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# **Comity and International Court and Tribunals**

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# COMITY AND INTERNATIONAL COURTS AND TRIBUNALS

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## Introduction

In June 2003 an UNCLOS tribunal constituted under the auspices of the Permanent Court of Arbitration rendered a procedural order that has since entered the number of international decisions to be studied in a modern international law course. This was not the only decision in the broader dispute between Ireland and the United Kingdom concerning the operation of the nuclear reprocessing plant in Sellafield (in fact, the dispute yielded a grand total of four) nor was it the one that settled it. Rather, its importance lies in the way the tribunal—one of illustrious composition—decided to manage a potential conflict with other international jurisdictions. Faced with the prospect of an almost certain involvement of the European Court of Justice, the tribunal opted to suspend its proceedings.<sup>1</sup>

Let us keep the tape rolling as we fast-forward a decade. In 2013, an ICSID arbitral tribunal observed that, while not bound, in principle, by any rule of precedent, ‘it should have regard to earlier decisions of courts (particularly the ICJ) and of other international dispute tribunals engaged in the interpretation of the terms of a BIT’.<sup>2</sup> And the next year, another example: faced with the problem of parallel proceedings on the same dispute pending before the domestic courts of the respondent state, an investment tribunal observed that it had ‘a

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<sup>1</sup> *MOX Plant Case Ireland v. United Kingdom* (‘MOX Plant Case’) (Order No 3) (UNCLOS Annex VII Tribunal, PCA).

<sup>2</sup> *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013.

measure of discretion with respect to the timing and conduct of the arbitration and that municipal judicial proceedings may sometimes need to be taken into account'.<sup>3</sup>

What the cases (and the list could be extended quite at length) have in common is not the originating regime, the factual matrix at issue, or the legal problem in question, but rather the reliance on a specific, if multifaceted, principle: comity. In most legal systems, the word is looked at with some suspicion, as there seems to be no end to the debate on its meaning. In the field of international law, the problem is even greater, as to talk of a principle of 'comity' is to talk of a principle that does not satisfy the legality threshold. Yet, this is a concept that can lay claim to a long history, and stubbornly refuses to go away: with some generalisations, the traditional definition of comity may be that of a principle in the name of which courts would 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. Whatever one thinks of it, comity is widely referred to in the case law of domestic courts. And of more immediate relevance for our purposes, there are indications that it may be resurfacing in the context of international adjudication. While it was never really a stranger in their chambers, its recent rediscovery by international courts and tribunals can be better explained against the background of the proliferation of judicial and arbitral institutions and the interactions deriving therefrom.

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<sup>3</sup> PCA, *British Caribbean Bank Limited v. The Government of Belize* - Award, 19 December 2014, PCA Case No 2010-18 para. 187.

International law, to go along with an oft-cited decision, ‘lacks a centralised structure’, and ‘does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals’.<sup>4</sup> Given the number and diversity of international judicial bodies, it is hardly surprising that those who adopted expressions such as ‘the international judiciary’ only did so at the price of far-reaching caveats or inverted commas.<sup>5</sup> Jurisdictional competition need not necessarily be considered disadvantageous, but it inevitably brings to the table the possibility of parallel proceedings, diverging interpretations of the same rule, instances of forum shopping, as well as the risk of conflicting decisions.<sup>6</sup> Conflicts of legal regimes probably cannot be dealt with in a fashion that is entirely satisfactory with the currently available rules. Doubts in fact remain as to whether any rules at all could succeed in the task. For this reason, comity, which is a creature subtler than rules, may well appear as a readily available cure for some of these systemic problems.<sup>7</sup>

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<sup>4</sup> Prosecutor v Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, (Oct. 2, 1995), (1996) 35 ILM 32, 39. See also J. Pauwelyn and L.E. Salles, ‘Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions’, 42 *Cornell International Law Journal* (2009) 77, at 84.

<sup>5</sup> See, *inter alia*, Chester Brown, *The Evolution and Application of Rules Concerning Independence of the “International Judiciary,”* 2 LAW PRACT. INT. COURTS TRIB. 63–96 (2003); Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Piece of the Puzzle* (1999), 31 N. Y. UNIV. J. INT. LAW POLIT. 709.

<sup>6</sup> See CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 15 (2007); YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 74 (2003).

<sup>7</sup> Similarity in the Eye of the Beholder: Revisiting the Application of Rules Governing Jurisdictional Conflicts in the *Lauder / CMS Cases*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2007 119, 135 (Arthur W. Rovine & Yuval Shany eds., 2008).

The question we want to address, then, is this: what exactly is the place of comity in modern public international law adjudication? To do so, the present study moves in three parts: Part 1 deals with the concept of comity in private and public international law, briefly considering its development and its modern understanding. In Part 2, we shift our focus to international dispute settlement and seek to identify the problems for which the use of comity has been proposed and we engage with the current scholarly debate on the matter. In Part 3 we discuss all the publicly available decisions by international courts and tribunals using the term ‘comity’ and classify them before finally pulling the threads together.<sup>8</sup>

## 1. The concept of comity

A celebrated international law textbook quipped that comity is ‘a wonderful word to use when one wants to blur the distinction between public and private international law, or to avoid clarity of thought’.<sup>9</sup> There are two pieces of conventional wisdom here. The first is that, indeed, private and public international lawyers, with some remarkable exceptions, seem to agree that the

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<sup>8</sup> This covers all decisions issued by dispute settlement mechanisms in disputes with at least one state party where there is some discussion of what comity is. Accordingly, we have included cases where mentions of the principle were meaningful, albeit brief, and excluded decisions which, while containing the word ‘comity’, clearly and unambiguously addressed entirely different issues. Consideration was also given to the issue of ‘false positives’: this is the case, for example, of expressions such as ‘the *comity* of the majority’ and citations of excerpts from other judgments lacking further discussion, but also of decisions referring to unrelated concepts such as ‘positive comity’: see, for example, Agreement on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, US-EC, 37 ILM 1070 (1998).

<sup>9</sup> PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 73 (2002).

concept of comity is not to be understood as terribly helpful. We will try, throughout this article, to show that the helpfulness of comity may well depend on well we understand it. The second is that private and public international law understandings of comity need to be distinguished. In attempts to investigate what comity means, it is indeed problematic to dispense with this distinction. It leads us, for instance, to try to find a common denominator for comity in private and in public international law. This common denominator, according to Cheatham, is the idea that ‘the relation or the action in question is governed by considerations other than compulsion or legal duty’.<sup>10</sup> Not much understanding is gained this way. Along the same line of thought, if we focus on the etymological origins of the word, we end up in a similar place. Consider: the word ‘comity’ derives from the Latin noun *comitas*, meaning ‘courtesy’, ‘friendliness’, and ‘civility’, but also ‘humanity’.<sup>11</sup> In the English language, the term indicates courtesy and considerate behaviour towards others<sup>12</sup>, or ‘a loose widespread community based on common social institutions’.<sup>13</sup>

In this Part, then, we will examine what comity means in public and in private international law separately. This does mean, however, that the concept in one field cannot be

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<sup>10</sup> Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, HARV. LAW REV. 361–394, 374 (1945).

<sup>11</sup> Definition of ‘comitas’ in A LATIN DICTIONARY (C.T. Lewis & C. Short eds, 1879); definition of ‘comitas’ in K.E. Georges & F. Calonghi (eds), GEORGES: DIZIONARIO ENCICLOPEDICO LATINO-ITALIANO.

<sup>12</sup> Definition of ‘comity’, Oxford Dictionaries online, <http://www.oxforddictionaries.com/definition/english/comity> (last visited 18 January 2016).

<sup>13</sup> ‘Definition of Comity’, Merriam-Webster Dictionary, available online at <http://www.merriam-webster.com/dictionary/comity> (last visited 30 October 2016).



conveniently used in the other, as we will argue throughout this article. Before we do this, however, we should recall that it is not too hard to find cases where comity was employed as a shorthand for public international law or the entire field of conflict of law. But it is for a more specific meaning that we are looking.

**A. Comity and public international law**

In traditional public international law scholarship, the term ‘comity’ traditionally designates, first and foremost, those acts performed—by states and towards states only—for reasons other than the belief that there is a binding legal norm mandating them. Accordingly, it is customary to focus on them to explain what international law *is not*.<sup>14</sup>

The non-bindingness of the rules of international comity is clearly not disputed, but to conclude that they have no normative value whatsoever would be a non sequitur. Bindingness and normativity are two different things. As Hedley Bull pointed out, order in social life, broadly understood, is very closely connected with the conformity of behaviour to (normative) rules of conduct, though not necessarily to (binding) rules of law.<sup>15</sup> This is surely the case of rules of comity, which too arise from repetition of conduct—conduct which, however, is carried

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<sup>14</sup> JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (8 edition ed. 2012); LASSA OPPENHEIM, ROBERT YEWDALL JENNINGS & ARTHUR WATTS, 1 *OPPENHEIM’S INTERNATIONAL LAW* 24 (9th ed. 2008); MALCOLM N. SHAW, *INTERNATIONAL LAW* 2 (2014); Hugh Thirlway, *The Sources of International Law*, in *INTERNATIONAL LAW* 91, 99 (Malcolm D. Evans ed., 2014).

<sup>15</sup> HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 6 (2002).

out in the belief that is not mandated by a rule of international law.<sup>16</sup> In the real world, rules of comity are routinely complied with. This may result, as Hersch Lauterpacht put it, in a rule of comity ‘acquiring the complexion’ of rules of customary international law.<sup>17</sup> In other words, comity is not a source of international law, but it may be, and has been, the basis and justification for the emergence of rules of international law.<sup>18</sup> Questions of immunity, for instance, largely fall into this category.<sup>19</sup> Where comity constitutes the basis of a rule of

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<sup>16</sup> For a helpful discussion of comity and custom see Gerald J. Postema, *Custom in international law: a normative practice account*, in *THE NATURE OF CUSTOMARY LAW*, 285 (James B Murphy & Amanda Perreau-Saussine eds., 2007).

<sup>17</sup> HERSCH LAUTERPACHT, *INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT. VOL 1: GENERAL WORKS*. 43–4 (Elihu Lauterpacht ed., 1970); CRAWFORD, *supra* note 14 at 24. It should be pointed out that the reverse may also occur, so that rules of international law may lose their legal nature and be demoted to rules of comity. One usual example is the practice of greeting foreign warships: Jörn Kämmerer, *COMITY MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW § 7* (Rüdiger Wolfrum ed., 2006), <http://opil.ouplaw.com/home/epil>.

<sup>18</sup> LASSA OPPENHEIM, *1 Peace INTERNATIONAL LAW: A TREATISE* 25 (1905). (‘But there can be no doubt that many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law. And it is certainly to be expected that this development will go on in future also, and that thereby many a rule of present International Comity will in future become one of International Law.’) The passage is reproduced without substantial changes in OPPENHEIM, JENNINGS, AND WATTS, *supra* note 14 at 51.

