

# Comity and International Courts and Tribunals

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## Introduction

In June 2003, a United Nations Convention on the Law of the Sea (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.<sup>1</sup> 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 six); nor was it the one that settled it.<sup>2</sup> 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>3</sup>

Let us keep the tape rolling as we fast-forward a decade. In 2013, an International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunal observed that, while the tribunal was not bound in principle by any rule of precedent, “it should have regard to earlier decisions of courts (particularly the International Court of Justice (ICJ)) and of other international dispute tribunals engaged in the interpretation of the terms of a [Bilateral Investment Treaty].”<sup>4</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 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>5</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. Most legal systems look at the word with some suspicion because there seems to be no end to the debate on its meaning.<sup>6</sup> 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.<sup>7</sup> Yet, this is a concept that can lay claim to a long history, and stubbornly refuses to go away: with some generalizations, 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 sover-

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1. See generally *MOX Plant Case (Ir. v. U.K.)*, (Order No. 3) (Perm. Ct. Arb. June 24, 2003) [hereinafter *MOX Plant Case*].

2. *Id.*

3. *Id.*

4. *Tulip Real Est. Inv. & Dev. Netherlands v. Turkey ICSID Case No. ARB/11/28*, Decision on Bifurcated Jurisdictional Issue, para. 45 (Mar. 5, 2013).

5. *Brit. Caribbean Bank Ltd. v. Gov't Belize (Turks & Caicos Is. v. Belize)*, para. 187 (Perm. Ct. Arb. Dec. 19, 2014).

6. See Joel R. Paul, *Comity in International Law*, 32 HARV. L. REV. 1, 3-4 (1991).

7. JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 23-24 (8th ed. 2012).

eign state's acts, and restrict themselves from issuing such judgments and orders when to do so would amount to an unjustifiable interference. Whatever one thinks of it, comity is widely referred to in the case law of domestic courts.<sup>8</sup> And of more immediate relevance for our purposes, there are indications that it may be resurfacing in the context of international adjudication.<sup>9</sup> 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.

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>10</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>11</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>12</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>13</sup>

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 I deals with the concept of comity in private and public international law, briefly considering its development and its modern understanding. In Part II, 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 III we discuss all the publicly available decisions by international courts and tribunals using the term comity and clas-

8. Paul, *supra* note 6, at 2.

9. See generally MOX Plant Case, *supra* note 1.

10. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, P 11 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995). See also J. Pauwelyn & L.E. Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 84 (2009).

11. See Chester Brown, *The Evolution and Application of Rules Concerning Independence of the International Judiciary*, 2 LAW & PRAC. INT'L CTS. & TRIBUNALS 63, 64 (2003); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U.J. INT'L L. & POL. 709, 752 (1999).

12. See CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 33-34 (Philippe Sands et al. eds., 2007); see also YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 73-74 (Philippe Sands et al. eds., 2003).

13. Yuval Shany, *Similarity in the Eye of the Beholder: Revisiting the Application of Rules Governing Jurisdictional Conflicts in the Lauder/CME Cases*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2007 136 (Arthur W. Rovine ed., 2008).

sify them before finally pulling the threads together.<sup>14</sup>

## I. 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>15</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 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 how 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>16</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>17</sup> In the English language, the term indicates courtesy and considerate behaviour towards others,<sup>18</sup> or “a loose widespread community based on common social institutions.”<sup>19</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 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 short-

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14. 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 Agreement on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 3-4, 1998, U.S.-E.C., art. III.

15. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 73 (2002).

16. Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, HARV. L. REV. 361, 374 (1945).

17. *Comitas*, A LATIN DICTIONARY FOR SCHOOLS (1879); *Comitas* DIZIONARIO-ITALIANO-LATINO.

18. *Definition of “comity,”* OXFORD DICTIONARIES ONLINE, <http://www.oxforddictionaries.com/definition/english/comity> [https://perma.cc/HBL6-8N3M].

