, *Selected Articles on the Conflict of Laws*, New Haven 1947.

<sup>40</sup> H.E. YNTEMA (note 23), at 30.

<sup>41</sup> A.V. DICEY, *A Digest of the Law of England with Reference to the Conflict of Laws*, London/ Boston 1896, p. 10.

<sup>42</sup> L. DAVIES, The Influence of Huber's *De Conflictu Legum* on English Private International Law, *British Yearbook of International Law* 1937, p. 49; T. SCHULTZ/ D. HOLLOWAY (note 22), at 91.

<sup>43</sup> A. WATSON, *Joseph Story and the comity of errors: a case study in conflict of laws*, Athens 1992, p. 28 *et seq.* See also *Saul v His Creditors*, 5 Mart. 569 (La. 1827).



nations pursued in the public one.<sup>44</sup> To his mind, the expression “comity” conveyed a sense of excessive discretion.<sup>45</sup>

This understanding influenced Joseph STORY, whose work made comity an important element of the interface between public international law and American conflict of laws. LIVERMORE’s treatise, along with the case that prompted its creation, were quoted in the influential work of KENT,<sup>46</sup> to whom STORY felt intellectually indebted.<sup>47</sup> STORY, too, felt that the issue of the application of foreign law was one of central importance for the management of frictions resulting from radically different state policies.<sup>48</sup> The issue of slavery was, of course, a central one.<sup>49</sup>

STORY insisted that no national law could have, in principle, extraterritorial effect, a conclusion that descended from public law principles and found support in VATTEL’s writings on the sovereign equality of nations in the field of international law.<sup>50</sup> Further, the application of foreign law was not mandated: “Every nation”, he wrote, “must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions, on which its exercise may be justly demanded”.<sup>51</sup> All that remained was an “imperfect obligation, like that of beneficence, humanity or charity”.<sup>52</sup> In this regard, STORY’s reliance on HUBER’s theories, which may well have supported very different conclusions, has been described as the result of a misunderstanding.<sup>53</sup> The rationale of comity thus derived “from mutual interest and utility, from a sense of the inconveniences” – STORY quotes LIVERMORE – “which would result from a contrary doctrine”.<sup>54</sup>

---

<sup>44</sup> S. LIVERMORE, *Dissertations on the questions which arise from the contrariety of the positive laws of different states and nations*, New Orleans 1928, p. 30; cf. R.C. MINOR, *Conflict of laws, or, Private international law*, Boston 1901, p. 5.

<sup>45</sup> J.R. PAUL (note 4), at 21. The expression in question is “something like an obligation upon sovereigns”: S. LIVERMORE (note 44), p. 30.

<sup>46</sup> J. KENT, *Commentaries on American Law*, New York 1826. In reality, KENT attributed the work to LIVERMORE with the title “Dissertations on Personal and Real Statutes”, a corruption of the title of an earlier work, by the British scholar HENRY, titled “Dissertation on Personal, Real and Mixed Statutes”. STORY, however, cites both authorities correctly: J. STORY (note 20).

<sup>47</sup> A. WATSON (note 43), at 27–28.

<sup>48</sup> “To no part of the world is it of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of those states, which call for the constant administration of extra-municipal principles”: J. STORY (note 20), § 9.

<sup>49</sup> See generally P. FINKELMAN, *An Imperfect Union: Slavery, Federalism, and Comity*, Union New Jersey 2013; W.S. DODGE (note 7), at 19. See also STORY’s opinion in *Prigg v Pennsylvania*, 41 U.S. 539 (1842).

<sup>50</sup> J. STORY (note 20), § 8.

<sup>51</sup> *Id.* § 33.

<sup>52</sup> *Id.* § 33.

<sup>53</sup> For an in-depth analysis of the issue, see A. WATSON (note 43).

<sup>54</sup> J. STORY (note 20), § 33; S. LIVERMORE (note 44), at 28.

The forum state's discretion was crucial in STORY's treatment of the issue. His solution was exceptionally elegant, as it managed to universalise conflict and, at the same time, reflect his policy concerns by affirming the primacy of the forum's law; what is more, this thesis was in line with the rise of positivism – a characteristic that helped it survive and further develop in the American setting.<sup>55</sup>

STORY's engagement with the idea of comity has traditionally represented the ideal *dénouement* of an historical analysis of the concept. Upon publication, his *Commentaries* became the main authority on the topic, and STORY's legacy was very much alive 150 years later.<sup>56</sup> But comity – like sovereignty – is inherently context-dependent. Its meaning and implications, as we will seek to elucidate in the next sections, under the lens provided by almost two centuries of judicial decision-making, transformed as a reflection of the changes in the status quo.

## IV. The Judicial Evolution of Comity

The principle of comity was thus developed as a flexible mediating principle between a new model of allocation of regulatory authority, based on territoriality, and the need to safeguard commercial interests and relations. Flexibility is a key characteristic of comity, though the term has been denounced as misleading.<sup>57</sup> Rather, comity, is “flexible” because it takes different shapes depending on the goals that need to be accomplished. The following sections seek to elucidate how American courts have taken advantage of this quality.

### A. “Legislative” or “Prescriptive” Comity: Restraint and Recognition

#### 1. *Comity and the Recognition to the Law and the Acts of Other States*

While *Hilton v Guyot* remains the landmark on the issue, statements of the Supreme Court invoking comity to allow the application of foreign law and acts predate it by almost one full century. As early as 1797 the Supreme Court, in *Emory v Grenough*, had qualified the application of foreign law as due to the “concurring consent” of the two governments concerned, so that the “mutual convenience of the two nations... which is the foundation of all these rules” could be attained without prejudicing their sovereignty.<sup>58</sup> A more elaborate discussion was presented in the 1839 case *Bank of Augusta v Earle*, which came even closer to STORY's theories. The decision, which has been called “the original fountain

---

<sup>55</sup> J.R. PAUL (note 4), at 25.

<sup>56</sup> See the citation of the *Commentaries* in Justice SCALIA's dissent in *Hartford Fire Ins. Co. v California*, 509 U.S. 764, 817 (1993).

<sup>57</sup> A. BRIGGS (note 2), at 87.

<sup>58</sup> U.S. 369 (Dall.), 374. The case contains an extract of HUBER's *De Conflictu Legum* by Alexander DALLAS: see W.S. DODGE (note 7).

head of the law of foreign corporations in America”,<sup>59</sup> and had its drafter privately applauded by STORY himself,<sup>60</sup> referred to the *Commentaries* to strengthen the proposition that foreign companies could, lacking an express prohibition, make business in another state.<sup>61</sup> Most importantly, it clarified that comity and sovereignty were not mutually incompatible – in fact, because of its voluntary nature, it remained inadmissible when prejudicial, but could be welcomed when conducive to “justice between individuals and to produce a friendly intercourse between the sovereignties”.<sup>62</sup> The implications of this case were clear in *Canada Southern Railway. Co. v Gebhard*.<sup>63</sup> The case concerned a Canadian railway company that was reorganised through a plan agreed upon by the majority creditors and the Canadian Parliament, which had then passed a statute to bind the minority creditors. Faced with the question of giving effect to it, the Supreme Court reasoned that “the laws of a country have no extraterritorial force... but things done in one country under the authority of law may be of binding effect in another country... Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government”.<sup>64</sup>

## 2. *Using Comity to Limit the Reach of American Law*

Comity has historically played an important role in limiting the reach of United States law. It has done so by acting as an upper limit to the exercise of jurisdiction or an interpretive canon capable of making sense of ambiguous statutes and treaties,<sup>65</sup> counselling restraint or a degree of intrusiveness depending on the interests and the context at issue. Of course, the principle has evolved and it has been applied to varying measures throughout its history.

Early cases demonstrate a preoccupation to avoid interference with other sovereign nations. For example, in *American Banana Co. v United Fruit Co.*,<sup>66</sup>

---

<sup>59</sup> G.C. HENDERSON, *The Position of Foreign Corporations in American Constitutional Law: A Contribution to the History and Theory of Juristic Persons in Anglo-American Law*, Cambridge 1918, p. 42.

<sup>60</sup> C.G. HAINES, *The Role of the Supreme Court in American Government and Politics 1835-1864*, Boston 1973, p. 75.

<sup>61</sup> *Bank of Augusta v Earle*, 38 U.S. 519, 520 (1839).

<sup>62</sup> *Id.* at 589 and *passim*.

<sup>63</sup> 109 U.S. 527 (1883).

<sup>64</sup> *Id.* at 536. Justice HARLAN, however, dissented, arguing that comity was not a sufficient reason to enable a foreign corporation to “benefit, in our courts – to the prejudice of our own people and in violation of their contract and property rights – of a foreign statute which could not be sustained had it been enacted by congress or by any one of the United States”, at 539.

<sup>65</sup> An early example is provided by the *Wildenhuis’s* case, 120 U.S. 1, at 12 (1887), where the Supreme Court discussed the rationale of this provision by reference to the concept of comity and the “inconvenience that might arise from attempts to exercise conflicting jurisdictions”.

<sup>66</sup> 213 U.S. 347 (1909).