<sup>19</sup> *The Exchange v. McFaddon* 11 U.S. 116 (1812); Hazel Fox, *International Law and Restraints on the Exercise of Jurisdiction by National Courts of States*, in *INTERNATIONAL LAW*, 856 (Malcolm Evans ed., 2010); Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 *EUR. J. INT. LAW* 853–881 (2010). It must be pointed out that there exist, in this area, references to comity that blur the distinction. According to Collins, for example, ‘[i]t is no doubt in the sense of binding rules of public international law that the expression is used’ with

international law, the question may arise of what significance, if any, this origin should have. In any event, while it has been argued that reading a rule of international law with comity in mind could, for example, ‘determine what is required by good faith, which takes into account reliability based on tradition and expectations of courtesy’.<sup>20</sup> Reliance on the principle is, in any event, limited to elucidating the meaning and purpose of the rule itself.<sup>21</sup>

## ***B. Comity in private international law***

### *1. Background*

The history of the notion of comity in private international law is very much a history of the concept of sovereignty.<sup>22</sup> With the development of the Westphalian system, territorial

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reference to immunity: Laurence Collins, *Comity in Modern Private International Law*, in REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH, 96–7 (James Fawcett ed., 2002).

<sup>20</sup> Kämmerer, *supra* note 17 at § 8.

<sup>21</sup> See for example *Cudak v. Lithuania*, App. No. 15869/02 (Eur. Ct. H.R. Mar. 23, 2010): ‘The Court must first examine whether the limitation pursued a legitimate aim. In this connection, it observes that State immunity was developed in international law out of the principle *par in parem non habet imperium*, by virtue of which one State could not be subject to the jurisdiction of another. The Court considers that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty’. The matter will be further investigated *infra* Part IV.

<sup>22</sup> KURT LIPSTEIN, PRINCIPLES OF THE CONFLICT OF LAWS: NATIONAL AND INTERNATIONAL 16 (1981); Thomas Schultz & David Holloway, *Retour sur la comity, deuxième partie: La comity dans l’histoire du droit international privé*, J. DROIT INT. 571–595, 573 (2012).

sovereignty and freedom from interference were consecrated as the essential pillars of the new world order, and a system of territorial law replaced the old personal statutes. Still, the transnational commercial relations that flourished on the European continent were not ready for such rigidity.<sup>23</sup> Accordingly, comity was developed as a doctrine intended to mitigate the ill-effects of strict territoriality.<sup>24</sup> The doctrine was developed in the Netherlands by scholars seeking to answer the specific problem of which law should govern a specific legal relationship.<sup>25</sup> In its most celebrated formulation, by Ulrich Huber, the doctrine provided an elegant solution based on three axioms, the first two reaffirming the principle of territorial sovereignty, and the third postulating that state authorities could have applied foreign laws to govern private interactions, ‘insofar as they do not prejudice the powers or rights’ of the state concerned.<sup>26</sup>

There is no genuine consensus as to the issue of whether the third axiom was meant to grant absolute discretion to the national authorities of one nation or was, on the contrary, a simple description of the current practices.<sup>27</sup> Huber’s understanding of international law was

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<sup>23</sup> RODOLFO DE NOVA, HISTORICAL AND COMPARATIVE INTRODUCTION TO CONFLICT OF LAWS 441 (1966); Harold G. Maier, *Resolving Extraterritorial Conflicts, or There and Back Again*, 25 VA J INTL L 7, 10 (1984).

<sup>24</sup> CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 150 (2008).

<sup>25</sup> PAULUS VOET, DE STATUTIS EORUMQUE CONCURSU LIBER SINGULARIS (1661); JOHANNES VOET, COMMENTARIUS AD PANDECTAS. (1698).

<sup>26</sup> This translation appears in Ernest Gustav Lorenzen, *Huber’s De Conflictu Legum*, in SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947). See also the text in Ernest G. Lorenzen, *Story’s Commentaries on the Conflict of Laws: One Hundred Years after*, HARV. LAW REV. 15–38, 403 (1934); Joel R. Paul, *Comity in international law*, 32 HARV. INT. LAW J. 1 (1991).

<sup>27</sup> DE NOVA, *supra* note 23 at 449.

fundamentally Grotian, and it is not inconceivable that his intention might have been to qualify the rule as an international usage—if not as a custom proper. It was comity’s discretionary component, however, that had the most significant impact, especially in the common law world. Lord Mansfield in England and Joseph Story in the United States realised the significance of the concept, and the latter in particular granted widespread recognition to Huber’s views—though, according to some, he did so at the cost of some inaccuracies.<sup>28</sup> A United States Supreme Court Justice, Story did not see comity as amounting to anything more than a rather imperfect obligation, arising ‘from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine’.<sup>29</sup> The Supreme Court later produced what still is the most influential statement of the doctrine. In *Hilton v Guyot*, a decision of immeasurable influence, Justice Gray defined it as ‘neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other’.<sup>30</sup> Comity was in fact, Justice Gray continued, ‘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 under the protection of its laws’.<sup>31</sup>

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<sup>28</sup> ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 27–44 (1992).

<sup>29</sup> JOSEPH 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 (1834)§ 33; Story quotes SAMUEL LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS 28 (1828).

<sup>30</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-64.

<sup>31</sup> *Ibid.*

## 2. *Current uses of comity*

With the unfolding of the positivist revolution, comity ceased to be considered a suitable basis for private international law. Yet, as Lawrence Collins noted in 2002, the use of the term by the judiciary remains extensive, regardless how much it is frowned upon in textbooks.<sup>32</sup> In its modern incarnation, the ‘doctrine of comity’ requires courts to place trust in and not interfere with foreign courts, as well as to give ‘full faith and credit to, or [respect] the conclusiveness of, the acts of foreign institutions’; at the same time, it provides the principles that should guide these practices.<sup>33</sup> With some approximation, the uses of comity may be classified according to a taxonomy proposed by Harold Koh, which distinguishes between legislative (or prescriptive) comity, judicial comity, and executive comity.<sup>34</sup> The first two concern the application of foreign law or the limitation of the reach of local law, as well as the recognition of foreign decisions or the use of discretion to limit the jurisdiction of domestic courts. The third, instead, commands deference when foreign sovereign interests are at stake and provides a basis for the ‘act of state doctrine’—which bars a court from sitting in judgment of the acts that another sovereign state

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<sup>32</sup> Collins, *supra* note 19; Collins refers in particular to the description of comity as “grating to the ear when it proceeds from a court of law” CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, (James Fawcett et al. eds., 14th ed. 2008); The phrase is Samuel Livermore’s, *supra* note 29 at 28.

<sup>33</sup> Adrian Briggs, *The Principle of Comity in Private International Law*, 354 in RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 65, 91.

<sup>34</sup> HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS (2008); Donald Earl III Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 UC DAVIS LAW REV. 11, 48 (2010).

performs in its territory—and does not necessarily fit well with the other two categories.<sup>35</sup> All these uses reflect, as Donald Childress puts it, ‘a set of ideas about sovereign-sovereign relations that courts can point to and take into account when adjudicating transnational disputes’.<sup>36</sup> In the day-to-day administration of justice, comity tends, however, to be a simpler matter, and operates as a judicial tool in such a way that, in Adrian Briggs’s words, ‘the language of the comity of sovereigns... feels out of place’.<sup>37</sup> In practice, comity has been invoked as an upper limit to restrain the reach of domestic law in cases concerning issues as diverse as competition and human rights; it has been considered a relevant factor in the granting of recognition to foreign and international judicial decisions, and interpreted as counselling restraint in passing judgment on the sovereign acts of other states; further, it has also been considered as a compelling reason to refrain from adjudication in case of international litispence (actual or simply foreseen) and a significant parameter for the granting of anti-suit injunctions.<sup>38</sup>

Comity, not entirely unlike equity, operates *infra* and *praeter legem*, but never overrides a command of the sovereign.<sup>39</sup> In practice, while the transnational regulatory web has become

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<sup>35</sup> KOH, *supra* note 34; On the emergence of executive comity and the act of state doctrine as a way to “accommodate respect for foreign sovereignty with growing American intercourse with other nations” see Harold Koh, *Transnational public law litigation*, YALE LAW J. 2347–2402, 2357 (1991); Childress, *supra* note 34 at 47.

<sup>36</sup> Childress, *supra* note 34 at 60.

<sup>37</sup> Briggs, *supra* note 33 at 89.

<sup>38</sup> On the operation of comity, see Paul, *supra* note 26; Joel R. Paul, *Transformation of International Comity, The*, 71 LAW CONTEMP. PROBL. 19 (2008); Childress, *supra* note 34; Thomas Schultz & Jason Mitchenson, *Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts*, 12 J. PRIV. INT. LAW (2016).

<sup>39</sup> Briggs, *supra* note 33 at 87.

more dense, comity still remains a useful tool in the hands of courts, capable as it is of operating as a lubricant or counterbalancing ‘the inadequacy of the normative criteria’ necessary to solve jurisdictional conflicts.<sup>40</sup>

### 3. *New understandings of comity*

While sovereignty constitutes the traditional theoretical underpinning of the doctrine, it does not follow that it covers the ways in which comity has been used or necessarily matches the evolution of its understanding. These changes have occurred through gradual—but radical—changes in the backdrop of transnational adjudication, so that it has been referenced to justify instances of deference to ‘the needs of the international commercial system’<sup>41</sup>, support transnationally consistent interpretations of international instruments (public or private alike)<sup>42</sup>, and, more in general, further the ‘mutual interests of all nations in a smoothly functioning international legal regime’.<sup>43</sup>

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<sup>40</sup> Briggs, *supra* note 33; ELISA D’ALTERIO, LA FUNZIONE DI REGOLAZIONE DELLE CORTI NELLO SPAZIO AMMINISTRATIVO GLOBALE 181 (2011).

<sup>41</sup> For example, giving effect to an arbitration clause that covered antitrust matters, traditionally considered non-arbitrable, see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614, at 615. The decision was also cited in ICSID, *ADF Group Inc. v. United States of America – Procedural Order No. 2*, 9 January 2003, Case No ARB(AF)/00/1.

<sup>42</sup> Paul, *supra* note 38. Schultz and Mitchenson, *supra* note 38. T. Schultz and N. Ridi, *How Comity Makes Transnationalism Work*, forthcoming.

<sup>43</sup> *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522 (1987) at 555.



Moreover, comity constitutes a key concept for the understanding of judicial networks. Anne-Marie Slaughter has convincingly relied on the notion to explain certain dynamics.<sup>44</sup> In her view, comity constitutes one of the building blocks of judicial dialogue occurring in the ‘global community’ of national and international courts, offering ‘the framework and the ground rules for a global dialogue among judges in the context of specific cases’.<sup>45</sup> According to her model, courts would respect foreign courts ‘qua courts, rather than simply as the face of a foreign government’, recognizing them as co-equals in the global task of judging’, though with a distinctive emphasis on individual rights and the judicial role in protecting them.