19. *Comity*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

hand 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.<sup>20</sup> Accordingly, it is customary to focus on them to explain what international law is *not*.<sup>21</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.<sup>22</sup> Bindingness and normativity are two different things.<sup>23</sup> As Hedley Bull pointed out, “order in social life is very closely connected with the conformity of human behaviour to [normative] rules of conduct, if not necessarily to [binding] rules of law.”<sup>24</sup> This is surely the case of rules of comity, which too arise from repetition of conduct—conduct which, however, is carried out in the belief that is not mandated by a rule of international law.<sup>25</sup> In the real world, rules of comity are routinely complied with.<sup>26</sup> This may result, as Hersch Lauterpacht put it, in a rule of comity “acquiring the complexion” of rules of customary international law.<sup>27</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>28</sup> Questions of immunity, for instance, largely fall into this category.<sup>29</sup> Where comity constitutes the basis of a rule of inter-

20. Paul *supra* note 6, at 79.

21. CRAWFORD, *supra* note 7, at 23–24; LASSA OPPENHEIM, OPPENHEIM’S INTERNATIONAL LAW 1, 51 (Robert Jennings & Arthur Watts eds., 9th ed. 2008); MALCOLM N. SHAW, INTERNATIONAL LAW 2 (7th ed. 2014); Hugh Thirlway, *The Sources of International Law*, in 91 MALCOLM D. EVANS, INTERNATIONAL LAW 99 (2014).

22. Gerald J. Postema, *Custom in International Law: A Normative Practice Account*, in THE NATURE OF CUSTOMARY LAW, 285 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007).

23. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 6 (2002).

24. *Id.*

25. For a helpful discussion of comity and custom see Postema, *supra* note 22, at 285.

26. *Id.*

27. 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 43–44 (Elihu Lauterpacht ed., 1970); CRAWFORD, *supra* note 7, 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).

28. 1 LASSA OPPENHEIM, 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, *supra* note 21, at 51.

29. *Schooner Exchange v. McFaddon*, 11 U.S. 116, 134 (1812); Hazel Fox, *International Law and Restraints on the Exercise of Jurisdiction by National Courts of States*, in

national 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>30</sup> Reliance on the principle is, in any event, limited to elucidating the meaning and purpose of the rule itself.<sup>31</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>32</sup> With the development of the Westphalian system, territorial 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.<sup>33</sup> Still, the transnational commercial relations that flourished on the European continent were not ready for such rigidity.<sup>34</sup> Accordingly, comity was developed as a doctrine intended to mitigate the ill-effects of strict territoriality.<sup>35</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>36</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 postulat-

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INTERNATIONAL LAW, 344 (Malcolm Evans ed., 2010); Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT. LAW 853, 870-71 (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 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, 96-97 (James Fawcett ed., 2002).

30. Kämmerer, *supra* note 27, § 8.

31. See e.g., *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 III.

32. 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’L 571, 573 (2012).

33. *Id.* at 576-77.

34. See 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. INT’L L. 7, 10 (1984).

35. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW, 150 (2d ed. 2015).

36. JOHANNES VOET, COMMENTARIUS AD PANDECTAS. (1698); PAULUS VOET, DE STATUTIS EORUMQUE CONCURSU LIBER SINGULARIS (1661).

ing that state authorities could have applied foreign laws to govern private interactions, “so far as they do not cause prejudice to the power or rights” of the state concerned.<sup>37</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>38</sup> Huber’s understanding of international law was 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.<sup>39</sup> It was comity’s discretionary component, however, that had the most significant impact, especially in the common law world.<sup>40</sup> Lord Mansfield in England and Joseph Story in the United States realized 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>41</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>42</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 comity as “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other.”<sup>43</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>44</sup>

## 2. *Current Uses of Comity*

With the unfolding of the positivist revolution, comity ceased to be considered a suitable basis for private international law.<sup>45</sup> Yet, as Lawrence Collins noted in 2002, the use of the term by the judiciary remains

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37. This translation appears in ERNEST GUSTAV LORENZEN, HUBER’S DE CONFLICTU LEGUM, in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 139 (1947). See also the text in Ernest G. Lorenzen, *Story’s Commentaries on the Conflict of Laws: One Hundred Years after*, 48 HARV. L. REV. (1934); Paul *supra* note 6, at 15–16.

38. DE NOVA, *supra* note 34, at 449.

39. *Id.* at 450.

40. *Id.*

41. ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 38 (1992).

42. 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) (quoting SAMUEL LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS 28 (1828)).

43. *Hilton v. Guyot*, 159 U.S. 113, 143 (1895).