Justice HOLMES defended the idea that legislation was to be presumed territorial, as holding otherwise would result in an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent”.<sup>67</sup> On this point, the case had limited legacy: the changed circumstances transnational commerce – and, perhaps, the changed attitude towards jurisdiction in international law<sup>68</sup> – caused a reconsideration of this approach: in *United States v Aluminum Corporation of America* (“*Alcoa*”) it was held that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends”.<sup>69</sup> No express reference was made to comity – though some echoes may be perceived in the discussion of the issue of extraterritoriality.<sup>70</sup> It is to this case that the “nationalist jurisprudence” that culminated in *Hartford Fire*, based on a growing willingness of American courts to interfere, may be traced back.

Indeed, the significance of comity grows with the potential for interference warranted by grounds of jurisdiction that can be understood as “virtually unbounded in scope”.<sup>71</sup> Though in certain areas the presumption against extraterritorial effect of American law continued to operate in the traditional fashion,<sup>72</sup> antitrust cases remained fundamentally different. The new approach was codified in the Ninth Circuit case *Timberlane Lumber Co. v Bank of America*,<sup>73</sup> which established an elaborate test to determine “whether American authority should be asserted in a given case as a matter of international comity and fairness”.<sup>74</sup> The *Alcoa* solution was found wanting in that it failed “to consider the interests of other nations in the application or non application of United States law”.<sup>75</sup> Relying on comity, the Court added interest-balancing to the picture.<sup>76</sup> This

---

<sup>67</sup> 213 U.S. 347, at 357, citing *Phillips v Eyre*, L.R. 4 Q.B. 225, 239. It must be observed that this English case introduced a two-limbed test of “double actionability” (or “criminality”), which was applied until a different rule was adopted in *Boys v Chaplin*, [1969] 2 All ER 1085. According to KOH, *American Banana* is as much a result of considerations of comity as it is of the application of rules of conflict, as the acts in question were not prohibited in the states where they had been committed and did not therefore satisfy the English test: see H.H. KOH (note 16), at 60.

<sup>68</sup> *SS “Lotus” (France v Turkey)*, (1927) PCIJ Ser. A, No. 10 253. See also *Id.* at 59–60.

<sup>69</sup> *Id.* at 443.

<sup>70</sup> *Id.* (“Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers”). The statement was quoted to this effect in *Timberlane Lumber Co. v Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976). See also S.D. PIRAINO, *Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act*, *Hofstra Law Review* 2011, p. 1105.

<sup>71</sup> J.A. MEYER, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, *Minnesota Law Review* 2010, p. 151.

<sup>72</sup> See for example the maritime cases *Lauritzen v Larsen*, 345 U.S. 571 (1953); *International Longshoremen’s Ass’n, AFL-CIO v Allied Intern., Inc.*, 456 U.S. 212 (1982).

<sup>73</sup> 549 F.2d 597.

<sup>74</sup> *Timberlane*, 549 F.2d 597, at 613.

<sup>75</sup> A. LOWENFELD (note 13), at 44.

approach was more consistent with existing approaches at the time and was incorporated in the Restatement (Third) of Foreign Relations law. Yet, the Restatement does not mention the term “comity”, perhaps “because the reporters believed that comity carries too much of the idea of discretion or even political judgment, as contrasted with the principle of reasonableness, which is conceived of in terms of legal obligation”.<sup>77</sup> The approach also came under attack in *Laker Airways Ltd. v Sabena, Belgian World Airlines*,<sup>78</sup> where it was memorably held that “[i]f promotion of international comity is measured by the number of times United States jurisdiction has been declined under the «reasonableness» interest balancing approach, then it has been a failure”.<sup>79</sup>

In *Hartford Fire Ins. Co. v California*<sup>80</sup> the Court seized the opportunity to discuss the way comity operates in this context. Often hailed as a “death blow” to the principle<sup>81</sup>, the case concerned the conduct taken by American and British reinsurance and co-insurance companies, which had conspired to limit their offering in the United States, with domestic anticompetitive consequences. The reinsurers argued that the Sherman Act did not apply to them, as the activities they had carried out were lawful under the comprehensive legislation of the United Kingdom, which had “a heavy interest in regulating the activity”.<sup>82</sup> The Court, however, held that it was not enough for the reinsurers to comply with foreign law when compliance with foreign *and* American law was possible: only a “true conflict” would have imported considerations of comity in resolution of the dispute. As the situation in the case at issue did not amount to one, comity was no ground to decline the court’s jurisdiction. Justice SCALIA criticized the decision, correctly observing that it confused two separate issues,

“the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed «prescriptive comity»: the respect sovereign nations afford each other by limiting the reach of their laws... comity in this sense includes the choice-of-law principles that, «in the absence of contrary congressional direction», are

---

<sup>76</sup> K.J. FLOREY, *State Law, US Power, Foreign Disputes: Understanding the Extraterritorial Effect of State Law in the Wake of Morrison v National Australia Bank*, *Boston University Law Review* 2012, p. 543.

<sup>77</sup> A. LOWENFELD (note 13), at 52. The author does, however, note that “If agreement can be reached or approached on content, it may not be worthwhile continuing to debate the terminology”.

<sup>78</sup> *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

<sup>79</sup> *Id.* at 950.

<sup>80</sup> 509 U.S. 764 (1993).

<sup>81</sup> S.W. WALLER, *The Twilight of Comity*, *Colum. J. Transnat’l L.* 1999, p. 563, 564.

<sup>82</sup> *Hartford Fire*, at 819 (SCALIA J).

assumed to be incorporated into our substantive laws having extra-territorial reach”.<sup>83</sup>

SCALIA’s view was destined to be popular: in *F. Hoffman-La Roche Ltd. v Empagran S.A.*,<sup>84</sup> the Court echoed his words on “principles of prescriptive comity” counseling against construing a statute as “an act of legal imperialism”.<sup>85</sup> But *Hartford Fire* did strike a blow to the principle. In *United States v Nippon Paper Indus. Co.*,<sup>86</sup> the First Circuit affirmed that comity was “more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by *Hartford Fire*”.<sup>87</sup> In *Empagran* comity served as grounds for the Court to dismiss the claims relating to alleged foreign damages, but not those concerning domestic harmful effects.<sup>88</sup> Though claiming to construe “ambiguous statutes to avoid unreasonable interference with other nations’ sovereign authority”, it arguably fell short of the mark by allowing for intrusive regulatory interference – rather than helping, as it professed, “the potentially conflicting laws of different nations work together in harmony”.<sup>89</sup> On the whole, the “breathtakingly broad”<sup>90</sup> holding of *Hartford Fire* and its reliance on the concept of “true conflict” are responsible for much terminological and conceptual confusion: while later decisions have been more critical of this approach, it is sometimes difficult to tell where disagreement ends and misunderstanding begins.<sup>91</sup>

*Outside the antitrust context:* comity remained relatively absent from the debate on extraterritoriality in cases not concerning antitrust, though similar notions were often cited.<sup>92</sup> For example, in the 1991 case *EEOC v Arabian*

---

<sup>83</sup> *Id.* at 817-8. W.S. DODGE observes – correctly – that this is not what STORY meant, because in his time courts did not have the authority to decline jurisdiction. This is true, but it might be added that, before *International Shoe*, courts did not have extraterritorial jurisdiction anyway (except, of course, in admiralty cases): if this detail is taken into account, GRAY’s “rhetorical flourish” does not appear to be inconsistent with STORY’s thinking. See W.S. DODGE (note 7), at 2071.

<sup>84</sup> 542 U.S. 155 (2004).

<sup>85</sup> *Id.* at 169.

<sup>86</sup> 109 F.3d 1, 9 (1<sup>st</sup> Cir. 1997).

<sup>87</sup> *Id.* at 8.

<sup>88</sup> 542 U.S. 155, 159 (2004).

<sup>89</sup> 542 U.S. 156.

<sup>90</sup> 509 U.S. 764, at 820 (SCALIA J).

<sup>91</sup> See for example *Mujica v AirScan Inc.*, 771 F.3d 580, 599 (9<sup>th</sup> Cir. 2014), affirming that the “true conflicts” approach is restricted to prescriptive comity and says nothing about adjudicatory comity (as in the case at issue), only to apply the comity considerations contained in § 403 of the Restatement, which deal with prescriptive comity too. See also R. ALFORD, *The Ninth Circuit’s Muddled Comity Analysis in Mujica*, at *Opinio Juris*, available at <<http://opiniojuris.org/2014/11/21/ninth-circuits-muddled-comity-analysis-mujica/>>; S.C. SYMEONIDES, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey*, *Am. J. Comp. L.* 2015, p. 299, 312.

<sup>92</sup> See for example *Foley Bros., Inc. v Filardo*, 336 U.S. 281 (1949).