To be sure, Slaughter’s theory is not without its critics and it has been suggested that it is, to a large extent, quite starry-eyed.<sup>46</sup> Yet, it has the merit of emphasising the role of judges and arbitrators—national and international—as facilitators of the coordination of legal regimes. In this guise, comity is a primary rule of conduct addressed to judges and arbitrators, asking them to balance some of the variegated interests implied in making one legal regime prevail over another in a specific instance. Such a theory of comity underscores the importance of

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<sup>44</sup> Anne-Marie Slaughter, *Judicial globalization*, 40 VA J INTL L 1103 (1999); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT. LAW J. 191 (2003); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

<sup>45</sup> SLAUGHTER, *supra* note 44 at 87.

<sup>46</sup> See Alex Mills & Tim Stephens, *Challenging the Role of Judges in Slaughter’s Liberal Theory of International Law*, 18 LEIDEN J. INT. LAW 1–30 (2005).

balancing efforts, and is hardly ‘arbitrary and dangerous’ as the traditional critique has often suggested.<sup>47</sup>

### **C. Comity: a summary**

One problem with most of the scholarship on comity is that it almost invariably defines the concept in the negative or indirectly. For the sake of clarity and the discussion that follows, but without any claim of exhaustiveness, we attempt to offer a positive, working definition. We understand comity as a judicial tool which, pursuant to an accepted paradigm on the allocation of regulatory authority (such as sovereignty), directs courts to engage in acts of restraint or recognition. This concretely translates into the following actions taken by courts: fine-tuning the reach of domestic substantive law; resorting to discretionary abstention in case of actual or foreseen jurisdictional conflicts; granting respect and recognition to the judgments of their foreign counterparts or presuming that foreign law and acts are valid; or otherwise respecting an expression of coequal authority that does not infringe its external limits. By extension, the term ‘comity’ also designates the rationale for the set of judicial tools and techniques developed to achieve these goals.

This understanding of comity essentially originates in private international law. But as we will try to show, it can also helpfully be used – and actually *is* helpfully used - in public international law. This is particularly so in international adjudication, to which we now turn.

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<sup>47</sup> T.H. HEALY, *Théorie générale de l'ordre public*, *Recueil des Cours de l'Académie de Droit International* Vol. 9 (1925) 411, 433; Louise Weinberg, *Against Comity*, 80 GEO LJ 53, 70 (1991).

## 2. The potential of comity in international adjudication

Comity, as we have already mentioned, is routinely used in domestic adjudication, and not at all unheard of in international fora. Its re-emergence, however, is linked to a specific phenomenon: the proliferation of international courts and tribunals. In this context, the concept of comity may have the potential to solve, or at least mitigate, some of the problems arising from a disorderly multiplication of competing authorities.

### A. Proliferation and its implications

The multiplication of international judicial institutions has probably been one of the most significant developments to ever occur in the international legal system. Its causes have been identified, on the one hand, in the increased willingness of states to submit to international adjudication and, on the other hand, in the inevitable specialisation of certain fields.<sup>48</sup> A burgeoning and spread of international courts and tribunals resulted, differing in their mandates, the rules they have to apply, the status of the parties to the disputes they are called to resolve, and the very inclusiveness of their jurisdictions, which tend to grow more inclusive and difficult to elude as international adjudication moves from a consensual to a compulsory paradigm.<sup>49</sup> Proliferation is a divisive topic. For some, numerous and diverse set of judicial institutions may better serve the interest of justice, efficiency, and party autonomy, with different approaches to

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<sup>48</sup> BROWN, *supra* note 6; Geir Ulfstein, *International Courts and Judges: Independence, Interaction, and Legitimacy*, NYU J. INT. LAW POLIT. 2014 14–13, 22 (2014).

<sup>49</sup> Cesare P. R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent, The*, 39 N. Y. UNIV. J. INT. LAW POLIT. 791, 795 (2006).

the same matters ultimately sparking legal development.<sup>50</sup> Others contend that it is reason for concern, both for the parties to the dispute and the international legal system as a whole. If the problem is seen through this lens, the value of comity comes quite naturally into focus. With more international courts comes a greater risk of parallel proceedings, instances of forum shopping, conflicting decisions, and diverging interpretations of the same rules of law that may bring about ‘fragmentation’ issues as a consequence of the move towards specialisation.<sup>51</sup> Conflicts may occur between international courts and tribunals and their counterparts, but can also easily involve national courts. There exists ample room for inter-systemic and infra-systemic conflicts, which have further complicated the resolution of certain disputes and diminished the overall trust in international dispute settlement.

The root of the problem is threefold: First of all, general international law does not provide for jurisdiction-regulating rules.<sup>52</sup> Second, in most cases the treaties establishing international courts and tribunals do not expressly provide rules governing their relationships with the jurisdictions of their counterparts or national jurisdictions.<sup>53</sup> Third, jurisdictional provisions of individual international courts and tribunals are characterized by some degree of

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<sup>50</sup> Jacob Katz Cogan, *Competition and control in international adjudication*, 48 VA J INTL L 411, 448 (2007).

<sup>51</sup> Gilbert Guillaume, *Advantages and Risks of Proliferation: A Blueprint for Action*, 2 J. INT. CRIM. JUSTICE 300, 303 (2004). See also M. Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, para. 8, UN Doc. A/CN.4/L.682 (13 April 2006).

<sup>52</sup> BROWN, *supra* note 6 at 29.

<sup>53</sup> CAMPBELL MCLACHLAN, LIS PENDENS IN INTERNATIONAL LITIGATION 441 (2009).

rigidity: as James Crawford puts it, it is precisely this lack of elasticity that produces the problems generally blamed on the proliferation phenomenon.<sup>54</sup>

The use of comity has the potential of alleviating some of the problems arising from this rigidity, improving coordination between overlapping jurisdictions, and mitigating the undesired effects of unilateral forum shopping by encouraging a sound management of simultaneously pending proceedings and the choice of the most suitable forum. Further, it can serve as a theoretical basis to foster *overall* coordination between judicial bodies, prompting them to accord respect to the decisions of other international courts and tribunals and, more generally, creating a framework for their jurisdictional interaction—a framework which at the same time encourages cross-fertilization and ‘promotes the systematic nature of international law’.<sup>55</sup>

### ***B. Challenges in using comity for international adjudication***

A traditional understanding of comity, as we pointed out in section 1, links it to sovereignty. Can a principle developed to deal with issues regarding sovereignty – in a private international law dimension – be adequately used to deal with jurisdictional arrangements within the international judiciary? To answer the question, we first argue that horizontality, which is at the

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<sup>54</sup> JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW, GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 211 (2014).

<sup>55</sup> BROWN, *supra* note 6 at 29; YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS 179–80 (2007); *passim* Elisa D’Alterio, *From judicial comity to legal comity: A judicial solution to global disorder?*, 9 INT. J. CONST. LAW 394 (2011); GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS: JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION 117 (2013).

heart of sovereignty, is not an inappropriate ordering model for the relationship of the competences of international courts and tribunals. This in turn leads us to the transposition of conflicts of law to regime interactions. We finally take a step back from these considerations, which are arguably overly doctrinal and insufficiently pragmatic, and turn to comity as a tool of judicial reasoning.

### *1. Horizontality as an ordering model*

The global arrangement of states is not so different from the global arrangement of international judicial bodies. As James Crawford puts it, comity ‘arises from the horizontal arrangements of state jurisdictions [...] and the field’s lack of a hierarchical system of norms’.<sup>56</sup> In the interstate system, horizontality is a consequence of the principle of sovereign equality of states; in the international system, it is the ordering model of the ‘new style of public international law litigation’.<sup>57</sup>

It is true that not all international judicial bodies are created equal, with some having, according to an accepted classification, universal jurisdiction *ratione personae*, others a regional mandate, a general competence *ratione materiae* or a high degree of specialization.<sup>58</sup> However, despite some advocacy of a more central role for the International Court of Justice<sup>59</sup>,

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<sup>56</sup> CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, *supra* note 1, at 485.

<sup>57</sup> MCLACHLAN, *supra* note 34, at 229–230.

<sup>58</sup> SHANY, *supra* note 6 at 2.

<sup>59</sup> The United Nations Charter, on the other hand, expressly provides for the possibility of entrusting disputes to other tribunals, either already in operation or to be created: Charter of the United Nations, 24 October 1945, 1 UNTS XVI Article 95.

no tribunal currently holds such a central function<sup>60</sup>, and indeed one should recall that when the problem concerns international tribunals, ‘the notion of a court of general jurisdiction is an inapt analogy’.<sup>61</sup> Some may have greater jurisdictional reach, but none *formally* stands out as hierarchically superior to the others: thus their potential clashes still occur in a horizontal dimension.

More intriguing is the problem of the exercise of comity by international courts towards national courts, and vice versa. As a principle, comity has sometimes been identified as the *basis* of particular aspects of the relationship between courts of different orders.<sup>62</sup> The broader question, however, is whether it can help overcome the lack of jurisdictional rules and principles governing the relationship of their competences.<sup>63</sup> Sovereignty-based arguments may cut both

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<sup>60</sup> Pierre-Marie Dupuy, *Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice, The*, 31 NYU J. INTERNATIONAL LAW POLIT. 791, 798 (1998); Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT. COMP. LAW Q. 791–804, 791 (2006); Ulfstein, *supra* note 48.

<sup>61</sup> James Crawford & Penelope Nevill, *Relations between International Courts and Tribunals: e “Regime Problem”*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 235, 249 (Margaret A. Young ed., 2012).

<sup>62</sup> SABINO CASSESE, I TRIBUNALI DI BABELE. I GIUDICI ALLA RICERCA DI UN NUOVO ORDINE GLOBALE 88–9 (2009).

<sup>63</sup> See *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, *Objections to Jurisdiction*, (Jan. 29, 2004) [hereinafter *Société Générale v. Philippines*]: the arbitral tribunal established its jurisdiction to hear the case, but stayed its proceedings in favour of the domestic courts, which had been selected as the appropriate forum in a contract clause through a decision on the admissibility of claims: the move has generally been described as based on comity. Michael Waibel, *Coordinating Adjudication Processes*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE , 505 (Zachary Douglas,

ways, but at least they are useful in justifying different types of ‘deferential review’ concerning the acts of a state.<sup>64</sup>

## 2. Conflict of laws analogies and regime interaction

If one takes on the view that jurisdictional clashes occur in a horizontal dimension, conflict of laws analogies become alluring, in particular if one has in mind the ‘jurisdictional’ nature of these clashes.<sup>65</sup> Such comparisons are not novel, and have been employed to describe the overlaps between the functional jurisdictions of international organisations, which, as was submitted, presented ‘a closer analogy with the problem of conflict of laws than with the problem of conflicting obligations within the same legal system’.<sup>66</sup>

There is merit in the idea of these analogies, but how far they can be used in practice is a distinct question. From the perspective of an international adjudicator, it is possible to single out rather useful doctrines, such as those of governmental interest analysis or the ‘comparative

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Joost Pauwelyn, & Jorge E. Viñuales eds., 2014); SHANY, *supra* note 55 at 75–76; One of the arbitrators of the SGS case has expressly stated that the tribunal stayed its proceedings “in the interests of comity”: James Crawford, *Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture*, 1 J. INT. DISPUTE SETTL. 3–24, 20 (2010); on the distinction between jurisdiction and admissibility see Jan Paulsson, *Jurisdiction and admissibility*, GLOB. REFLECT. INT. LAW COMMER. DISPUTE RESOLUT. 601 (2010).