44. *Id.*

45. CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, (James Fawcett et al. eds., 14th ed. 2008); Collins refers in particular to the description of comity as “grating

extensive, regardless how much it is frowned upon in textbooks.<sup>46</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>47</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>48</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.<sup>49</sup> 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 performs in its territory—and does not necessarily fit well with the other two categories.<sup>50</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>51</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>52</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 counseling 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 cases of international litispence (actual or simply foreseen) and a significant parameter for the granting of anti-suit injunctions.<sup>53</sup>

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to the ear when it proceeds from a court of law.” Collins, *supra* note 29, at 96–97. The phrase is Samuel Livermore’s, *supra* note 42, at 39.

46. See Collins, *supra* note 29, at 96–97.

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

48. HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* 6, 80, 102 (2008); Donald Earl III Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 48 (2010).

49. KOH, *supra* note 48.

50. *Id.*; Childress, *supra* note 48, at 48. 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 L.J.* 2347, 2357 (1991).

51. Childress, *supra* note 48, at 60.

52. Briggs, *supra* note 47, at 89.

53. On the operation of comity, see Childress, *supra* note 48; Paul, *supra* note 6; Joel R. Paul, *The Transformation of International Comity*, 71 *LAW & CONTEMP. PROBS.* 19, 36–37 (2008); Thomas Schultz & Jason Mitchenson, *Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts*, 12 *J. PRIV. INT’L LAW* (2016).

Comity, not entirely unlike equity, operates *infra* and *praeter legem*, but never overrides a command of the sovereign.<sup>54</sup> In practice, while the transnational regulatory web has become denser, 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>55</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>56</sup> to support transnationally consistent interpretations of international instruments (public or private alike),<sup>57</sup> and, more generally, to further the “mutual interests of all nations in a smoothly functioning international legal regime.”<sup>58</sup>

Moreover, comity constitutes a key concept for understanding judicial networks. Anne-Marie Slaughter has convincingly relied on this notion to explain certain dynamics.<sup>59</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>60</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.<sup>61</sup>

To be sure, Slaughter’s theory is not without its critics and it has been

54. Briggs, *supra* note 47, at 87.

55. ELISA D’ALTERIO, LA FUNZIONE DI REGOLAZIONE DELLE CORTI NELLO SPAZIO AMMINISTRATIVO GLOBALE 190 (2011); Briggs, *supra* note 47.

56. 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 U.S. 614, 615 (1985). The decision was also cited in *ADF Group Inc. v. United States ICSID Case No. ARB (AF)/00/1, Award*, P 15 (Jan. 9, 2003).

57. Paul, *supra* note 6; Schultz & Mitchenson, *supra* note 53. Thomas Schultz & Niccolò Ridi, *How Comity Makes Transnationalism Work* (King’s College London Dickson Poon School of Law Paper No. 2017-14, 2017), <https://ssrn.com/abstract=2897538>.

58. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 555 (1987).

59. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 87 (2004). Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 194 (2003) [hereinafter *Global Community*]; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1112–13 (1999) [hereinafter *Judicial Globalization*].

60. *Global Community*, *supra* note 59, at 211, 206.

61. *Judicial Globalization*, *supra* note 59, at 206.

suggested that it is, to a large extent, quite starry-eyed.<sup>62</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.<sup>63</sup> 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.<sup>64</sup> Such a theory of comity underscores the importance of balancing efforts, and is hardly “arbitrary and dangerous” as the traditional critique has often suggested.<sup>65</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.<sup>66</sup> 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.

## II. 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.<sup>67</sup> Its re-emergence, however, is linked to a specific phenomenon: the proliferation of international courts and tribunals.<sup>68</sup> In this context, the concept of comity

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62. Alex Mills & Tim Stephens, *Challenging the Role of Judges in Slaughter's Liberal Theory of International Law*, 18 LEIDEN J. INT'L L. 1, 3 (2005).

63. *Global Community*, *supra* note 59, at 192-93.

64. *Id.* at 206.

65. T.H. HEALY, *Théorie générale de l'ordre public*, in 9 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL (1925) 411, 433; see Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 70 (1991).