*American Oil Co. (Aramco)*,<sup>93</sup> the principle was only mentioned in the dissenting opinion of Justice MARSHALL.<sup>94</sup> In deciding whether the 1964 Civil Rights Act applied to a Delaware-registered employer operating in Saudi Arabia, the Court espoused the presumption against extraterritoriality as a guarantee “against unintended clashes... which could result in international discord”.<sup>95</sup> In this regard, however, comity operates in the abstract: in *Morrison v National Australian Bank Ltd*,<sup>96</sup> a case concerning securities fraud, the Court held that the presumption against extraterritoriality applied “regardless of whether there is a risk of conflict between the American statute and a foreign law. When a statute gives no clear indication of an extraterritorial application, it has none”.<sup>97</sup>

Other cases concerned claims for violation of the “law of nations” under the Alien Tort Statute (ATS).<sup>98</sup> Passed as part of the Judiciary Act of 1789, the ATS had remained largely forgotten until the early 1980s, when the Second Circuit rediscovered it in the landmark case *Filártiga v Peña-Irala*,<sup>99</sup> holding that torture amounted to a breach of the law of nations and that the ATS provided federal jurisdiction.<sup>100</sup> However, *Kiobel v Royal Dutch Petroleum Co.*,<sup>101</sup> a controversial case concerning the alleged complicity of a number of corporations in breaches of international law, the Court traced the evolution of the ATS back to its historical roots<sup>102</sup> and considered the foreign policy implications of extraterritorial ATS jurisdiction in terms of interference with both other sovereign states and the executive as the sole responsible of the United States foreign policy.<sup>103</sup> The Court held that the prosecution of extraterritorial conduct such as piracy would not have interfered with foreign sovereignty, whereas cases such as the one at issue could have prompted resentment.<sup>104</sup> These conclusions are consistent with Justice BREYER’s findings in his separate opinion in *Sosa v Alvarez-Machain*.<sup>105</sup> as

---

<sup>93</sup> 499 U.S. 244 (1991).

<sup>94</sup> *Id.* at 260.

<sup>95</sup> *Id.* at 248, citing *McCulloch v Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963).

<sup>96</sup> 561 U.S. 247 (2010).

<sup>97</sup> *Id.* at 255.

<sup>98</sup> 28 USCA. § 1350. On the increased reliance on custom for suits under the ATS see J. CRAWFORD, *Chance, Order, Change: The Course of International Law, General Course on Public International Law*, The Hague 2014, p. 164.

<sup>99</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>100</sup> *Id.* at 878.

<sup>101</sup> 133 S.Ct. 1659. On the history of the ATS see A.M. BURLEY, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, *American Journal of International Law* 1989; W.S. DODGE, *The Historical Origins of the Alien Tort Statute: A Response to the Originalists*, *Hastings International and Comparative Law Review* 1995, p. 221.

<sup>102</sup> *Id.* at 1665 *et seq.*

<sup>103</sup> *Id.* at 1663.

<sup>104</sup> *Id.* at 1669.

<sup>105</sup> 542 U.S. 692.

“universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery”, and universal tort jurisdiction threatened “the practical harmony that comity principles seek to protect” and was to be reserved to a limited number of norms.<sup>106</sup> This formulation allowed for some headroom: in fact, BREYER disagreed with the *Kiobel* majority over too strict an interpretation of the ATS.<sup>107</sup>

## **B. Comity and the Recognition of Foreign Judicial Acts**

The doctrine of comity has also provided the basis for the recognition of foreign judgments in the United States.<sup>108</sup> In *Hilton v Guyot*, hailed as “the lodestar for all transnational enforcement doctrines in the U.S”,<sup>109</sup> the Court famously held that comity was

“neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws”.<sup>110</sup>

The analysis was partly consistent with the theories of STORY and the Dutch writers, and resulted in the rule whereby a judgment was granted recognition unless basic conditions were not satisfied or “by the principles of international law, and by the comity of our own country, it should not be given full credit and effect”.<sup>111</sup> This principled framework was somewhat marred by the introduction of an unclear requirement of reciprocity.<sup>112</sup>

*Hilton*’s significance for the recognition of judgments also faded to some degree after the Supreme Court’s decisions in *Erie* and *Klaxon*. Indeed, *Hilton* has been considered in contrast to the more efficient rules of state law,<sup>113</sup> and the

---

<sup>106</sup> *Id.* at 762.

<sup>107</sup> *Kiobel*, 133 S.Ct. 1659, at 1673-4.

<sup>108</sup> A number of authorities have classified the recognition of foreign judgments under the heading of adjudicative comity. We prefer to privilege the aspects concerning comity as a principle of recognition and treat it separately. For different views see *Ungaro-Benages v Dresdner Bank AG*, 379 F.3d 1227, 1238 (11<sup>th</sup> Cir. 2004). See also W.S. DODGE (note 7); D.E.I. CHILDRESS (note 7).

<sup>109</sup> H.H. KOH (note 16), at 206.

<sup>110</sup> *Hilton v Guyot*, 159 U.S. 113, 163-64 (1895).

<sup>111</sup> *Id.* at 205-06.

<sup>112</sup> *Hilton v Guyot*, 159 U.S. 113, 228 (1895).

<sup>113</sup> See for example *Banque Libanaise Pour Le Commerce v Khreich*, 915 F.2d 1000, 1004 (5<sup>th</sup> Cir. 1990) (“Although comity is not a rule of law, it is more than mere courtesy and accommodation... Under the Texas Recognition Act the rules relating to the recognition of foreign country money-judgments are statutory and therefore more predictable”).



reciprocity rule denounced more or less expressly.<sup>114</sup> In any event, even before *Erie* many American legal minds were aware of the limitations of *Hilton's* reciprocity. As early as 1925 Judge LEARNED HAND could affirm on circuit that the Court “certainly did not mean to hold that an American court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations existing here”.<sup>115</sup> Indeed, criticism of such a model was quite widespread,<sup>116</sup> to the point that Judge Cuthbert POUND recognized that the precedent was sometimes departed from quite overtly.<sup>117</sup>

Today, comity as a recognition doctrine has largely faded as Uniform Acts cover the matter and provide more straightforward solutions. Yet, the doctrine has not been sidestepped completely: first of all, comity served as a fallback device as the acts had yet to receive a homogeneous adoption by states;<sup>118</sup> second, it retains a function as a “saving clause” under current legislation, as the Acts allow recognition “under principles of comity or otherwise of a foreign-country judgment not within [its] scope”;<sup>119</sup> third, comity informs the statutory construction of the Acts, for example, with regards to the concept of “repugnancy”<sup>120</sup> or the scope of the public policy exception;<sup>121</sup> fourth, comity has been invoked in the context of injunctions, which the Uniform Acts do not cover;<sup>122</sup> finally, it has been argued in at least one case that the demands of comity might be met by requiring that non-enforceable judgments be granted recognition: this might, of course, be a meaningful result on its own – one may think of the *res judicata* effect of such a

---

<sup>114</sup> See for example *De la Mata v Am. Life Ins. Co.*, 771 F. Supp. 1375, 1383 (D. Del. 1991) (“[T]he court predicts that the Delaware Supreme Court would no longer regard reciprocity as a precondition for the recognition of a foreign judgment”). *Johnston v Compagnie Générale Transatlantique*, 242 N.Y. 381, 387 (1926) (“Comity is not a rule of law, but it is a rule of «practice, convenience and expediency... It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question.”).

<sup>115</sup> *Direction der Disconto-Gesellschaft v U.S. Steel Corp.*, 300 F. 741, 747 (S.D.N.Y. 1924).

<sup>116</sup> *Disconto Gesellschaft v Umbreit*, 208 U.S. 570, 580 (1908).

<sup>117</sup> *Johnston v Compagnie Générale Transatlantique*, 242 N.Y. 381.

<sup>118</sup> *12 Soc’y of Lloyd’s v Reinhart*, 402 F.3d 982, at 999 (10<sup>th</sup> Cir. 2005).

<sup>119</sup> *Id.* § 11.

<sup>120</sup> See *Wolff v Wolff*, 40 Md. App. 168, at 175 (1979) (“Thus the Uniform Foreign Money-Judgments Recognition Act was intended to promote principles of international comity by assuring foreign nations that their judgments would, under certain well-defined circumstances, be given recognition by courts in states which have adopted the Uniform Act”). See also M.P. EPSTEIN, *Comity Concerns Are No Joke: Recognition of Foreign Judgments Under Dormant Foreign Affairs Preemption*, *Fordham L. Rev.* 2013, p. 2317, 2321.

<sup>121</sup> *Naoko Ohno v Yuko Yasuma*, 723 F.3d 984, at 1002 (9<sup>th</sup> Cir. 2013), citing *Crockford’s Club Ltd. v Si-Ahmed*, 203 Cal. App. 3d 1402, at 1406 (Ct. App. 1988).

<sup>122</sup> 433 F.3d 1199 (9<sup>th</sup> Cir. 2006).

judgment – and exemplifies a conclusion that could not be reached by the reading of the acts alone.<sup>123</sup>

In conclusion, *Hilton*’s legacy remains uncontested authority for the view that comity constitutes the basis for recognition doctrines, and comity reasoning still fills the gaps left by and fine-tuning the more detailed regulation of the matter by state sources. Conversely, reciprocity has failed to become an essential element of a comity analysis in this context.<sup>124</sup>

### **C. Adjudicatory Comity, or “the Comity of Courts”**

Comity has also been invoked to justify certain approaches towards adjudication emanating from foreign countries and, to some extent, international courts and tribunals. The notion that the comity may provide the basis for the coordination of the exercise of adjudicatory power is usually assumed as a starting point,<sup>125</sup> but such an assessment belies the complexity of the issue: as MCLACHLAN observes, it is unclear that what the early Dutch writers envisaged could so far as to require ceding adjudicatory power to a foreign court.<sup>126</sup>

Indeed, recognition of acts is one thing, but deference to mere *proceedings* is much closer to judicial abdication. To be sure, this might be truer in some cases than in others.<sup>127</sup> But in all of them comity plays a role: informing doctrines of abstention “deferring to foreign courts by restraining the exercise of U.S. courts’ jurisdiction”.<sup>128</sup>

#### **1. The Origins of Adjudicatory Comity in Admiralty Courts and the Use of Forum non Conveniens**

The origins of adjudicatory comity are to be found in admiralty courts, which were originally the only ones not limited to strictly territorial jurisdiction.<sup>129</sup> This was required by their tasks – relating, for example, to the claims brought by seamen for their wages or injuries suffered during employment.<sup>130</sup> But taking jurisdiction in such cases often meant holding a ship in an American port, which could be

---

<sup>123</sup> *Guinness PLC v Ward*, 955 F.2d 875, at 889 (4<sup>th</sup> Cir. 1992) (“[W]e nonetheless believe that such goal as well as the principles of comity are still sufficiently served by the fact that judgments which are not enforceable might still be entitled, if consistent with the Act’s criteria, to recognition.”).