<sup>64</sup> For example, the margin of appreciation doctrine has been considered one such example: SHANY, *supra* note 55 at 185.

<sup>65</sup> For a critique of this ‘temptation’ see JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 9 (2003).

<sup>66</sup> C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BR. YEAR B. INT. LAW 401–453, 403 (1953); See also Joel P. Trachtman, *Institutional linkage: Transcending “trade and...”*, 96 AM. J. INT. LAW 77–93 (2002).



impairment principle'. With some simplification, the first requires the interpreter to look to the specific policy goals underlying the provisions to be applied.<sup>67</sup> The second 'requires the interpreter to weigh the relative interests of the conflicting legal systems' with a view to determining which among them 'would be most greatly impaired by a legal decision, assuming that that decision were to become a general practice'.<sup>68</sup>

The main problem with these conflict of law approaches is that, while they are implemented at the judicial level, they mainly relate to choice of law matters, and cannot do much for the resolution of jurisdictional conflicts—as such—between courts. The perspective may change slightly when it comes to the application of substantive law, or when international adjudication is embedded, as it often is, in a certain 'regime'. Granted, the very use of the word 'regime', in the sense of 'regime interactions', which is a loan from international relations literature, is somewhat controversial in the field of international law. But it is not without analytical purchase. Broadly, regime interactions scholarship deals with sets of norms, decision-making procedures and organisations coalescing around functional issue-areas'.<sup>69</sup> More to the point, it addresses questions relating to overlaps of these areas and their conflicts, and methods with which certain agents—such as international organisations—should engage in

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<sup>67</sup> BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS*. (1963); For a concise critique of this approach see PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 252 (2012).

<sup>68</sup> On the principle of comparative impairment see William F. Baxter, *Choice of Law and the Federal System*, 16 *STANFORD LAW REV.* 1–42 (1963); DIRK PULKOWSKI, *THE LAW AND POLITICS OF INTERNATIONAL REGIME CONFLICT* 331 ff (2014).

<sup>69</sup> Margaret A. Young, *Introduction: The Productive Friction Between Regimes*, in *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* 1, 23 (Margaret A. Young ed., 2012).

interaction and accommodation, and the basis of any such power to do so. What we must observe, in this regard, is that the function of an international court cannot be easily isolated from the regime to which it pertains. Their judicial process, and ‘the law-making that occurs contingently in litigation’, have implications that have bearing on the interaction between different regimes.<sup>70</sup> In the search for a solution to jurisdictional conflicts, this perspective must perforce be taken into account.

### *3. Comity: between judicial tool and meta-principle of coordination*

Comity may offer a possible solution to conflicts occurring between international jurisdictions. As a concept, it pertains to the realm of judicial reasoning and behaviour. As Crawford and Nevill have observed, judges and arbitrators owe allegiance to their jurisdictional mandate, and their approaches in seeking coordination—rather than competition—between different regimes might be described as a ‘meta-position’, or even as an exercise of imagination.<sup>71</sup> Still, as the authors continue, there is no ‘informing meta-principle’ from which easy answers can be drawn.<sup>72</sup> Rather, when jurisdictional overlaps between international courts and tribunals are seen as a form of regime conflict and interaction, we are left with the troublesome realisation that no hard and fast rules exist for their resolution, though concerns about legitimacy and the risk of managerialism are hard to deflect.<sup>73</sup>

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<sup>70</sup> Crawford and Nevill, *supra* note 61 at 260.

<sup>71</sup> *Id.* at 251.; PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 204 (2013).

<sup>72</sup> Crawford and Nevill, *supra* note 61 at 259.

<sup>73</sup> MARGARET A. YOUNG, TRADING FISH, SAVING FISH 276, 295 (2011).

The arguments for hard rules and final arbiters are quite compelling, but, so far, these are desiderata that do not lie in the realm of what is accessible. What we *do* have, instead, is the understanding that conflicts can be otherwise managed. ‘A problem’, Philip Jessup wrote in his Storrs lectures, ‘may also be resolved not by the application of law (although equally not in violation of law) but by a process of adjustment—an extralegal or metajudicial means’.<sup>74</sup> Comity is one such principle—or ‘meta-principle’.<sup>75</sup> Its potential, which we attempted to unpack in the previous sections, is revealed by its historical evolution and continual application at the domestic (so to speak) level. We submit that, lacking (unlikely) hierarchical solutions, comity may assist international courts and tribunals in mediating jurisdictional conflicts between themselves, balancing their coordination efforts with the need to keep track of the need to provide justice in individual cases.<sup>76</sup>

Of course, ‘managerialism’ is a risk, and the proposition that the degree to which judges are required to strive for the ‘maintenance of the integrity of the international legal system... [and] the broader idea of an international rule of law’ is hardly uncontested.<sup>77</sup> Still, it can hardly

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<sup>74</sup> PHILIP C. JESSUP, *TRANSNATIONAL LAW* 6 (1956).

<sup>75</sup> Crawford and Nevill, *supra* note 61 at 243.

<sup>76</sup> CRAWFORD, *supra* note 54 at 208.

<sup>77</sup> Andreas Paulus, *International Adjudication*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 207, 221 (Samantha Besson & John Tasioulas eds., 2010). For a law and process perspective, consider ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 10 (1995). See also W. Michael Reisman, “*Case Specific Mandates*” versus “*Systemic Implications*”: *How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture*, 29 *ARBITR. INT.* 131–152 (2013).

be doubted that international adjudication has overcome its quasi-arbitral beginnings<sup>78</sup>, and that, when it comes to the proper and sound administration of justice (a concept, we should perhaps emphasise, which has deeper moral implications than that of ‘the rule of law’<sup>79</sup>), community interests (or something much akin to them) are at stake.<sup>80</sup> As far as international courts and tribunals are concerned, judges pursue these interests the best way they can, through the use of shared assumptions, methodological tools, the responsible use of legal doctrine, and—perhaps most importantly—with the limitations that their own professions calls for.<sup>81</sup>

Comity does not simply respond to the hopes for coordination within the international judiciary—and, more broadly, the international legal system. It is also something that international adjudicators can and know how to employ in order to attain these goals. With this in mind, comity might be set to be employed to ease other types of conflict, for example, as a principle informing the use by certain international tribunals of extrasystemic elements imported from other legal regimes, for indeed the use of such ‘outside law’ is not devoid of complications and calls for a careful balancing of the interests at stake.<sup>82</sup>

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<sup>78</sup> Paulus, *supra* note 77 at 223.

<sup>79</sup> Thomas Schultz, *Against Consistency in Investment Arbitration*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 297 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014)*passim*.

<sup>80</sup> On community interests see B. Simma, From bilateralism to community interest in international law, Vol. 250 (1994) *Recueil des Cours de l’Académie de Droit International* 217, *passim*.

<sup>81</sup> Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT. LAW 265–297, 234 (2009); Crawford and Nevill, *supra* note 61 at 249; PULKOWSKI, *supra* note 68.

<sup>82</sup> José E. Alvarez, “Beware: Boundary Crossings” – A Critical Appraisal of Public Law Approaches to *International Investment Law*, 17 J. WORLD INVEST. AMP TRADE 171–228 (2016); VALENTINA VADI, ANALOGIES

### *C. An uncertain umpire? The case of competing proceedings*

What type of relief exactly could comity provide to the problem of jurisdictional conflicts? Answering this question requires a more advanced understanding of the problem of regulation of jurisdiction in international adjudication. This section examines the potential of comity as an instrument to be employed to alleviate the ill-effects deriving from the pendency of parallel proceedings in the same dispute.

#### *1. The regulation of jurisdiction: jurisdictional clauses and general principles*

General international law does not provide for rules governing the jurisdiction of international courts and tribunals, but the constituting instruments of the latter often do. Normally, they do so indirectly, namely through their jurisdictional clauses. According to the classification proposed by Yuval Shany, it is possible to distinguish between exclusive jurisdictional clauses, barring litigation before any other forum, and non-exclusive jurisdictional clauses.<sup>83</sup> Exclusive jurisdiction clauses can be further qualified as flexible or inflexible, depending on whether they can be derogated from; non-exclusive jurisdiction clauses can be unqualified or residual, such as Article 282 UNCLOS.<sup>84</sup> The latter species of jurisdictional clauses may be chosen for the

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IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2015). On this type of regime interaction and the implications for international governmental organisations (as a possible analogy) see YOUNG, *supra* note 73 at 279.

<sup>83</sup> SHANY, *supra* note 6 at 179–80.

<sup>84</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Article 282, providing that ‘If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall,

purpose of limiting, to some extent, unilateral forum shopping.<sup>85</sup> In contrast, very few instruments include rules intended to coordinate multiple proceedings and, more broadly, mediate conflicts.<sup>86</sup>

It has been argued that, in the absence of a hierarchical system, the instruments to achieve these results are to be found ‘outside the framework of their legal order’.<sup>87</sup> The central question is whether the vacuum can be filled with general jurisdiction-regulating principles. One such principle is *res judicata*, a preclusion doctrine aimed at protecting the finality of the decision. Its applicability in international adjudication is well accepted,<sup>88</sup> though recent judicial

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at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.’

<sup>85</sup> SHANY, *supra* note 6 at 202–4.

<sup>86</sup> For example, see the African (Banjul) Charter on Human and Peoples’ Rights, Jun. 27, 1981, 1520 UNTS 217, 21 ILM 58 (1982). According to Shany, Article 56(7) of the African Charter (barring the admissibility of communication from ‘other sources’ dealing with cases ‘which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter’) must be considered an implied *res judicata* clause: *Id.* at 225.

<sup>87</sup> MCLACHLAN, *supra* note 53 at 455; Waibel, *supra* note 63 at 522.