66. Elisa D'Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disaster?* 9 INT'L J. CONST. L. 394, 396 (2011).

67. Paul, *supra* note 6, at 5-6, 50-51.

68. CAMPBELL McLACHLAN, *LIS PENDENS IN INTERNATIONAL LITIGATION* 299, 421 (2009).

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 is likely one of the most significant developments to have ever occurred 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>69</sup> A burgeoning and spread of international courts and tribunals resulted, differing in their mandates, the rules they apply, the status of the parties to the disputes they 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>70</sup> Proliferation is a divisive topic. For some, a numerous and diverse set of judicial institutions may better serve the interests of justice, efficiency, and party autonomy, because different approaches to the same matters can ultimately spark legal development.<sup>71</sup> Others contend that proliferation is a reason for concern, both for the parties to the dispute and the international legal system as a whole.<sup>72</sup> 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>73</sup> Conflicts may occur between international courts and tribunals and their counterparts, but can also easily involve national courts.<sup>74</sup> 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, “general international law does not provide for jurisdiction-regulating rules.”<sup>75</sup> Second, in most cases the treaties establishing international courts and tribunals do not expressly provide rules governing their relationships with the jurisdictions

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69. BROWN, *supra* note 13, at 15–21; Geir Ulfstein, *International Courts and Judges: Independence, Interaction, and Legitimacy*, N.Y.U.J. INT'L L. & POL. 849, 857 (2014).

70. 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.U.J. INT'L L. & POL. 791, 794–95 (2006).

71. Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 447–48 (2007).

72. Gilbert Guillaume, *Advantages and Risks of Proliferation: A Blueprint for Action*, 2 J. INT'L CRIM. JUST. 300, 301 (2004).

73. *Id.*; see Martti 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, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

74. See YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS 75 (2007).

75. BROWN, *supra* note 12, at 29.

of their counterparts or national jurisdictions.<sup>76</sup> Third, jurisdictional provisions of individual international courts and tribunals are characterized by some degree of rigidity: as James Crawford puts it, it is precisely this lack of elasticity that produces the problems generally blamed on the proliferation phenomenon.<sup>77</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>78</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.<sup>79</sup> 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 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>80</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>81</sup>

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76. McLACHLAN, *supra* note 68, at 44.

77. JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW, THE GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 211 (2014).

78. BROWN, *supra* note 12, at 29; SHANY, *supra* note 74, at 179–81; VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS: JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION 117, 117 (2013); D’Alterio, *supra* note 66, at 416.

79. LIPSTEIN, *supra* note 32, at 14.

80. CRAWFORD, *supra* note 7, at 485.

81. McLACHLAN, *supra* note 68, at 41.

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>82</sup> However, despite some advocacy of a more central role for the International Court of Justice,<sup>83</sup> no tribunal currently holds such a central function,<sup>84</sup> and indeed one should recall that when the problem concerns international tribunals, “the notion of a court of a court of general jurisdiction is an inapt analogy.”<sup>85</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.<sup>86</sup>

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>87</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>88</sup> Sovereignty-based arguments may cut both ways, but at least they are useful in justifying different types of “deferential review” concerning the acts of a state.<sup>89</sup>

82. Shany, *supra* note 13, at 29.

83. 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, see U.N. Charter art. 95, para. 1.

84. Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U.J. INT'L L. & POL. 791, 798-99 (1998); see generally Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT'L COMP. L.Q. (2006); Ulfstein, *supra* note 69, at 849-50.

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

86. See Romano, *supra* note 70, at 848.

87. SABINO CASSESE, I TRIBUNALI DI BABELE. I GIUDICI ALLA RICERCA DI UN NUOVO ORDINE GLOBALE 87-88 (2009).

88. For an example of an arbitral tribunal that established its jurisdiction to hear the case, but stayed its proceedings in favor 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, see *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, *Objections to Jurisdiction*, (Jan. 29, 2004) 8 Rep. 518 (2005) [hereinafter *Société Générale v. Philippines*]; Michael Waibel, *Coordinating Adjudication Processes*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE, 505 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014); SHANY, *supra* note 74, at 74-76. One of the arbitrators of the case 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'L DISPUTE SETTL. 3, 22 (2010). On the distinction between jurisdiction and admissibility, see generally Jan Paulsson, *Jurisdiction and admissibility*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW COMMERCE AND DISPUTE RESOLUTION 601 (Gerald Asken et al. eds., 2010).

89. The margin of appreciation doctrine has been considered one such example, see SHANY, *supra* note 74, at 185.

## 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>90</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>91</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 impairment principle.”<sup>92</sup> With some simplification, the first requires the interpreter to look to the specific policy goals underlying the provisions to be applied.<sup>93</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>94</sup>

The main problem with these conflicts 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.<sup>95</sup> 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>96</sup> More to the point, it addresses questions relating to overlaps

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90. 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* 8-10 (2003).