<sup>124</sup> *Cunard S.S. Co. v Salen Reefer Servs. AB*, 773 F.2d 452, 460.

<sup>125</sup> N.J. CALAMITA (note 15), at 614.

<sup>126</sup> C. MCLACHLAN (note 37), at 223.

<sup>127</sup> A. BRIGGS (note 2), at 116 *et seq.*

<sup>128</sup> W.S. DODGE (note 7), at 2216.

<sup>129</sup> *International Shoe Co. v Washington*, 326 U.S. 310 (1945).

<sup>130</sup> A.M. BICKEL, *Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty*, *Cornell L. Q.* 1949, p. 12, 19.

perceived as an unjustified interference by the flag state.<sup>131</sup> In this regard, a choice to decline jurisdiction echoed concerns – as one early case put it – “of international comity, of delicacy, and of convenience”.<sup>132</sup> The common law doctrine of *forum non conveniens* (FNC), the “discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere,”<sup>133</sup> was a solution.<sup>134</sup>

The relationship between FNC and comity is particularly complicated – a decision to dismiss local proceedings in favour of a different forum entails an evaluation of a foreign court and may amount to “dumping” cases – that is, telling another court what to do.<sup>135</sup> Indeed, even though American courts swiftly understood the significance of the doctrine, the Supreme Court did not link FNC and comity for a long time.<sup>136</sup> Lower courts, in turn, have sometimes considered the two concepts together, but mainly to distinguish them where ambiguity arose or as alternative grounds for dismissal of the same suit.<sup>137</sup> Indeed, FNC is generally regarded as much narrower a ground for dismissal than comity.<sup>138</sup> Moreover, FNC does not require the same type of sovereign interests analysis: while comity may be taken as the basis of “local interest in having localized controversies decided at home”,<sup>139</sup> the two doctrines are best understood as separate.<sup>140</sup>

---

<sup>131</sup> *Id.* at 21.

<sup>132</sup> *Davis v Leslie*, 7 F. Cas. 134, 137 (S.D.N.Y. 1848).

<sup>133</sup> P. BLAIR, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, *Columbia Law Review* 1929, p. 1.

<sup>134</sup> *Am. Dredging Co. v Miller*, 510 U.S. 443, at 464 (1994) (KENNEDY and THOMAS Js dissenting) (“From the beginning, American admiralty courts have confronted this problem through the *forum non conveniens* doctrine.”).

<sup>135</sup> A. BRIGGS (note 2), at 119.

<sup>136</sup> *Am. Dredging Co. v Miller*, 510 U.S. 443, 467 (1994) (KENNEDY and THOMAS Js dissenting); *Sinochem Int’l Co. v Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007); *Daimler AG v Bauman*, 134 S. Ct. 746, 771 (2014) (SOTOMAYOR J concurring).

<sup>137</sup> *Republic of Panama v BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, at 951 (11<sup>th</sup> Cir. 1997).

<sup>138</sup> *Norex Petroleum Ltd. v Access Indus., Inc.*, 416 F.3d 146, at 159 (2d Cir. 2005).

<sup>139</sup> *Gulf Oil Corp. v Gilbert Storage & Transfer Co.*, 330 U.S. 501, 509 (1947). See also A.-M. SLAUGHTER, *Judicial globalization*, *Virginia Journal of International Law* 1999, p. 1113.

<sup>140</sup> But see W.S. DODGE (note 7), at 2209–10. “Because the doctrine of *forum non conveniens* allows U.S. courts to restrain their exercise of jurisdiction in deference to foreign courts, it is properly considered a doctrine of international comity.”

## **2. Comity as a Coordination Device for Pending or Potential Parallel Proceedings**

While “[c]oncurrent jurisdiction does not necessarily entail conflicting jurisdiction”,<sup>141</sup> differences and tensions do arise from parallel adjudication of the same or similar disputes in different countries. Comity has served as a powerful tool to resolve these problems by providing exceptions to the “virtually unflagging obligation” of American courts to exercise their jurisdiction.<sup>142</sup>

Traditionally, this has been common in bankruptcy cases, where “American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities”.<sup>143</sup> Granting comity to foreign proceedings, however, was soon conditioned to certain requirements of procedural fairness.<sup>144</sup> Moreover, comity could be afforded “to foreign bankruptcies only if those proceedings do not violate the laws or public policy of the United States”.<sup>145</sup>

The situation is not largely different outside the bankruptcy context, although the approaches are somewhat less principled. In order to defer to foreign proceedings, courts have normally required, in addition to the satisfaction of demands of fairness and the absence of prejudice to American public policy, an assessment of the “relative strengths” of the two countries’ interest to the determination of a dispute.<sup>146</sup> This is a complex analysis, especially because the sovereign parties involved may easily change views,<sup>147</sup> but it has been considered essential: since “[a]bstention from the exercise of federal jurisdiction is the exception, not the rule”,<sup>148</sup> “the mere existence of an adequate parallel action, by itself, does not justify the dismissal of a case on grounds of international comity abstention”.<sup>149</sup>

Of course, whether or not proceedings are already pending in the foreign country is an important element to consider. In *Ungaro-Benages v Dresdner Bank AG*<sup>150</sup>, the Eleventh Circuit drew a line between a “retrospective” and “prospective” application of the comity doctrine, concluding that the latter, applying to situations where proceedings have not been initiated elsewhere, requires “federal courts [to]

---

<sup>141</sup> *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984).

<sup>142</sup> *Colorado River Water Conser. Dist. v United States*, 424 U.S. 800, 817 (1976).

<sup>143</sup> *Cunard S.S. Co. v Salen Reefer Servs. AB*, 773 F.2d 452, at 458 (2d Cir. 1985).

<sup>144</sup> *Allstate Life Ins. Co. v Linter Grp. Ltd*, 994 F.2d 996 (2d Cir. 1993).

<sup>145</sup> *Finanz AG Zurich v Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999).

<sup>146</sup> *Turner Entm’t Co. v Degeto Film GmbH*, 25 F.3d 1512, at 1521 (11<sup>th</sup> Cir. 1994).

<sup>147</sup> *Jota v Texaco, Inc.*, 157 F.3d 153, at 160 (2d Cir. 1998) (Ecuador first opposed and then advocated the jurisdiction of United States courts).

<sup>148</sup> *Colorado River Water Conservation Dist. v United States*, 424 U.S. 800, 813 (1976). See W.S. DODGE (note 7), at 2112.

<sup>149</sup> *Royal & Sun All. Ins. Co. of Canada v Century Int’l Arms, Inc.*, 466 F.3d 88 (2d Cir. 2006).

<sup>150</sup> 379 F.3d 1227 (11<sup>th</sup> Cir. 2004).

evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum".<sup>151</sup> The case was atypical, as it concerned a suit by a descendant of the heir to a German company against German banks that, the plaintiff claimed, had stolen the stock belonging to Jewish heirs in aryanization processes. The fact that agreement between the United States and Germany had been made to create an exclusive forum for such claims, along with the German government's interests in having that exclusive jurisdiction respected "in its efforts to achieve lasting legal peace with the international community" supported dismissal.<sup>152</sup>

The very act of adjudication of a dispute may sometimes be regarded as an unfriendly act, and "extreme cases might be imagined where a foreign sovereign's interests were so legitimately affronted by the conduct of litigation in a United States forum that dismissal is warranted without regard to the defendant's amenability to suit in an adequate foreign forum".<sup>153</sup> The other state's opinion is thus of some importance: for example, in *Bigio v Coca-Cola Co.*,<sup>154</sup> the court rejected a plea of dismissal on the grounds of comity stating that the only such issue was whether the exercise of jurisdiction "would offend «amicable working relationships» with the foreign government". The latter, however, had not raised any objections and the Court proceeded with confidence that its judgment would not impact international relations.<sup>155</sup> More politically charged cases, however, may be handled differently: in *Khulumani v Barclay Nat. Bank Ltd.*,<sup>156</sup> a suit brought under the Alien Tort Statute by South African plaintiffs claiming that the defendants had "actively and willingly collaborated with the government of South Africa in maintaining the apartheid regime,"<sup>157</sup> the governments of both countries involved had produced statements of interest.<sup>158</sup> The Court, however, eventually held that "[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction", in which case only a decision to dismiss could have been warranted, based on interests of the two states.<sup>159</sup> The question was thus centered on whether one such conflict existed

---

<sup>151</sup> *Id.* at 1238.