<sup>88</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) 2007 ICJ REP 43, 89, paras. 114-120 (Feb. 26). See also BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 336 (1994); Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT. LAW J., 104 (2009); August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 LAW PRACT. INT. COURTS TRIB. 37–77, 44 (2004); SHANY, *supra* note 6 at 245.

practice demonstrates that there still is some degree of uncertainty as to its practical operation.<sup>89</sup> There is ample agreement that for *res judicata* to apply strict conditions must be satisfied: these are normally reduced to a ‘triple identity test’, which is intended to ascertain that *persona*, *petitum*, and *causa petendi* of the multiple disputes are in fact the same.<sup>90</sup> In international adjudication, this is easier said than done: due to a plethora of different treaty regimes, jurisdiction and cause of action are intimately linked and meeting the conditions for the operation of the principle is unlikely.<sup>91</sup> Further, especially in investment arbitration, it is quite possible that multiple arbitrations will be initiated by formally different entities.<sup>92</sup> As a consequence, there is a renewed interest in less restrictive doctrine such as issue estoppel.<sup>93</sup>

While *res judicata* is intended to shield from the undesired consequences of sequential proceedings, *lis alibi pendens* deals with parallel proceedings, giving priority to the ones first established. Compared to *res judicata*, its applicability in international adjudication does not enjoy the same widespread support.<sup>94</sup> Overall, the number of cases involving the principle has

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<sup>89</sup> See for example the decision, delivered by a split Court with the casting vote of the president, in Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia), Judgment, 17 March 2016, unreported (available at <<http://www.icj-cij.org/docket/files/154/18956.pdf>>).

<sup>90</sup> Factory at Chorzów: Interpretation Case (Germany v. Poland) 1927 PCIJ, Series A, No. 13, 4, at 23 (dissenting opinion of Judge Anzilotti); Pauwelyn and Salles, *supra* note 88 at 103.

<sup>91</sup> *Id.* at 104.

<sup>92</sup> Waibel, *supra* note 63 at 523.

<sup>93</sup> *Id.* at 523.

<sup>94</sup> Reinisch, *supra* note 88 at 123 (justifying the principle as a corollary of *res judicata*); MCLACHLAN, *supra* note 53 at 500 Arguing that the principle should be applied, and that it does not import a strict “first seized” requirement.

been comparatively low, and no tribunal has authoritatively pronounced on the issue.<sup>95</sup> Further, its status as a general principle of law has been disputed on the grounds that it is mainly a civil law doctrine,<sup>96</sup> and it too does, in any event, require the satisfaction of a strict triple identity test.<sup>97</sup>

Moreover, while the application of *res judicata* enjoys virtually universal support as a matter of policy, the use of *lis pendens* has, at least on occasion, been criticised. First, it has been observed that the simple fact that a tribunal has already been given jurisdiction does not constitute a guarantee that a dispute will be settled.<sup>98</sup> Second, it has been argued that the increase in litigation costs is a minor and, in any event, secondary issue in international adjudication.<sup>99</sup> This proposition is not entirely convincing, and does not take into account other adverse effects

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Against this proposition, see CRAWFORD, *supra* note 54 at 80; SHANY, *supra* note 6 (arguing that the status of the principle is still unclear).

<sup>95</sup> MCLACHLAN, *supra* note 53 at 500; CRAWFORD, *supra* note 54 at 383. It may be further observed that the Permanent Court of International Justice considered, but did not pronounce on the issue (as the ‘triple identity test’ could not, in any event, be satisfied) in *Certain German Interests in Polish Upper Silesia* (1925) PCIJ Rep, Series A No 6, 20.

<sup>96</sup> Gilles Cuniberti, *Parallel litigation and foreign investment dispute settlement*, 21 ICSID REV. FOREIGN INVEST. LAW J. 381, 383 (2006).

<sup>97</sup> Pauwelyn and Salles, *supra* note 88 at 110.

<sup>98</sup> *Case Concerning the Factory at Chorzów (Germany v. Poland) (Jurisdiction)* PCIJ Rep Series A No 9, at 30. Cuniberti, *supra* note 96 at 143.

<sup>99</sup> Pauwelyn and Salles, *supra* note 88 at 109.



of duplicative litigation on any given dispute.<sup>100</sup> Third, and perhaps more interesting, is the contention that the pendency of parallel proceedings could be an incentive for proverbially slow tribunals to issue their judgment first, a result that can only be achieved if *res judicata* applies and *lis alibi pendens* does not, encouraging a ‘race to ruling’, rather than a race to court.<sup>101</sup>

## 2. On the exercise of jurisdiction: comity and inherent powers

In the current international dispute settlement scenario, comity has appeal as a technique for the management of jurisdictional conflicts arising from the commencement of multiple proceedings before different courts or tribunals.

When domestic courts employ comity, they do so by dismissing or staying proceedings, thus adopting a decision not to exercise a jurisdiction that they indubitably have. The resolution of conflicts concerning the allocation of regulatory (or jurisdictional) authority tends to take this form, demanding the surrender of legal (or judicial) authority from one legal system or regime to another.<sup>102</sup> The same applies in international adjudication, where coordination efforts have been broadly labelled as exercises in avoidance and temporisation.<sup>103</sup>

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<sup>100</sup> The creation of a plurality of fora along “narrow functionalist lines” and their overlapping authority is certainly detrimental to weaker states: Eyal Benvenisti & George W. Downs, *The empire’s new clothes: political economy and the fragmentation of international law*, STANFORD LAW REV. 595–631 (2007).

<sup>101</sup> Pauwelyn and Salles, *supra* note 88 at 109; Waibel, *supra* note 63 at 518.

<sup>102</sup> A. Pillet, ‘Théorie Continentale des Conflits de Lois’, *Recueil des Cours de l’Académie de Droit International* Vol. 2 (1924) 451 at 472. See also PULKOWSKI, *supra* note 68 at 330–31.

<sup>103</sup> Jeffrey L Dunoff, *A New Approach to Regime Interaction*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION, 156 (Margaret A. Young ed., 2012).

Judicial discretion of this kind has faced comparatively few challenges at the domestic level, at least in common law countries, where it is more characteristic: doubts as to the authority of a court of general jurisdiction to do so remain the exception. Things tend to be different for international tribunals: do they or do they not have the power, in their discretion, to stay or dismiss proceedings? To be sure, it is possible for such a power to be provided for expressly.<sup>104</sup> However, the constitutive instruments of international courts and tribunals are seldom exhaustive and, in order to fill the gap, reliance has been placed on alternative sources of procedural rules and the more controversial concept of ‘inherent power’.

One possible solution is to qualify comity as a principle of international law<sup>105</sup> or a general principle of law in the sense of Article 38(1)(c) of the Statute of the International Court of Justice.<sup>106</sup> Debates as to the suitability of such principles to constitute a source of procedural law have been largely overcome, and the proposition that that ‘no sharp distinction’ exists in international law between substantive and adjectival aspects is relatively uncontroversial.<sup>107</sup> It must be pointed out, however, that the scarcity of practice does not appear to warrant the conclusion that comity fits squarely in the first category; by the same token, the fact that the

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<sup>104</sup> SHANY, *supra* note 55 at 172.

<sup>105</sup> We accept the definition employed in CRAWFORD, *supra* note 14 at 37 (“certain logical propositions underlying judicial reasoning on the basis of existing international law”).

<sup>106</sup> See Statute of the International Court of Justice, Article 38(1). SHANY, *supra* note 6 at 261.

<sup>107</sup> SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005* 1023 (2005); BROWN, *supra* note 6 at 37.

principle of comity does not enjoy universal acceptance at the domestic level seems to militate against its inclusion in the second.<sup>108</sup>

A preferable alternative is to find the source of discretion not to exercise jurisdiction in the inherent powers of international courts and tribunals.<sup>109</sup> As Judge Higgins observed in her separate opinion in the *Use of Force* cases, the inherent powers of a tribunal include that of not exercising a jurisdiction that it has.<sup>110</sup> Specifically, such powers are a corollary of the judicial character of the tribunal and descend from the need to protect the integrity of the judicial process. Their exercise is thus to be considered possible, if exceptional.<sup>111</sup> In other words, in

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<sup>108</sup> SHANY, *supra* note 55 at 172. This result is not surprising: while it is accepted that general principles of law may be sources of procedure, very few of them are applied extensively at the national level. Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 BR. YEARB. INT. LAW 195–244, 195 (2006); For an in-depth discussion of general principles of law see CHENG, *supra* note 88.

<sup>109</sup> CRAWFORD, *supra* note 54 at 210.

<sup>110</sup> *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, 2004 ICJ REP. 1307, 1361, para. 10 (Dec. 15) (Separate Opinion of Judge Higgins). It should be clarified that the problem at issue was that of the possibility of summarily dismissing abusive claims. See Brown, *A Common Law*, *supra* note 5, 249. The language is to be compared with the dictum in *Northern Cameroons (Cameroon v. UK)*, Preliminary Objections, 1963 ICJ REP. 29 (Dec. 2): “[T]he Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore... The Court itself, and not the parties, must be the guardian of the Court’s judicial integrity”.

<sup>111</sup> *Ibid.* para.12. Caroline Henckels, *Overcoming jurisdictional isolationism at the WTO–FTA nexus: a potential approach for the WTO*, 19 EUR. J. INT. LAW 571–599, 585 (2008).. Judge Higgins referred to the Court’s dictum in *Nuclear Tests (Australia v. France)*, 1974 ICJ REP. 253, 322 (Joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock): ‘for the Court to discharge itself from carrying out [the primary

this approach, inherent powers must be justified on the basis of the function of the international court concerned—and, arguably, of the general function of international adjudication: this last point warrants further consideration as it implies the question of whether the role of international courts and tribunals should be restricted to the settlement of the particular dispute between the parties or have wider implications.<sup>112</sup>

The ‘inherent powers’ approach is advantageous for two main reasons: first, it allows rejecting the misconception of comity as a jurisdictional rule and qualifying it as a set of principles that should inform the exercise of jurisdiction.<sup>113</sup> Second, it allows dispensing with an express provision of the power to stay or dismiss proceedings in the constitutive instrument of the tribunal. Nevertheless, there are limits to its operation: in general, the existence of an inherent power could be excluded by a provision or by the effect of either the constitutive instrument as a whole or the very function of an international tribunal.<sup>114</sup> It is doubtful, for example, whether an exclusive jurisdictional clause could warrant the exercise of such discretion. By the same token, it is up to question whether certain dispute settlement bodies possess the discretion to stay proceedings.

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obligation of deciding disputes in accordance with international law] must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require’.

<sup>112</sup> Brown, *supra* note 108 at 73.

<sup>113</sup> Laurence Boisson de Chazournes, *The Principle of Compétence-Compétence in International Adjudication*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN*, 1059 (Mahnoush H. Arsanjani & Jacob Cogan eds., 2011).

<sup>114</sup> Brown, *supra* note 108 at 91.