91. C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BR. Y.B. INT’L L. 401, 403 (H. Lauterpacht ed., 1953); see also Joel P. Trachtman, *Institutional Linkage: Transcending “Trade and . . .”*, 96 AM. J. INT’L L. 77 (2002).

92. See generally William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963) (explaining the principle of comparative impairment).

93. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 584-628 (1963). For a concise critique of this approach, see PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 251-52 (2012).

94. On the principle of comparative impairment, see DIRK PULKOWSKI, *THE LAW AND POLITICS OF INTERNATIONAL REGIME CONFLICT* 333-34 (2014); see generally Baxter, *supra* note 92.

95. MARGARET A. YOUNG, *Introduction: The Productive Friction Between Regimes, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* 1, 1-2 (Margaret A. Young ed., 2012).

96. *Id.* at 23.

of these areas and their conflicts, and methods with which certain agents—such as international organisations—should engage in interaction and accommodation, and the basis of any such power to do so.<sup>97</sup> 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>98</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 behavior. 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>99</sup> Still, as the authors continue, there is no “informing meta-principle” from which easy answers can be drawn.<sup>100</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>101</sup>

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>102</sup> Comity is one such principle—or “meta-principle.”<sup>103</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 provide justice in individual cases.<sup>104</sup>

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97. *Id.*

98. Crawford & Nevill, *supra* note 85, at 250.

99. *Id.*; PHILIPPA WEBB, *INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION* 203-04 (2013).

100. Crawford & Nevill, *supra* note 85, at 259.

101. MARGARET A. YOUNG, *TRADING FISH, SAVING FISH: THE INTERACTIONS BETWEEN REGIMES IN INTERNATIONAL LAW* 276, 276-77 (2011).

102. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 6 (1956).

103. Crawford & Nevill, *supra* note 85, at 243.

104. CRAWFORD, *supra* note 77, at 208.

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>105</sup> Still, there is little doubt that international adjudication has overcome its quasi-arbitral beginnings,<sup>106</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>107</sup>), community interests (or something much akin to them) are at stake.<sup>108</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 profession calls for.<sup>109</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.<sup>110</sup> With this in mind, comity can be employed to ease other types of conflict. For example, comity could act 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>111</sup>

105. Andreas Paulus, *International Adjudication*, in THE PHILOSOPHY OF INTERNATIONAL LAW 207, 221 (Samantha Besson & John Tasioulas eds., 2010); see generally ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1995) (detailing law and process perspective); W. Michael Reisman, ‘Case Specific Mandates’ versus ‘Systemic Implications’: How Should Investment Tribunals Decide?: *The Freshfields Arbitration Lecture*, 29 ARB. INT’L 131 (2013) (arguing that save for a few narrow exceptions international investment tribunals should confine themselves to a case-specific methodology).

106. Paulus, *supra* note 105, at 223.

107. Thomas Schultz, *Against Consistency in Investment Arbitration*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 297, 297–98 (Zachary Douglas, et al. eds., 2014).

108. On community interests, see Bruno Simma, *From Bilateralism to Community Interest in International Law*, RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 1994, at 217, 235–43 (outlining international peace and security, solidarity between developed and developing countries, protection of the environment, the “common heritage” concept, international concern with human rights, as community interests we should keep at the forefront of international law).

109. PULKOWSKI, *supra* note 94; Crawford & Nevill, *supra* note 85, at 249; Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT’L. L. 265, 275–79, 289 (2009).

110. Paul, *supra* note 53, at 22.

111. On this type of regime interaction and the implications for international governmental organizations (as a possible analogy), see YOUNG, *supra* note 101 at 279; see generally José E. Alvarez, “Beware: Boundary Crossings”—A Critical Appraisal of Public Law Approaches to International Investment Law, 17 J. WORLD INV. & TRADE 171 (2016) (discussing different kinds of complications inherent in boundary crossing); see YOUNG, *supra* note 101, at 279.

### 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 alleviate the ill effects that derive 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>112</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>113</sup> The latter species of jurisdictional clauses may be chosen for the purpose of limiting, to some extent, unilateral forum shopping.<sup>114</sup> In contrast, very few instruments include rules intended to coordinate multiple proceedings and, more broadly, mediate conflicts.<sup>115</sup>

Some have argued that, in the absence of a hierarchical system, the instruments to achieve these results are to be found outside the framework of their own legal order.<sup>116</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.<sup>117</sup> Its applicability in international adjudication is well

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112. SHANY, *supra* note 12, at 180.

113. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 282 (“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, 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.”).

114. SHANY, *supra* note 12, at 202–04.

115. 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 (quoting African (Banjul) Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982)).

116. McLACHLAN, *supra* note 68, at 346.

117. Waibel, *supra* note 88, at 522.

accepted,<sup>118</sup> though recent judicial practice demonstrates that there still is some degree of uncertainty as to its practical operation.<sup>119</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>120</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>121</sup> Further, especially in investment arbitration, it is quite possible that multiple arbitrations will be initiated by formally different entities.<sup>122</sup> As a consequence, there is a renewed interest in less restrictive doctrine such as issue estoppel.<sup>123</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.<sup>124</sup> Compared to *res judicata*, its applicability in international adjudication does not enjoy the same widespread support.<sup>125</sup> Overall, the number of cases involving the principle has been comparatively low, and no tribunal has authoritatively pronounced on the issue.<sup>126</sup> Further, the status of *lis pendens* as a general principle of law has been disputed on the grounds that it is mainly a civil law doctrine,<sup>127</sup> and, it too requires the satisfaction of a strict triple identity test.<sup>128</sup>

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118. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) 2007 I.C.J. Rep. 43, at 89–93, paras. 115–20 (Feb. 26); see also BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 336 (1994); Shany, *supra* note 13, at 245; Pauwelyn & Salles, *supra* note 10, at 102; August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 LAW & PRAC. INT’L CTS. & TRIB. 37, 44–45 (2004).

119. For example, see Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicar. v. Colom.), Judgment, 17 (Mar. 2016), available at <http://www.icj-cij.org/files/case-related/154/154-20160317-JUD-01-00-EN.pdf> [https://perma.cc/BYZ2-9YFF].

120. Factory at Chorzów (Ger. v. Pol.) 1927 PCIJ (ser. A) No. 13, 4, at 23 (dissenting opinion of Ehrlich, J.); Pauwelyn & Salles, *supra* note 10, at 103.

121. Pauwelyn & Salles, *supra* note 10, at 104.

122. Waibel, *supra* note 88, at 523.

123. *Id.*

124. *Id.* at 523–25.

125. Reinisch, *supra* note 118, at 44–45 (justifying the principle as a corollary of *res judicata*); see McLACHLAN, *supra* note 7, at 57–58 (arguing that the principle should be applied, and that it does not import a strict “first seized” requirement). *But see* CRAWFORD, *supra* note 77, at 384; SHANY, *supra* note 12, at 220 (arguing that the status of the principle is still unclear).

126. McLACHLAN, *supra* note 68, at 180–87; CRAWFORD, *supra* note 77, at 384. See generally Certain German Interests in Polish Upper Silesia, 1925 P.C.I.J. (ser. A) No. 6 (discussing, but failing to pronounce on the issue because the “triple identity test” was not satisfied).

127. Gilles Cuniberti, *Parallel Litigation and Foreign Investment Dispute Settlement*, 21 ICSID REV. FOREIGN INV. L.J. 381, 383 (2006).

128. Pauwelyn & Salles, *supra* note 10, at 110.

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>129</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>130</sup> This proposition is not entirely convincing, and does not take into account other adverse effects of duplicative litigation on any given dispute.<sup>131</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>132</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, they adopt a decision not to exercise a jurisdiction that they indubitably have.<sup>133</sup> 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>134</sup> The same applies in international adjudication, where coordinating efforts have been broadly labelled as exercises in avoidance and temporization.<sup>135</sup>

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, remain the exception.<sup>136</sup> Things tend to be different for international tribunals: do they or do they not have the power to stay or dismiss proceed-

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129. *Factory at Chorzów* (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, 30 (July 26); Cuniberti, *supra* note 129, at 143.

130. Pauwelyn & Salles, *supra* note 10, at 108.

131. Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, *STAN. L. REV.* 595, 595-98 (2007) (arguing the creation of a plurality of fora along “narrow functionalist lines” and their overlapping authority is detrimental to weaker states).

132. Pauwelyn & Salles, *supra* note 10, at 109; Waibel, *supra* note 88, at 518.

133. Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 *U.C. DAVIS L. REV.* 11, 47-48 (2010).

134. A. Pillet, *Théorie Continentale des Conflits de Lois*, 2 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* 451, 472 (1924); see Pulkowski, *supra* note 94, at 330-31.