<sup>152</sup> *Ungaro-Benages v Dresdner Bank AG*, 379 F.3d 1227, 1239 (11<sup>th</sup> Cir. 2004). For a case in which the *Ungaro-Benages* standard was not satisfied, see *GDG Acquisitions, LLC v Gov't of Belize*, 749 F.3d 1024, 1032 (11<sup>th</sup> Cir. 2014). A similar standard has been adopted, though perhaps not fully understood, in the Fifth Circuit decision *Perforaciones Exploración y Producción v Marítimas Mexicanas, S.A. de C.V.*, 356 F. App'x 675, 681 (5<sup>th</sup> Cir. 2009). The Third Circuit has remained skeptical of "prospective comity" analyses: see *Gross v German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006).

<sup>153</sup> *Jota v Texaco, Inc.*, 157 F.3d 153, at 160 (2d Cir. 1998).

<sup>154</sup> 448 F.3d 176 (2d Cir. 2006).

<sup>155</sup> *Id.*

<sup>156</sup> 504 F.3d 254 (2d Cir. 2007).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 259.

<sup>159</sup> *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 283 (S.D.N.Y. 2009).

between litigation in the U.S. courts and the Truth and Reconciliation Commission process in South Africa.<sup>160</sup>

This was problematic: it was not quite clear from *Hartford Fire* that a true conflict analysis should guide adjudicatory comity cases, and, if it did, it is not clear why it should have focused on sovereign interests.<sup>161</sup> This critical point was discussed in *Mujica v AirScan Inc.*,<sup>162</sup> an ATS action brought by Colombian nationals against an American corporation and its private security firm, for the defendants' alleged complicity in the bombings of their village.<sup>163</sup> No other proceedings were pending elsewhere and the court dismissed the suit on comity grounds: in its analysis, the Court correctly concluded that "*Hartford Fire* does not require proof of a «true conflict» as a prerequisite for invoking the doctrine of comity, at least in a case involving adjudicatory comity".<sup>164</sup> It also expanded on the test developed in *Ungaro-Benages* to formulate its own. While the latter test focused on "the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum"<sup>165</sup>, the Court in *Mujica* attempted to clarify the first element through the lens of the prescriptive comity factors which it had previously considered in *Timberlane*, and which made their way into § 403 of the Restatement, holding that they constituted "a general list of indicia to which we may look when weighing U.S. and foreign interests and the adequacy of the alternative forum".<sup>166</sup> This choice has been harshly criticized, and it has been observed that such an analysis seems to be the result of a misunderstanding. It appears, however, that the most important component of the Court's comity analysis might have been the deference granted to the Executive's statement of interest, thus seriously downplaying the significance of the other elements in picture.<sup>167</sup>

### 3. Anti-Suit Injunctions

Contrary to the English tradition, where "[i]t is easy to take anti-suit injunctions for granted", American courts have on the whole granted the remedy sparingly.<sup>168</sup>

---

<sup>160</sup> *Id.* at 285-6.

<sup>161</sup> D.E.I. CHILDRESS (note 7), at 55.

<sup>162</sup> 771 F.3d 580.

<sup>163</sup> *Id.* at 584.

<sup>164</sup> *Id.* at 600.

<sup>165</sup> *Id.* at 1238.

<sup>166</sup> *Mujica v AirScan Inc.*, 771 F.3d 580, 605.

<sup>167</sup> *Id.* at 610 ("Accordingly, we «give serious weight to the Executive Branch's view of [this] case's impact on foreign policy», and we conclude that the United States' interest in having the case adjudicated exclusively in Colombia is strong"). The Court cited *Sosa v Alvarez-Machain*, 542 U.S. at 733 (2004); one wonders, however, if *Republic of Austria v Altmann*, 541 U.S. 677, 702 (2004) would have been a more appropriate precedent.

<sup>168</sup> R. FENTIMAN, Anti-Suit Injunctions – Comity Redux?, *The Cambridge Law Journal* 2012, p. 273.

That federal courts have the power to grant them is not at all controversial,<sup>169</sup> but with the caveat that this power “effectively restricts the jurisdiction of the foreign tribunal and should therefore be used sparingly”,<sup>170</sup> as being too liberal would raise serious comity concerns.<sup>171</sup> Indeed, anti-suit injunction have the potential to interfere with the sovereign act of adjudication, albeit to a varying degree, depending on whether a foreign court has been already seised.<sup>172</sup>

Moreover, “[c]oncurrent jurisdiction does not necessarily entail conflicting jurisdiction”.<sup>173</sup> Accordingly, concurrent proceedings represent the rule and seldom suffice, alone, to warrant the remedy, even when their concurrence might produce an “embarrassing race to judgment” or “potentially inconsistent adjudications”.<sup>174</sup> In taking such a “drastic step”,<sup>175</sup> comity considerations play a major role, going so far as to establish a rebuttable presumption against the issuance of anti-suit injunctions.<sup>176</sup>

The grant of anti-suit injunctions follows the same logic of comity-driven recognition and abstention doctrines.<sup>177</sup> Accordingly, they may be issued if necessary to prevent “an irreparable miscarriage of justice”, “protect the jurisdiction of the enjoining court”, or to “prevent the litigant’s evasion of the important public policies of the forum”.<sup>178</sup> A more principled approach has been developed by the Ninth Circuit. *Microsoft Corp. v Motorola, Inc.*<sup>179</sup> clarified that an injunction would likely be consistent with comity where the enforcement of a choice of forum agreement is sought, less so in politically sensitive situations in which foreign relations implications are expected.<sup>180</sup> In midstream cases, the

---

<sup>169</sup> See for example *Seattle Totems Hockey Club, Inc. v Nat’l Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981) (“A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country”).

<sup>170</sup> *United States v Davis*, 767 F.2d 1025, 1038 (2d Cir. 1985). Of historical interest, see *Peck v Jenness*, 48 U.S. 612 (1849).

<sup>171</sup> *China Trade & Dev. Corp. v M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987).

<sup>172</sup> A. BRIGGS (note 2), at 125–6.

<sup>173</sup> *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984).

<sup>174</sup> *China Trade & Dev. Corp. v M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 928 (D.C. Cir. 1984).

<sup>175</sup> *Gau Shan Co. v Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992).

<sup>176</sup> *Quaak v Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004).

<sup>177</sup> *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984).

<sup>178</sup> *Id.* at 927.

<sup>179</sup> 696 F.3d 872 (9th Cir. 2012). See also *E. & J. Gallo Winery v Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006)

<sup>180</sup> *Id.* at 887.

comity analysis should consider elements such as whether the foreign suit has been initiated at a later moment for seemingly abusive purposes.<sup>181</sup>

Here, too, public policy exceptions play a role, though the standard is stricter in recognition of greater potential for interference. An evasion of public policy warranting the remedy cannot thus be found in “the availability of slight advantages in the substantive or procedural law”,<sup>182</sup> such as, for example, the unavailability of a treble damages remedy.<sup>183</sup> Interestingly, anti-suit injunctions have instead been granted because they frustrated a United States policy favoring forum selection clauses<sup>184</sup> and “the liberal enforcement of arbitration clauses”.<sup>185</sup>

#### **D. “Executive” or “Sovereign-Party” Comity**

Some uses of comity have been assigned the confusing label of “executive”.<sup>186</sup> The adjective professedly conveys the idea of deference to “the executive acts of foreign countries”<sup>187</sup>, and provides the basis for the Act of State doctrine, foreign sovereign immunity and the privilege of foreign governments to bring suit in United States courts. This terminology adds to the confusion stemming from the likely involvement of the Executive branch in the cross-border affairs that normally justify such doctrines, and some alternative formulations, such as “sovereign party comity” have been proposed, though they are not without drawbacks.<sup>188</sup> For reasons of intelligibility, we adopt here the traditional approach.

##### **1. Comity and the Act of State Doctrine**

The Act of State doctrine prevents American courts from questioning the validity of an act concluded by a foreign government in its territory. The classical statement of the doctrine is provided in *Underhill v Hernandez*, where the Supreme Court affirmed that

---

<sup>181</sup> *Id.*

<sup>182</sup> *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 932 (D.C. Cir. 1984).

<sup>183</sup> *Gau Shan Co. v Bankers Trust Co.*, 956 F.2d 1349, 1358 (6<sup>th</sup> Cir. 1992).

<sup>184</sup> *E. & J. Gallo Winery v Andina Licores S.A.*, 446 F.3d 984, 993 (9<sup>th</sup> Cir. 2006) (“We hold that Andina’s pursuit of litigation in Ecuador, in violation of the forum selection clause, frustrates a policy of the United States courts”).

<sup>185</sup> *Paramedics Electromedicina Comercial, Ltda v GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2<sup>d</sup> Cir. 2004). The opinion cites *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985).

<sup>186</sup> See for example D.E.I. CHILDRESS (note 7), at 47; M.W. LIEN, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, *Catholic University Law Review* 2000, p. 595.

<sup>187</sup> M.D. RAMSEY (note 5).

<sup>188</sup> W.S. DODGE (note 7), at 2079.



“Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory”.<sup>189</sup>

The doctrine is understood to stem from considerations of international comity, as “[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations”.<sup>190</sup> But what, precisely, does comity require in this context?