The case of the WTO dispute settlement mechanism can provide a useful illustration of the problem. The existence of such discretion for the panels has been questioned for different reasons. For example, it has been contended that they lack inherent powers due to the atypical nature of such bodies: a power to suspend proceedings would thus have to be based on different grounds.<sup>115</sup> Others have argued that a power to stay proceedings should be excluded on the grounds of the strict procedures and timeframes the panels are bound to respect.<sup>116</sup> Finally, in *Mexico–Soft Drinks* the Panel rejected Mexico’s request not to exercise its jurisdiction maintaining that it did not have ‘discretion to decide whether or not to exercise [it] in a case properly before it’.<sup>117</sup> The Appellate Body upheld the approach followed by the Panel in *Mexico–Soft Drinks*, arguing that the Panel would not have fulfilled its mandate of making ‘an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements’ if it had

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<sup>115</sup> Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT. COMP. LAW Q. 861 (2004); Friedl Weiss, in *THE WTO DISPUTE SETTLEMENT SYSTEM, 1995-2003*, 885 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004). According to Bartels, the panels or the appellate body are not plagued with a complete lack of power to regulate their proceedings, but still have to base its decision on a positive grant of authority under the WTO Dispute Settlement Understanding. He concludes that it would be possible for a panel or the Appellate Body to suspend its proceedings on the basis of the Working Procedures they can adopt under Article 12.1 (or 17.9, for the Appellate Body) DSU irrespective of the consent of the parties. As the Working Procedures are adopted for the purpose of hearing a particular case, it would not be possible to use them to decline jurisdiction altogether, but the result of a suspension of proceedings might be attainable.

<sup>116</sup> SHANY, *supra* note 55 at 265.

<sup>117</sup> WTO, Panel Report, *Mexico—Measures on Soft Drinks and Other Beverages*, Report of the Panel, 7 October 2005, WT/DS308/R, paras. 7.4–7.18.

declined to exercise a validly established jurisdiction.<sup>118</sup> According to Caroline Henckels, such an approach is rooted in ‘arid textualism’ and might be overcome by paying due regard to the purpose of the WTO dispute settlement mechanism.<sup>119</sup> Comity, she further argues, could thus be used upon meeting the high threshold of ‘an inextricable connection to an antecedent or concurrent dispute under another trade instrument... bearing in mind the need to ensure stability and predictability in the international trading system’.<sup>120</sup> Such a conclusion seems correct in principle. What is more, it is also buttressed by the recent practice of a number of international courts and tribunals, which have demonstrated an increasing willingness to suspend proceedings before them.<sup>121</sup> However, the extent to which other tribunals will be willing to do so is still up to question.

### *3. The potential of comity: advantages and drawbacks*

The application of the doctrine of comity has a number of advantages. First of all, as a general abstention doctrine, it does not need to be provided for expressly in the constitutive instrument of the tribunal concerned: provided that the tribunal possesses the powers necessary to exercise comity it constitutes a readily available remedy against the dangers of abusive litigation.<sup>122</sup> Second, and more attractive, its flexible character allows the decision-maker to defer the dispute

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<sup>118</sup> WTO, Mexico—Measures on Soft Drinks and Other Beverages, Report of the Appellate Body, 3 June 2006, WT/DS308/AB/R, paras. 4.4–4.14.

<sup>119</sup> Henckels, *supra* note 111 at 589–95.

<sup>120</sup> *Id.* at 597.

<sup>121</sup> BROWN, *supra* note 6 at 250–52.

<sup>122</sup> SHANY, *supra* note 6 at 280.

to the jurisdiction of other tribunals in a number of cases, without the need to satisfy the strict requirements of either *res judicata*, *lis alibi pendens* and, where similarities apply, *electa una via* provisions. Third, comity is predicated on the postulate that the tribunal exercising it has jurisdiction: in that it is not necessarily different from the principles considered above, which are more accurately classified as concerning the admissibility of claims.<sup>123</sup> But the argument may be made that *res judicata* and *lis alibi pendens* are hard-edged principles. Specifically, they are preclusion doctrines: as a consequence, as soon as the requirements for their operation are met, they bar the adjudicator from entertaining the dispute.<sup>124</sup> In contrast, the doctrine of comity simply results in a tribunal using its discretion and refraining from exercising a jurisdiction it has when hearing the case would not be appropriate. As a consequence, it does not deprive the tribunal of its power to hear the dispute when the reasons not to do so (such as, for example, simultaneously pending proceedings), albeit formally compelling, prove shaky as a matter of substance.

Using comity is not entirely unproblematic: its operation is subject to the tribunal exercising discretion, an idea that many constituencies could find problematic when associated with adjudication. From the parties' perspective, preclusion arguments may indeed be more attractive: a tribunal may have variegated reasons to be hesitant in declining to exercise its jurisdiction. Its members may simply be convinced that they do not have the power to make this decision, and err on the side of caution and give the parties their proverbial 'day in court'.

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<sup>123</sup> Pauwelyn and Salles, *supra* note 88; Gretta L. Walters, *Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?*, 29 J. INT. ARBITR. 651–680, 93 (2012121).

<sup>124</sup> *Ibid.*, at 83.

Reluctance of this kind may also occur even if there is no *legal* impediment: the conduct of the international judiciary, just as of any body of individuals, is not only affected by considerations of justice and the parties' interests. For example, as Cesare P. R. Romano points out, permanent tribunals could be reluctant to defer a dispute to other judicial bodies due to the fear that doing so could negatively affect their status in the area of international dispute settlement and the problematic correlation between caseload and funding.<sup>125</sup> In contrast, the members of arbitral tribunal can be said to have, from a law and economics perspective, a vested interest in making the dispute reach the merits stage. It makes sense for them to increase the demand for arbitration.<sup>126</sup>

And, of course, even then mistakes may be made. An example can help clarify the problem: in the *MOX Plant* case, the Annex VII Tribunal relied on comity to avoid a jurisdictional conflict, and, insofar as it based the decision on the virtually certain involvement of the European Court of Justice, its approach seems to be informed by a correct, if overly prudent and deferential, understanding of the principle.<sup>127</sup> But, as Campbell McLachlan has observed, the tribunal adopted its decision before the European Court, which undoubtedly has the competence to decide on its jurisdiction, was even *seized* of the dispute. It is thus arguable that, had the tribunal decided otherwise, its exercise of jurisdiction would not have infringed comity as no proceedings had been initiated; what is more—and, perhaps, most importantly—

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<sup>125</sup> Guillaume, *supra* note 51; Romano, *supra* note 49 at 301.

<sup>126</sup> See generally Thomas Schultz, *Arbitral Decision-Making: Legal Realism and Law & Economics*, 6 J. INT. DISPUTE SETTL. 231–251 (2015).

<sup>127</sup> *MOX Plant Case (Ireland v. United Kingdom)* (UNCLOS, Annex VII, Tribunal, Order of 14 November 2003) 126 ILR 310 [21].



the risk of leaving Ireland without *any* proceedings against the United Kingdom was a real one.<sup>128</sup>

### 3. Mentions of comity by international courts and tribunals

The foregoing sections have sought to clarify, at a theoretical level, the potential and shortcomings of the use of comity in international adjudication. In this section, we look more empirically at cases in which comity has indeed been used.

#### A. Comity as Opposed to ‘Legal Obligations’

First of all, in a number of cases, international courts and tribunals have employed the notion of comity to clarify the legal nature of an obligation. For example, in *Fisheries Jurisdiction*, Judge Dillard appended a separate opinion in which he argued that ‘in practice States accord deference to the 12-mile limit as a matter of legal obligation and not merely as a matter of reciprocal tolerance or comity’.<sup>129</sup>

In *Nuclear Tests (Australia v France)* the concept was only mentioned in passing in Judge *ad hoc* Barwick’s dissent, in which he criticized the view that the dispute at issue was only a political difference ‘as to whether France ought or ought not in comity to cease to test in

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<sup>128</sup> The argument has also been made that, in affirming its exclusive jurisdiction, the European Court of Justice *de facto* negated that the Annex VII Tribunal could rule on its competence: MCLACHLAN, *supra* note 53 at 454. A different narrative, however, is also possible: against the idea that the European Court proceeded some sort of usurpation, see Crawford and Nevill, *supra* note 61 at 254.

<sup>129</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland) (Merits)*, 1974 ICJ REP. 3, 58 (Jul. 25) (separate opinion of Judge Dillard).

the atmosphere of the South Pacific'. In his opinion, there was a legal dispute and that the Court's finding that Australia application had no object was incorrect.<sup>130</sup>

Again, in *Avena*, the issue of comity was raised in Mexico's argument at the provisional measures stage.<sup>131</sup> On the basis of a declaration of the president of the United States to the effect that the USA would have 'discharged their international obligations under the decision of the International Court of Justice... in accordance with general principles of comity', Mexico argued that the reference to comity the United States made clear that it did not believe to have any legal obligation. The Court did not address the issue. Finally, in *Jurisdictional Immunities*, the Court referred to the concept of comity to observe that the parties were in agreement as to the applicable law and, in particular, they agreed that 'immunity is governed by international law and is not a mere matter of comity'.<sup>132</sup>

A similar interpretation of the term has also been espoused by the European Court of Human Rights in *Mamatkulov*. In this case, the Court observed that previous practice had described the practice of complying with interim measures as 'a matter of expediency and comity'.<sup>133</sup>

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<sup>130</sup> *Nuclear Tests (Australia v. France)* 1974 ICJ REP. 253, 446 (Dec. 20) (dissenting opinion of Judge Barwick.

<sup>131</sup> Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* 1974 ICJ REP. 311 (Jul. 16). See also the Dissenting opinion of Judge Buergenthal.

<sup>132</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* 2012 ICJ REP. 99 para.53 (Feb. 3).

<sup>133</sup> *Mamatkulov and Askarov v. Turkey*, Eur. Ct. H.R. 2005-I, para 5.

## **B. Comity as Non-Interference**

In a second group of cases, references to comity were made in connection with non-interference arguments.

The principle was referred to in *Loewen* as the source of the requirement of ‘continuous nationality’.<sup>134</sup> According to the tribunal, the principle arose as a consequence of the fact that ‘[i]t was not normally the business of one nation to be interfering into the manner in which another nation handled its internal commerce’.<sup>135</sup>

Two cases of the Court of Justice of the European Communities concerned issues of regulation of competition: the first, *Ahlström v. Commission*, was part of the joined ‘wood pulp’ cases.<sup>136</sup> The comity argument was raised by a number of Canadian applicants contended that regulating their conduct – relating to activities performed outside of, but having effects within Europe – the Commission had ‘infringed Canada’s sovereignty and thus breached the principle of international comity’.<sup>137</sup> The Court quickly dismissed the argument, stating that it amounted to questioning the Community's jurisdiction to apply its competition rules.<sup>138</sup> *IBM v. Commission* concerned entirely similar issues, the main difference being that the conduct of the claimant was not only performed in another jurisdiction (the United States), but also the subject

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<sup>134</sup> ICSID, *Loewen Group Incorporated and Loewen (Raymond L.) v. United States - Award*, 26 June 2003, ICSID Case No ARB(AF)/98/3.

<sup>135</sup> *Ibid.* para 223.

<sup>136</sup> Case C-89/85, *Ahlström v Commission (Woodpulp II)*, [1993] ECR 1307.

<sup>137</sup> *Ibid.* para. 8.