It has been suggested that the interests protected by the doctrine have changed, moving from mutual convenience, to respect for sovereignty, and, finally, consideration for the foreign relations interests of the United States and prerogatives of the political branches.<sup>191</sup> These foreign policy concerns are exemplified by *Banco Nacional de Cuba v Sabbatino*, concerning an expropriation to the detriment of an American company by the Cuban government, which also brought the suit.<sup>192</sup> This latter circumstance, along with the alleged illegality of the expropriation under international law, had prompted the defendant to argue that the act of state doctrine could not apply.<sup>193</sup> The Court, however, held otherwise, stating that

“[t]he doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere”.<sup>194</sup>

Comity thus provides a basis of the rule.<sup>195</sup> It must be noted, however, that the deference to foreign sovereignty is also a result of precise policy determinations. Accordingly, deference must also be paid to the branch of government best suited to pursue them: the Executive.<sup>196</sup> The Supreme Court has clarified that that the act

---

<sup>189</sup> 168 U.S. 250, at 252 (1897).

<sup>190</sup> *Oetjen v Central Leather Co.*, 246 U.S. 297 (1918) at 304.

<sup>191</sup> W.S. DODGE (note 7); J.R. PAUL (note 4), at 31.

<sup>192</sup> 376 U.S. 398 (1964).

<sup>193</sup> Indeed, this hypothesis is now covered by the Foreign Assistance Act of 1964 (amended 2000) (28 U.S. Code § 1605), which exclude the application of the act of state doctrine for declining jurisdiction over confiscations of property violating international law after 1 January 1959.

<sup>194</sup> 376 U.S. 398, at 423.

<sup>195</sup> Though the contention has been made that the Act of State doctrine can be explained without references to comity: M.D. RAMSEY (note 5).

<sup>196</sup> “The act of state doctrine does, however, have «constitutional» underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.” *Sabbatino*, 376 U.S. 398, at 423. According to PAUL, the Court’s desire to give the government the widest possible discretion in dealing with communist states prompted the ironic and

of state doctrine, much like sovereign immunity,<sup>197</sup> was “judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government”.<sup>198</sup> Such doctrines need to be malleable enough to suit the needs of the Executive: and in *Sabbatino*, the Executive had “expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy”.<sup>199</sup>

According to KOH, “by explicitly linking the doctrine to separation of powers, *Sabbatino* implied that determinations regarding the legality of foreign state acts are quasi-political questions, whose decision is appropriately confided in the Executive”.<sup>200</sup> Almost twenty years later, the Court partially endorsed this reconstruction in *Kirkpatrick*,<sup>201</sup> arguing that the judiciary’s “engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs”.<sup>202</sup> Yet, the judgment restricted its operation to situations concerning a specific act having bearing on the outcome of a dispute.<sup>203</sup> In other words, the “embarrassment” of any government does not, in and by itself, constitute a sufficient reason for dismissal.<sup>204</sup>

*Kirkpatrick* may thus be said to have mitigated the significance of comity for the use of the doctrine – and indeed, as far as its application is concerned, Joel PAUL is absolutely correct in observing that “[t]he risk of embarrassing the executive is a curious rationale for a conflicts principle”.<sup>205</sup> The point is that, if “embarrassment” belongs within the semantic spectrum of comity, the contrary is not necessarily true. In fact, the comity that explains the origin of the doctrine – it was through comity that American courts created it in their quest to “accommodate respect for foreign sovereignty with growing American intercourse with other

---

contradictory result of replacing deference to party autonomy with deference to the Executive: J.R. PAUL (note 4), at 32.

<sup>197</sup> However, “[u]nlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits. Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts”: *Republic of Austria v Altmann*, 541 U.S. 677, 700 (2004). See also *Samantar v Yousuf*, 560 U.S. 305, at 322 (2010). Most importantly, as Justice MARSHALL pointed out in a dissent, the two “differ fundamentally in their focus and in their operation. Sovereign immunity accords a defendant exemption from suit by virtue of its status. By contrast, the act of state doctrine exempts no one from the process of the court. *Alfred Dunhill of London, Inc. v Republic of Cuba*, 425 U.S. 682, 725-26 (1976).

<sup>198</sup> *First Nat’l City Bank v Banco Nacional de Cuba*, 406 U.S. 759, at 762 (1972).

<sup>199</sup> *Id.* at 767.

<sup>200</sup> H.H. KOH, Transnational public law litigation, *Yale Law Journal* 1991, p. 2362.

<sup>201</sup> *Kirkpatrick & Co. v Evtl. Tectonics*, 493 U.S. 400 (1990).

<sup>202</sup> *Kirkpatrick*, 493 U.S. 400, at 404.

<sup>203</sup> *Id.* at 406.

<sup>204</sup> *Id.* at 410.

<sup>205</sup> J.R. PAUL (note 4), at 32.

nations”<sup>206</sup> – is very much the same comity that remains relevant for the modern-day life of the institution. In other words, comity, intended as a tool to promote successful political and commercial relations, supports the idea of deference to the Executive, assumed as the branch capable of best pursuing these objectives.

## 2. *Sovereign Immunity*

Doctrines of sovereign immunity have long been recognised to be based on comity. A reference to the principle is absent in the early landmark case *The Schooner Exchange v McFaddon*.<sup>207</sup> Delivering the majority opinion, Chief Justice MARSHALL carefully balanced his language, referring obliquely to the language of the law of nations and succeeding in illustrating exceptions to national jurisdiction while reaffirming the absolute nature of sovereignty.<sup>208</sup> Yet, MARSHALL referred to “distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other”.<sup>209</sup> Other authorities, too, support a comity-driven reading of the decision.<sup>210</sup>

In the Twentieth Century, this relationship was investigated further. In *Guaranty Trust Co. v United States* comity was understood to require that “foreign sovereigns and their public property [be] held not to be amenable to suit in our courts without their consent”,<sup>211</sup> while in *City Bank of New York v Republic of China*, Justice REED found the word appropriate to describe a relaxation of jurisdictional rules – in light of the fact that any such consent could be easily revoked by the sovereign.<sup>212</sup> Finally, in *Verlinden B.V. v Central Bank of Nigeria*,<sup>213</sup> the Court interpreted *The Exchange* as qualifying sovereign immunity as “a matter of grace and comity... and not a restriction imposed by the Constitution”.<sup>214</sup> For the

---

<sup>206</sup> H.H. KOH (note 200), at 2257.

<sup>207</sup> 11 U.S. 116 (1812).

<sup>208</sup> P.C. JESSUP, *Transnational Law*, New Haven 1956.

<sup>209</sup> *The Schooner Exchange*, 11 U.S. 116, at 137.

<sup>210</sup> *The Parlement Belge*, (1880) 5 P.D. 197. See also *Compania Naviera Vascongado v Steamship “Cristina”*, [1938] A.C. 485. The case is remembered as most divisive: see M.N. SHAW, *International Law*, Cambridge 2008, p. 705, (Lord MAUGHAM J “the word «comity», whatever may be its defects in regard to other rules of private international law, has a very powerful significance”).

<sup>211</sup> 304 U.S. 126 (1938), at 134-5.

<sup>212</sup> *Cf. La Santissima Trinidad*, 20 U.S. 283, at 352-3 (1822). “But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels”: 20 U.S. 283, at 352-3 (1822).

<sup>213</sup> 461 U.S. 480 (1983).

<sup>214</sup> *Id.* at 486. See also, seemingly suggesting that *The Exchange* had generally been interpreted too broadly, *Samantar v Yousuf*, 560 U.S. 305, 311 (2010). See also *Republic of Argentina v NML Capital, Ltd.*, 134 S.Ct. 2250, 2255 (U.S., 2014): (“Foreign sovereign

Court, this justified deference to the determinations of the executive when deciding whether to exercise jurisdiction against foreign sovereigns and their instrumentalities.<sup>215</sup> Comity thus continues to shape the doctrine of immunity. Not only is it often referenced and discussed at length as the basis of immunity; it is also used to explain what precisely immunity, pursuing the interests of comity, requires.<sup>216</sup>

### **3. The Privilege of Suit**

Finally, comity has traditionally served as the traditional justification for the privilege granted to foreign governments to bring suit in United States courts. The Supreme Court recognized this function as early as 1870, stating that “[a] foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling”.<sup>217</sup> One consequence of this approach to granting of the privilege was the ability to preserve “the discretion of the United States to deny it, at least to foreign states that are at war with the United States or not recognized by it”.<sup>218</sup> Later decisions have confirmed this approach,<sup>219</sup> but have also highlighted that the treatment of the issue differs significantly from that of immunity: as the Court put it in a later case, “[b]y voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought”.<sup>220</sup>

Again, the concept of comity has continued to be relevant: for example, it has been relied on for purposes of statutory interpretation in *Pzifer*, where the Court relied on it to affirm that a sovereign state damaged by anticompetitive conduct could sue for treble damages in United States district courts and could thus, under the Clayton Act,<sup>221</sup> qualify as “persons”.<sup>222</sup>

It has been argued that comity, the roots of the privilege notwithstanding, has now a much smaller role to play, and that questions concerning suits brought

---

immunity is, and always has been, “a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.”).

<sup>215</sup> *Verlinden B.V.*, 461 U.S. 480, at 486 (1983). See also *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) and *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (relying on *Hilton*).