<sup>138</sup> *Ibid.* para. 22.

of legal proceedings there.<sup>139</sup> The Court did not address the claim, and dismissed it on other grounds. To this day, the Court has not modified its approach, and a recent decision by the General Court referring to *Ahlström* reveals that the timeworn *dictum* withstands the test of time.<sup>140</sup>

### C. *Comity and the Management of Multiple Proceedings*

In a third category of cases, references to comity concerned the coordination of multiple proceedings relating to the same dispute pending before different national or international judicial bodies.

Perhaps the best-known instance of the use of comity was considered in relation to parallel proceedings is the early ICSID case *Southern Pacific Properties*.<sup>141</sup> The dispute at issue had been referred to arbitration before the International Chamber of Commerce and only later ICSID proceedings were initiated. As domestic proceedings concerning the arbitration clause were pending before the French Cour de Cassation, the Tribunal was faced with the request to decline its jurisdiction. Eventually, the tribunal stayed its proceedings, but went to great lengths to clarify that, it was doing so ‘in the interest of international judicial order’, ‘in its discretion and as a matter of comity’. In its view, there was no rule of international law preventing two tribunals whose jurisdictions extended to the same dispute from exercising such jurisdiction.<sup>142</sup>

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<sup>139</sup> Case C-60/81, *IBM v. Commission*, [1981] ECR 2639, 2643, at 2650.

<sup>140</sup> Case T-406/08, *ICF v. Commission* (General Court, Jun. 18, 2013). Available at <http://curia.europa.eu>.

<sup>141</sup> ICSID, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt – Decision on Jurisdiction*, 27 November 1985, ICSID Case No ARB/84/3.

<sup>142</sup> *Ibid.* 129.

Questions relating to comity were considered again in the *MOX Plant* case.<sup>143</sup> There the PCA Annex VII 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 a virtually certain involvement of the European Court of Justice.<sup>144</sup> Such an occurrence would have excluded the Tribunal’s jurisdiction under Article 282 of the UNCLOS. Comity was also mentioned in the separate opinion appended by Judge Treves to the Order on Provisional Measures issued by the International Tribunal for the Law of the Sea in the same dispute.<sup>145</sup> Treves regretted that a discussion on the existence and content ‘of a customary law rule or of a general principle concerning the consequences of litispendence, as well as considerations of economy of legal activity and of comity between courts and tribunals’ had not been included in the order.<sup>146</sup>

Comity arguments were also raised in *Itera International Energy*.<sup>147</sup> The respondent maintained that the claimant was trying to bring before the ICSID Tribunal, under the cloak of ancillary claims, a wholly separate dispute, which was already the subject of separate proceedings before the International Commercial Arbitration Court of the Russian Chamber of Commerce. These proceedings had been initiated by the claimant and had been going on for

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<sup>143</sup> Ireland v. United Kingdom (‘MOX Plant Case’) (Order No 3) (UNCLOS Annex VII Tribunal, PCA).

<sup>144</sup> Ibid. 28.

<sup>145</sup> MOX Plant Case (Ireland v. United Kingdom), Request for Provisional Measures (Order), ITLOS Case No 10, Separate Opinion of Judge Treves.

<sup>146</sup> Ibid. para.5.

<sup>147</sup> ICSID, *Itera International Energy LLC and Itera Group NV v Georgia - Admissibility of Ancillary Claims*, 3 December 2009, ICSID Case No ARB/08/7.

three years. According to the respondent, the Tribunal's dismissal of these claims would have avoided potentially conflicting decisions and served the interests of 'efficiency and comity'.<sup>148</sup> Eventually, the claims were not found to arise from the same dispute and the Tribunal did not address the issue of comity.<sup>149</sup>

The issue of comity was raised again in *Achmea*.<sup>150</sup> The European Commission had submitted written observations to propose a stay of the PCA proceedings in order to avoid a potential conflict between its decision and an ensuing ECJ ruling. It suggested that the PCA adopted the same approach embraced in *MOX Plant*, where the arbitral tribunal had concluded that 'considerations of mutual respect and comity' warranted a stay of proceedings. According to the Commission, such considerations formed 'part of the general principles of law that the Tribunal must apply by virtue of Article 8(6) of the BIT'.<sup>151</sup> Ultimately, the tribunal concluded that while the Tribunal wished to organize its proceedings 'with full regard for considerations of mutual respect and comity as regards other courts and institutions' it did not consider the questions in issue 'so far coextensive with the claims in the present case' to warrant a decision of suspension of the proceedings.<sup>152</sup> Yet, the tribunal left open the possibility of a later

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<sup>148</sup> Ibid. para.81.

<sup>149</sup> Ibid. para.100.

<sup>150</sup> PCA, *Achmea BV (Formerly Eureko BV). v. Slovakia – Award on Jurisdiction*, 26 October 2010, PCA Case No 2008-13.

<sup>151</sup> Ibid. para.196.

<sup>152</sup> Ibid. para. 292.

suspension if it were to become clear ‘that the relationship between the two sets of proceedings is so close as to be a cause of procedural unfairness or serious inefficiency’.<sup>153</sup>

Finally, questions concerning comity and the management of multiple proceedings were discussed, rather thoroughly, in *British Caribbean Bank*.<sup>154</sup> In this case, the Respondent had invoked the precedents of *Southern Pacific Properties* and *MOX Plant* to argue that, when parallel proceedings are pending, a Tribunal may ‘in its discretion and as a matter of comity’ stay the exercise of its jurisdiction.<sup>155</sup> The argument was accepted as a matter of principle, and the Tribunal admitted that it had ‘a measure of discretion with respect to the timing and conduct of the arbitration and that municipal judicial proceedings may sometimes need to be taken into account in the exercise of international comity’. However, the Tribunal also observed that any such discretion ‘must be carefully exercised’, for to do otherwise would have amounted to ‘permit comity to frustrate a claimant’s right to the arbitral forum and, potentially, to the relief offered by the bilateral investment treaty under which the arbitration proceedings were commenced’.<sup>156</sup> In this respect, the Tribunal observed, the situation in the case at issue was entirely different from the precedent cited, as a stay would not have been motivated by either an exclusive jurisdictional clause included in a contract (as in *SGS*) or the exclusive jurisdiction vested in a certain forum by a treaty.<sup>157</sup> What is more, its determinations did not depend from

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<sup>153</sup> *Ibid.*

<sup>154</sup> PCA, *British Caribbean Bank Limited v. The Government of Belize - Award*, 19 December 2014, PCA Case No 2010-18.

<sup>155</sup> *Ibid.* para. 179.

<sup>156</sup> *Ibid.* para. 187.

<sup>157</sup> *Ibid.* para. 188.

the result of any action before the domestic court, and, even then, none were currently pending.<sup>158</sup>

#### ***D. Comity as respect and recognition***

International juridical bodies have also relied on comity in order to assist their reasoning about the respect to be granted to what we may broadly refer to as the regulatory space of states: what faith and credit should be accorded to states regarding their own conduct? What are the appropriate evidential weight, evidential requirements, and standards of review for the conduct of states? Four cases point the way.

In *Soufraki*, an investment arbitration, a reference to comity appears in Omar Nabulsi's dissenting opinion.<sup>159</sup> The question concerned certificates of nationality issued by the Italian government. According to Nabulsi, the tribunal had the power to make determinations of nationality, but these had to be made in accordance with the proper law, which was, in the case at issue, Italian law. In his view, 'The Tribunal's application of rules other than the substantive rules of Italian law would be a manifest excess of power'.<sup>160</sup> Nabulsi went on to ask whether the 'Act of State' doctrine applied to the issue. This would have required that the tribunal 'abstain[s] from inquiring into the validity of acts of the government of another country', namely the certificates of nationality. He answered the question in the negative, finding that the doctrine did not apply to international tribunals whose jurisdiction depends on the parties'

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<sup>158</sup> Ibid. para. 189.

<sup>159</sup> ICSID, *Soufraki v United Arab Emirates - Decision on the Application for Annulment*, 5 June 2007, ICSID Case No ARB/02/7, Separate Opinion and Statement of Dissent by Omar Nabulsi.

<sup>160</sup> Ibid. para.62.



nationality.<sup>161</sup> So the power of the tribunal to go beyond official certificates was not up for debate. Yet, and this is the key point, he maintained that the concept of ‘comity’ required that ‘international tribunals should accord respect to official certificates by treating them as ‘prima facie evidence’’.<sup>162</sup>

A similar reference to comity and evidence, though dealing with a qualitatively different issue, was made in *Tokios Tokelès*, also an investment arbitration.<sup>163</sup> The tribunal held that, when addressing the issue of allegations made against persons or bodies ‘in a position of [state] authority’, evidentiary requirements could not be ‘heightened purely on the grounds of deference or comity or otherwise’.<sup>164</sup>

In *CCL*, a commercial arbitration decided by a SCC Tribunal, the issue of comity was raised with reference to the possibility of reviewing the conduct of a foreign state.<sup>165</sup> The principle was invoked by the respondent, who argued that ‘as a matter of international comity’ the Tribunal should have been hesitant to review the acts of Kazakhstan in its sovereign and judicial capacity, acting to enforce its laws against its own government agency, absent a blatant abuse of power, which clearly is not the case’. The Tribunal ‘should at least give the sovereign, non-commercial acts of Kazakhstan the deference that comity requires’.<sup>166</sup> The claimant was

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<sup>161</sup> Ibid. para.84.

<sup>162</sup> Ibid.

<sup>163</sup> ICSID, *Tokios Tokelès v. Ukraine* – Award, 26 July 2007, ICSID Case No. ARB/02/18, Award.

<sup>164</sup> Ibid. para.124.

<sup>165</sup> *CCL v. Kazakhstan*, SCC Case 122/2001, Jurisdictional Award (Jan. 1, 2003), 2005 Stockholm International Arbitration Review 123.

<sup>166</sup> Ibid. 138.

lucky enough that comity was such an ambiguous concept, shrouded in misunderstandings, rarely if ever seriously examined – a situation explained, as we may recall from the introduction to this article, by lawyers’ generally dismissive attitude for the concept. Hence the claimant could safely argue that comity was a public international law concept referring to ‘non-binding rules of politeness, convenience and goodwill observed by sovereign states in their mutual dealings’. A tribunal not being a sovereignty state, it followed that the reference to comity was misplaced.<sup>167</sup> The Tribunal tagged along, holding that the concept of comity had no applicability in arbitration. Further, it stated that it had not been shown that ‘such a legal principle is part of any known laws or rules concerning international commercial arbitration, including Swedish or Kazakh arbitration law’. It thus concluded that there was no legal basis for it to abstain from reviewing the acts of the respondent solely because it was a sovereign state and that comity was not, under the arbitration clause, a bar to the exercise of jurisdiction.<sup>168</sup>

While less straightforward, the reference to comity in the Second Procedural Order in *ADF* can also be included under this heading. In the decision, concerning the place of arbitration, the Tribunal relayed the United States argument voicing its commitment to facilitating international arbitration, and considered the approach of the United States Supreme Court on the matter.<sup>169</sup> In particular, the Tribunal relied the deferential approach epitomised in *Mitsubishi v Soler*, which we discussed *supra*, 1.B.3.

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<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.* 139.

<sup>169</sup> *ADF Group v United States*, *supra* n41.

A comity argument was again raised by the respondent state in *Railroad Development Corporation*.<sup>170</sup> The case was about Guatemala's use of a legal process known as *lesividad* or *lesivo*, which serves to declare an activity harmful to the interests of the state. Guatemala maintained that this process was not in itself contrary to the minimum standard of treatment. Finding otherwise, Guatemala argued, would in effect 'undermine the requirement that fair and equitable treatment be determined by a case-specific, fact-based inquiry, and would violate notions of comity and sovereignty'.<sup>171</sup> The investment arbitral tribunal dodged the issue of comity and merely found that the procedure had been abused.<sup>172</sup>

A similar argument was raised by one of the parties in *Hesham T. M. Al Warraq*.<sup>173</sup> Appearing as the Respondent, Indonesia argued that the Claimant's accusation that the decisions of the domestic courts had been 'unfair and unjust' amounted to 'a grave charge against the independent judiciary of one of the world's largest democracies'.<sup>174</sup> Accordingly, 'the principle of comity alone' required the Tribunal to act on the presumption that the Indonesian Court had acted properly.<sup>175</sup>

More recently, comity arguments were also considered by a PCA tribunal in *Chevron and Texaco v. Ecuador*. In the first case, party reference. The decision on Track 1B is

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<sup>170</sup> ICSID *Railroad Development Corporation v. Republic of Guatemala* – Award, 29 June 2012, ICSID Case No. ARB/07/23.

<sup>171</sup> *Ibid.* 24.

<sup>172</sup> *Ibid.* 233.

<sup>173</sup> *Hesham T. M. Al Warraq v. Republic of Indonesia* – Award, 15 December 2014, UNCITRAL.

<sup>174</sup> *Ibid.* para. 405

<sup>175</sup> *Ibid.*

particularly interesting: the claimants had requested, among other things, a declaratory award stating that the *Lago Agrio* Judgment ‘violate[d] international public policy and natural justice, and that as a matter of international comity and public policy... [it] should not be recognised and enforced’. The Tribunal noted that ‘whilst not strictly bound to follow their result or reasoning as a matter of international law, this Tribunal would have wished to be guided, as regards any relevant issue of Ecuadorian law, by the decisions of the Lago Agrio Court, the Appellate Court of Lago Agrio and the Cassation Court’. Such an approach, the Tribunal was eager to remark, ‘would extend beyond courtesy, comity and due respect for the Respondent’s judicial branch’.<sup>176</sup> Ultimately, it found that the circumstances of the case—namely the multiple allegations of denial of justice raised by the claimants—militated against the adoption of one such approach.<sup>177</sup>

### ***E. Comity and Precedent***

The idea that precedents – in the non-technical meaning of ‘prior cases’ – of other tribunals should be followed, because of comity, was entertained in the ICSID case *Tulip Real Estate*.<sup>178</sup> The parties had referred the Tribunal to prior decisions of various international judicial bodies. Here is what the Tribunal thought of it: ‘although not bound by such citations... as a matter of

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<sup>176</sup> PCA, *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA.) v. Republic of Ecuador* [II], Decision on Track 1B, 12 March 2015, PCA Case No 2009-23.

<sup>177</sup> *Ibid.* para. 141.

<sup>178</sup> ICSID, *Tulip Real Estate Investment and Development Netherlands BV. v. Turkey - Decision On Bifurcated Jurisdictional Issue*, 5 March 2013, ICSID Case No ARB/11/28.

comity, it should have regard to earlier decisions of courts (particularly the ICJ) and of other international dispute tribunals engaged in the interpretation of the terms of a BIT'.<sup>179</sup>

Interestingly, issues of hierarchy were also considered: the respondent had submitted that preference should be accorded to the decisions of the International Court of Justice; the claimant maintained that those of ICSID tribunals were more relevant.<sup>180</sup> The Tribunal concluded that both sources could inform its interpretation of the terms of the BIT according to their rigour and persuasiveness.<sup>181</sup>

***F. Comity as Neighbourliness, Cooperation and Respect for Other Sovereign Entities***

In other cases, the term comity comes up as a catchall expression covering neighborliness and respect for the sovereign prerogatives of other states.

In *Passage Through the Great Belt* comity is mentioned, in passing, in the separate opinion of Judge Bross, where the argument is made that the dispute at issue could be resolved by the use of negotiations 'in the best Nordic spirit of comity and co-operation'.<sup>182</sup> Nordic spirits notwithstanding, it is hard to ascribe any certain meaning, beyond the general idea of co-operation, to this invocation of comity.

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<sup>179</sup> *Ibid.* para.45.

<sup>180</sup> *Ibid.* para.46.

<sup>181</sup> *Ibid.* para.47.

<sup>182</sup> *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, 1991 ICJ REP. 12, 37 (Jul. 29) (separate opinion of Judge Bross).

The European Court of Human Rights has in turn invoked the concept several times with reference to the question of the grant of sovereign immunities in civil proceedings. The Court has addressed the issue several times to assess whether such a grant of immunity could unduly limit one's right of access to a court.<sup>183</sup> Under the European Convention of Human Rights, limitations to rights such as the one of access to a court must, among other things, pursue a legitimate aim. Starting in 2001, the Court has consistently argued that the grant of sovereign immunity does just that.<sup>184</sup> It 'is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State'.<sup>185</sup> Its grant thus 'pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'.<sup>186</sup>

The concept was also invoked in an unclear fashion in *Certain Questions of Mutual Assistance in Criminal Matters*.<sup>187</sup> The issue of comity was raised in an argument by Djibouti

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<sup>183</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221, Article 6 (henceforth 'the Convention').

<sup>184</sup> *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. (2001) para. 54; *McElhinney v. Ireland*, Eur. Ct. H.R. (2001) para. 35; *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. (2001) para. 34; *Cudak v. Lithuania*, App. No. 15869/02 (Eur. Ct. H.R. Mar. 23, 2010) para. 60; *Sabeh el Leil v. France*, App. No. 34869/05 (Eur. Ct. H.R. Jun. 29, 2011) para. 52; *Oleynikov v. Russia*, App. No. 36703/04 (Eur. Ct. H.R. Mar. 3, 2013) paras. 60-64; *Wallishauser v. Austria*, App. No. 156/04 (Eur. Ct. H.R. Jul. 17, 2012) paras. 53-60; *Jones and Others v. United Kingdom*, App. No. 34356/06 and 40528/06 (Eur. Ct. H.R. Jan. 14, 2014) paras. 184, 188, 196.

<sup>185</sup> *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. (2001) para. 54.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* 2008 ICJ REP. 177 (Jun. 4).

about a witness summons issued under French law to the Djiboutian head of state.<sup>188</sup> Djibouti contended that France would have been required to take preventive measures to protect the immunity and dignity of a head of state on its territory on an official visit (as per Article 29 of the VCDR). France was thus responsible for ‘internationally wrongful acts consisting of infringements of the principles of international comity and of the customary and conventional rules relating to immunities’.<sup>189</sup> The Court ultimately found that the defects in the summons were not unambiguously attributable to France and eluded the interpretation of the term ‘comity’.<sup>190</sup>

More recently, mentions of the principle in the case law of the European Court of Human Rights have arguably leaned towards more qualified forms of neighborliness: for example, in a recent case one judge has emphasized the role of the Court in ensuring the uniform application of the 1980 Hague Convention on Child Abduction furthers comity among States.<sup>191</sup> In yet another case it was argued that ‘reasons of international comity and practicality’ could have called for an effort by a state party to the Convention, which had become a source of migrants, to assist other states in the implementation of their immigration rules and policies.<sup>192</sup>

It is arguable that the term was employed to the same ends by the European Commission in one of the *Kadi* cases. The Court of First Instance relayed the Commission’s argument that

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<sup>188</sup> Ibid. para.162.

Ibid. para.165.

<sup>190</sup> Ibid. paras 172-175.

<sup>191</sup> X v. Latvia, App. No. 27853/09 (Eur. Ct. H.R. Nov. 26, 2013), concurring opinion of Judge Pinto de Albuquerque.

<sup>192</sup> Stamose v. Bulgaria, App. No. 29713/05 (Eur. Ct. H.R. Nov 11, 2012) para. 36.

‘the principle of comity of nations obliges the Community to implement those measures (UNSC sanctions) inasmuch as they are designed to protect all States against terrorist attacks’, but did not discuss the remarkable claim.<sup>193</sup>

The European Court of Justice has later used the term in a different way in the context of a reference for a preliminary ruling concerning the interpretation of a directive on the protection of workers.<sup>194</sup> The case concerned the closure of a United States military base in the United Kingdom: the United States argued that the application of the directive concerned to such a strategic decision would have been incompatible with ‘principles of public international law, in particular the principle of *jus imperii* and that of the ‘comity of nations’’.<sup>195</sup> The Court, however, did not pronounce on the issue as it found that it did not have jurisdiction, as the situation did not fall within the scope of the directive.<sup>196</sup>

## Conclusion

This study has sought to clarify the importance, current and potential, of the use of comity by international courts and tribunals. Our findings support the idea that comity might be an emerging principle of procedural law, though agreement on its exact meaning—or unequivocal choices among its many connotations—still tend to be uncommon. We submit that, as long as other solutions are not in place, the principle can be successfully employed to assist

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<sup>193</sup> Case T-315/01, *Kadi v. Council and Commission* ECR 2005 II-3649, para. 163.

<sup>194</sup> Case C-583/10, *Nolan* (Court of Justice, Third Chamber, October 18, 2012). Available at <http://curia.europa.eu>.

<sup>195</sup> *Ibid.*, paras. 24-25.

<sup>196</sup> *Ibid.*, paras. 32-57.



international courts and tribunals in mediating jurisdictional conflicts between themselves, balancing coordination efforts and the demands of justice in the individual cases.

Comity may serve as a meta-principle of coordination between international judicial bodies, to be employed in the pursuit of the common interest to an efficient and fair system of international dispute settlement. There are strong reasons militating in favour of this proposition: international tribunals, by and large, possess the powers necessary to exercise it; international judges and arbitrators know how to use it; and its long history of applications at the domestic level suggests that it can be employed successfully for a variety of purposes.

We also submit the hunch that comity may most likely be employed as a central principle for further aspects of the coordination of international adjudication, for instance informing the sound use of analogical reasoning and precedent-borrowing process. Further study will be required to assess the potential of comity in this context. We have, so far, restricted ourselves to a simpler and more crucial task, seeking to resituate the principle of comity as one on which to rely for the resolution of different types of conflicts between international jurisdictions, and to question the traditional assumption that it is just an unhelpful complication: its history and rediscovery suggest otherwise.