<sup>216</sup> 553 U.S. 851, at 851 (2008) (“Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine”).

<sup>217</sup> *The Sapphire*, 78 U.S. 164, at 167-8 (1870).

<sup>218</sup> W.S. DODGE (note 7), at 2091 citing the authority of *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308.

<sup>219</sup> “Although comity is often associated with the existence of friendly relations between states... prior to some recent lower court cases which have questioned the right of instrumentalities of the Cuban Government to sue in our courts, the privilege of suit has been denied only to governments at war with the United States”: *Sabbatino*, 376 U.S. 398, at 409.

<sup>220</sup> *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), at 134-5.

<sup>221</sup> 15 U.S. Code § 12.

<sup>222</sup> 434 U.S. 308, at 311-312.

by foreign governments can be resolved by clear-cut – if judge-made – rules (as opposed to standards).<sup>223</sup> But as a less dated Second Circuit decision puts it, reliance on comity highlights “that foreign nations are external to the constitutional compact, and it preserves the flexibility and discretion of the political branches in conducting this country’s relations with other nations”.<sup>224</sup>

## V. United States Experience and the Global Dimension of Comity

In the foregoing sections we have examined the approach American courts and scholars have adopted when dealing with the concept of comity. It is now time to understand its peculiarities and overall fortune in the global discourse on the notion.

### A. Comity Doctrines and Comity Reasoning

An analysis of the notion of comity in American law highlights the variety of meanings that are commonly associated with the expression, but also reveals the number of doctrines and rules that in comity find their rationale. The notion thus informs a variety of areas and it is difficult to drive out the impression that, today as in HUBER’s time, comity has been to judges “a springboard from which they proceeded to develop a highly organized and sophisticated set of choice of law rules”.<sup>225</sup> While American courts have largely lost touch with the conflict of laws roots (and rationale) of the comity doctrine, which would provide “a more principled basis for applying the doctrine in transnational cases by bringing sovereign interests to light” and allowing for a more reasoned mediation between them,<sup>226</sup> comity continues to play a role.

The metaphor of “comity as a springboard” does not fully describe its role in American law anymore, and we need not enter discussions on whether its demands are met by the application of rules or standards.<sup>227</sup> The point is that comity often enters the picture in a more oblique manner than it is generally suggested, and that what we may label “comity reasoning” is as important as the reliance on the “principle” or the “doctrine” of comity.

One illustration is offered by the numerous references to comity in the context of decisions involving international law. To many commentators, American courts have consistently struggled to distinguish one from the other. Yet,

---

<sup>223</sup> W.S. DODGE (note 7), at 2126.

<sup>224</sup> *Price v Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002).

<sup>225</sup> C. McLACHLAN (note 37), at 222.

<sup>226</sup> D.E.I. CHILDRESS (note 7), at 63.

<sup>227</sup> W.S. DODGE (note 7), at 2124.

in many cases, it appears that courts have simply used the concept of comity as lens through which they were required to ascertain what exactly international law permitted or required. Indeed, the idea that the interpretation of norms of international law may draw inspiration from comity is not theoretically illogical, especially if comity's theoretical vicinity with the principle of good faith is taken into account.<sup>228</sup> When these aspects are considered, the cogency of comity appears in another light: statements to the effect that “the king is wise and good” clearly work much better in the context of domestic statutory interpretation than they do with regards to international sources.<sup>229</sup> In other words there might be method in the American judiciary's apparent confusion of comity and public international law, in that the former allows to give proper effect to the latter.

## **B. The Problem of Deference to the Executive**

The debate on comity in the United States has often turned into a discussion on separation of powers. Comity, it may be recalled, is largely agent-agnostic in terms of which among the powers exercises it – HUBER's own statement of the doctrine supports as much.<sup>230</sup> It also accords with the rationale of many canons of statutory interpretation, first and foremost the presumption against extraterritoriality, which assumes comity to have been exercised by the legislative branch, the role of the judiciary being limited to an *ex post* recognition of such exercise. Yet, by looking at the instances in which comity has been invoked and the issue of deference to the Executive raised, one would not conclude that the problem of separation of powers fits so neatly in the life of the doctrine. In practice, the most troubling links between comity and deference to the executive stem from sensitive matters arising from cross-border or international disputes.

Comparable occurrences before courts of other nations have not prompted courts to grant the political branches such a substantial degree of deference.<sup>231</sup> More precisely, a more limited number of hypotheses call for this type of deference, which is, conversely, deeply rooted in American legal thinking continues to encourage one of the most unbending “myths” of international comity.<sup>232</sup> This difficulty has less to do with questions relating to the United States form of government than with certain attitudes of the American judiciary, divided – when dealing with issues of foreign affairs – between the opposed

---

<sup>228</sup> J. KÄMMERER, Comity, in R. WOLFRUM (ed), *Max Planck Encyclopedia of Public International Law*.

<sup>229</sup> E.S. MORGAN, *Inventing the People: The Rise of Popular Sovereignty in England and America*, New York 1989, p. 29.

<sup>230</sup> E.G. LORENZEN (note 39), at 227. See also *Hartford Fire*, at 813 (SCALIA J).

<sup>231</sup> For example, in the United Kingdom the question of deference to executive power normally arises in the context of political questions and issues of justiciability. For an example concerning the grant of diplomatic protection and the position of the British Court of Appeal that an unreasonable refusal would have been considered justiciable, see *Abbasi*; see also Supreme Court of Canada, *Khadr (No 2)*, 2010 SCC 3, [2010] 1 SCR 44.

<sup>232</sup> W.S. DODGE (note 7), at 2132.

approaches of a “customary” practise of judicial abdication<sup>233</sup> and their constitutional “province and duty... to say what the law is”.<sup>234</sup> Further, contrary to obsequiousness to the will of Congress, deference to the executive could also be seen as undermining the principle of democratic accountability, and the advocacy of Executive power in this area has been linked to the growing fear of the “Soviet threat”.<sup>235</sup> As Curtis BRADLEY has persuasively observed, the main problem with the hoary problem of deference is that it has been traditionally perceived as a unitary phenomenon, when in fact it cannot be labelled as such.<sup>236</sup>

While there is no reason why a court cannot be invested of an issue having cross-border significance and conduct its comity analysis, where needed, alone, common sense and institutional courtesy limit this kind of behavior. But if deference must be granted to the executive, is it possible to conceptualise a framework for doing so?

It has been suggested that borrowing the doctrine of *Chevron*<sup>237</sup> deference from administrative law could be particularly fruitful.<sup>238</sup> Broadly speaking, the *Chevron* doctrine requires courts to engage in a two-step analysis in the interpretation of statutes, first determining whether Congress has spoken clearly on the question at issue, and then giving deference to the reading put forward by the governmental agency tasked with the administration of the statute itself, insofar as it is permissible.<sup>239</sup> The rationale for this deference is that “[j]udges are not experts in the field, and are not part of either political branch of the Government”, while agencies are both better placed and more politically accountable – if only through the Chief Executive.<sup>240</sup>

However, the appropriateness of the *Chevron* model is highly context-dependent: to defer to the Executive’s interpretation of a treaty is not the same thing as relying on its determination as to whether the Act of State doctrine should not be applied,<sup>241</sup> or a foreign head of state granted immunity from jurisdiction.<sup>242</sup> The concept of deference is clearly not unitary.<sup>243</sup> Even worse would be to argue that deference to the executive should inform “the core responsibility of the courts to manage their dockets and decide cases”.<sup>244</sup>

---

<sup>233</sup> *Jama v Immigration & Customs Enforcement*, 543 U.S. 335, 338.

<sup>234</sup> *Marbury v Madison*, 5 U.S. (1 Cranch) 137,177 (1803).

<sup>235</sup> J.R. PAUL (note 4), at 33.

<sup>236</sup> C.A. BRADLEY, *Chevron Deference and Foreign Affairs*, *Va. L. Rev.* 2000, p. 649, 659.

<sup>237</sup> *Chevron USA Inc. v Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>238</sup> C.A. BRADLEY (note 236); E.A. POSNER/ C.R. SUNSTEIN, *Chevronizing Foreign Relations Law*, *Yale Law Journal* 2007, p. 1170.

<sup>239</sup> *Chevron*, 467 U.S. 837, at 842-43, 865.

<sup>240</sup> *Id.* at 865-866.

<sup>241</sup> See *supra*.

<sup>242</sup> *Samantar v Yousuf*, 560 U.S. 305, at 322 (2010).

<sup>243</sup> C. BRADLEY (note 236), at 666.

<sup>244</sup> W.S. DODGE (note 7), at 2132.

Beyond this aspect, the involvement of the Executive need not, in and by itself, be considered incompatible with the doctrine of comity. We may consider the role of deference within the broader framework of “foreign relations law” – a legal category that is well-established in the United States, if less so elsewhere.<sup>245</sup> MCLACHLAN, who has devoted considerable attention to the field, describes foreign relations law as performing an “allocative function”.<sup>246</sup> As the author contends, this function is an aggregate of two different ones, in that it controls the jurisdiction and applicable law “in the external exercise and control of the public power of states” and contributes to the ordering of “the allocation of foreign affairs competence within the municipal constitution”.<sup>247</sup> This function obeys to a conflict of laws logic: however, while conflict involves determinations that follow a “two-dimensional” approach considering two systems of municipal law, foreign relations law implicates a “three-dimensional” judgment on the allocation of institutional competence.<sup>248</sup> In the United States, foreign relations law is a fundamentally internal matter and reflects the American Constitution’s structural aspects. It follows that constitutional prerogatives of the Executives make it so that deference is, if not always necessary, justifiable. To this extent, this is compatible with the Courts’ “judicial duty to know and to declare” the “comity of our own country” is probably a question.<sup>249</sup>

On the one hand, the Executive may appeal because of its expertise and accountability;<sup>250</sup> on the other hand, there may be questions of legitimacy and fear of being led onto a short-term focused agenda with potentially harmful long-term consequences.<sup>251</sup> But above all, BRADLEY is right in observing that “[e]ach opportunity for deference invites pressure from foreign governments and creates the possibility of diplomatic backlash if the Executive decides not to support their positions”.<sup>252</sup> In this regard, the pattern established in limiting the reliance on executive determinations in both the areas of foreign sovereign immunity support the proposition that the “government need not, and should not, speak in every case”: as then legal adviser to the Department of State Harold KOH put it, “[i]n domestic litigation, [the Department’s] ultimate goal is, in fact, not more verbiage, but more silence”.

---

<sup>245</sup> See for example L. HENKIN, *Foreign Affairs and the United States Constitution*, Oxford 1997.

<sup>246</sup> C. MCLACHLAN, The Allocative Function of Foreign Relations Law, *British Yearbook of International Law* 2012, p. 377.

<sup>247</sup> *Id.* at 377.

<sup>248</sup> *Id.* at 380. MCLACHLAN also refers to LAUTERPACHT’s own treatment of issues of foreign relations law. See H. LAUTERPACHT, *The Function of Law in the International Community*, Oxford 2011, p. 397.

<sup>249</sup> *Hilton v Guyot*, 159 U.S. 113, 228.

<sup>250</sup> H.H. KOH (note 16), at 150.

<sup>251</sup> D. JINKS/ N.K. KATYAL, Disregarding Foreign Relations Law, *Yale Law Journal* 2007, p. 1262.

<sup>252</sup> W.S. DODGE (note 7), at 2140.



### C. Beyond the Domestic: the “Comity of Courts” as a Global Ordering Principle

In 1998, in the wake of *Breard v Greene*<sup>253</sup> and the provisional measures issued by the International Court of Justice (ICJ) in the *Case concerning the Vienna Convention on Consular Relations*<sup>254</sup>, Anne-Marie SLAUGHTER penned a seminal essay on the *American Journal of International Law* in which she discussed the implications of the Supreme Court’s decision not to accord a stay of execution in compliance with the World Court’s order.<sup>255</sup> SLAUGHTER observed that, irrespective of whether the measures issued by the ICJ were binding,<sup>256</sup> the Supreme Court should have nonetheless honored the request “as a matter of judicial comity”.<sup>257</sup> SLAUGHTER further observed that the United States judiciary was re-discovering the concept of “judicial comity”, building the case on the basis of SCALIA’s dissent in *Hartford Fire*. The “comity of courts” terminology left much to be desired, but provided an opportunity to describe comity as “the lubricant of transjudicial relations”.<sup>258</sup> SLAUGHTER’s understanding of “judicial comity” later evolved as one of the building blocks of the theoretical model she developed in later writings for the construction of a global legal system through the concerted work of domestic courts. In *A New World Order* she described it as providing

“... the framework and the ground rules for a global dialogue among judges in the context of specific cases. It has four distinct strands. First is a respect for foreign courts qua courts, rather than simply as the face of a foreign government... Second is the related recognition that courts in different nations are entitled to their fair share of disputes – both as co-equals in the global task of judging and as the instruments of a strong «local interest in having localized controversies decided at home». Third is a distinctive emphasis on individual rights and the judicial role in protecting them. Fourth [...] is a greater willingness to clash with other courts when necessary, as an inherent part of engaging as equals in a common enterprise”.<sup>259</sup>

---

<sup>253</sup> 523 U.S. 371 (1998).

<sup>254</sup> *Vienna Convention on Consular Relations (Paraguay v United States of America)*, Provisional Measures, Order of 9 April 1998, *ICJ Reports* 1998, p. 248.

<sup>255</sup> A.-M. SLAUGHTER, Court to Court, *AJIL* 1998, p. 708.

<sup>256</sup> There can now be no doubt as to the binding nature of provisional measures in international adjudication. See C. BROWN, *A Common Law of International Adjudication*, Oxford 2007; S. ROSENNE, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, Oxford 2005; H. THIRLWAY, The Law and Procedure of the International Court of Justice 1960–1989. Part Eleven, *British Yearbook of International Law* 2001, p. 71.

<sup>257</sup> A.-M. SLAUGHTER (note 255), at 708.

<sup>258</sup> *Id.* at 708.

<sup>259</sup> A.-M. SLAUGHTER (note 8), at 87; A.-M. SLAUGHTER, A Global Community of Courts, *Harvard International Law Journal* 2003, p. 191.

To be sure, SLAUGHTER's claims have sometimes been portrayed as vaguely starry-eyed: most notably, while acknowledging that conflict between courts is inevitable, she argues that it is conducive to greater dialogue, and thus comity.<sup>260</sup> As MILLS and STEPHENS have observed, such a claim relies on the questionable notion that "the «special» character of courts" and "a capacity of a free market of legal ideas to avoid distortions caused by inequalities of power" will allow substantive conflict avoidance through agreed procedure.<sup>261</sup> Yet, SLAUGHTER's theory has proved fascinating to many, especially with scholars of public international law. In the context of its "fragmentation" and the proliferation of international courts and tribunals, it has been argued that comity might have the potential of mitigating the resulting problems.<sup>262</sup> The practice of international adjudication and arbitration too seems to provide a number of indications that international adjudicators are conscious of the value of comity, and respect each other's competence and decision-making capacity, displaying an awareness of their status as "co-equals in the global task of judging" and recognising different specializations.<sup>263</sup> This attitude seems to transcend simple institutional dialogue,<sup>264</sup> rather amounting to "an emerging general principle of international procedural law".<sup>265</sup> Indeed, there are indications that comity has served as a valuable tool even when dealing with competing proceedings before courts of different orders.<sup>266</sup>

Reasons of space and context prevent us from examining these aspects in further detail. We restrict ourselves to observing that the roots of the global comity discourse are, in both its real-world and theoretical dimensions, unmistakably American.

---

<sup>260</sup> A.-M. SLAUGHTER (note 8), at 89–90.

<sup>261</sup> A. MILLS/ T. STEPHENS, Challenging the Role of Judges in Slaughter's Liberal Theory of International Law, *Leiden Journal of International Law* 2005, p. 30.

<sup>262</sup> See, *inter alia*, J.R. CRAWFORD (note 98), at 210–11; T. SCHULTZ/ N. RIDI (note 2); Y. SHANY (note 9), at 260; Y. SHANY, *Regulating jurisdictional relations between national and international courts*, Oxford 2007, p. 166.

<sup>263</sup> See for example *Ireland v United Kingdom* ("MOX Plant Case") (Order No 3) (UNCLOS Annex VII Tribunal, PCA), where the tribunal relied on "considerations of mutual respect and comity which should prevail between judicial institutions" to justify the suspension of its proceedings in the face of an almost certain involvement of Court of Justice of the European Union. For a critique, see C. MCLACHLAN (note 37), at 455. For a discussion of the meaning and significance of comity in a variety of different international fora, see T. SCHULTZ/ N. RIDI (note 2).

<sup>264</sup> See for example R. HIGGINS, A Babel of Judicial Voices? Ruminations from the Bench, *I.C.L.Q.* 2006, p. 791; C.P.R. ROMANO, Deciphering the Grammar of the international jurisprudential dialogue, *NYU Journal of International Law and Politics* 2008, p. 755. Relying almost exclusively on the concept of comity E. D'ALTERIO, From judicial comity to legal comity: A judicial solution to global disorder?, *International Journal of Constitutional Law* 2011, p. 394.

<sup>265</sup> B. SIMMA, Universality of International Law from the Perspective of a Practitioner, *European Journal of International Law* 2009, p. 287.

<sup>266</sup> See for example *Société Générale de Surveillance S.A. v Republic of the Philippines*, Decision on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6. See also generally Y. SHANY (note 262); T. SCHULTZ/ N. RIDI (note 2).

## VI. Conclusion

While comity plays a smaller role today than it did two hundred years back, critics of the doctrine have always conceded that it was never really forgotten by the American legal world: in this study we acknowledge as much, but we also demonstrate how its use is as lively as ever. If “the definition of comity may be tenebrous, its importance could not be more clear”.<sup>267</sup> True, comity has undoubtedly “transformed”.<sup>268</sup> This transformation, though, is not an indication of the doctrine’s demise, but rather of its inherently relational logical antecedents, sovereignty and territoriality. Comity, in other words, still represents an unparalleled “springboard” from which a number of inferences relating to regime conflict can be drawn.<sup>269</sup>

---

<sup>267</sup> *Quaak v Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1<sup>st</sup> Cir. 2004).

<sup>268</sup> We borrow the expression from J.R. PAUL (note 4).

<sup>269</sup> C. McLACHLAN (note 37), at 223.