135. Jeffrey L. Dunoff, *A New Approach to Regime Interaction*, in *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* 136, 156 (Margaret A. Young ed., 2012).

136. Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 *SUP. CT. REV.* 267, 268-69 (2001).

ings? To be sure, it is possible for such a power to be provided for expressly.<sup>137</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.”<sup>138</sup>

One possible solution is to qualify comity as a principle of international law<sup>139</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>140</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>141</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 principle of comity does not enjoy universal acceptance at the domestic level seems to militate against its inclusion in the second.<sup>142</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>143</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>144</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.<sup>145</sup> Their exercise is thus to be considered possible, if exceptional.<sup>146</sup> In other words, in this approach, inherent pow-

137. SHANY, *supra* note 74, at 172.

138. See Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 BRIT. Y.B. INT'L L. 195, 198 (2006).

139. We accept the definition employed by Crawford: “certain logical propositions underlying judicial reasoning on the basis of existing international law.” See CRAWFORD, *supra* note 21, at 37.

140. See Statute of the International Court of Justice, art. 38, para. 1; SHANY, *supra* note 74, at 261.

141. BROWN, *supra* note 12, at 37; SHABTAI ROSENNE, 1 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 486 (1965).

142. SHANY, *supra* note 74, 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. See BROWN, *supra* note 140, at 198-205; see generally CHENG, *supra* note 120 (discussing general principles of law).

143. CRAWFORD, *supra* note 21, at 40.

144. Legality of Use of Force (Serb. & Montenegro v. Belg.), Separate Opinion of Judge Higgins, 2004 I.C.J. para. 11 (Dec. 15) [hereinafter *Use of Force*], (discussing the possibility of summarily dismissing abusive claims). See Brown, *supra* note 12, at 249. *Contra* Northern Cameroons (Cameroon v. U.K.), Judgment, 1963 I.C.J. 15, 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.”).

145. See *Use of Force*, *supra* note 144, at para. 12.

146. *Id.* at para.12. For the Court to discharge itself from carrying out the primary 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.” Caroline Henckels, *Overcoming Jurisdictional*

ers 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>147</sup>

The “inherent powers” approach is advantageous for two main reasons: first, it allows rejecting the misconstruction of comity as a jurisdictional rule and qualifying it as a set of principles that should inform the exercise of jurisdiction.<sup>148</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, a provision or a effect of either the constitutive instrument as a whole or the very function of an international tribunal could exclude the existence of an inherent power.<sup>149</sup> It is doubtful, for example, whether an exclusive jurisdictional clause could warrant the exercise of such discretion. By the same token, it is questionable whether certain dispute settlement bodies possess the discretion to stay proceedings.

The case of the WTO dispute settlement mechanism can provide a useful illustration of the problem. Some have questioned the existence of such discretion for the panels for different reasons. For example, some have 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>150</sup> Others have argued for the exclusion of a power to stay proceedings on the grounds of the strict procedures and timeframes the panels must respect.<sup>151</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

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*Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO*, 19 EUR. J. INT’L L. 571, 585 (2008) (quoting Judge Higgins reference to the Court’s dictum, in *Nuclear Tests* (Austl. v. Fr.) 1974 I.C.J., para. 22).

147. Henckels, *supra* note 146, at 585.

148. 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 (Mahmouh H. Arsanjani & Jacob Cogan eds., 2011).

149. Brown, *supra* note 12, at 91.

150. FRIEDL WEISS, *THE WTO DISPUTE SETTLEMENT SYSTEM, 1995-2003*, at 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 World Trade Organization (WTO) Dispute Settlement Understanding (DSU). 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. Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT’L COMP. L.Q. 861, 862 (2004).

151. SHANY, *supra* note 74, at 265.

properly before it.”<sup>152</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 declined to exercise a validly established jurisdiction.<sup>153</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>154</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>155</sup> Such a conclusion seems correct in principle. What is more, it is also buttressed by the recent practice of some international courts and tribunals, which have demonstrated an increasing willingness to suspend proceedings before them.<sup>156</sup> However, the extent to which other tribunals will be willing to do so is still unknown.

### 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>157</sup> Second, and more attractive, its flexible character allows the decision-maker to defer the dispute 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>158</sup> But, one might make the argument 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>159</sup> In contrast, the doctrine of comity simply

152. WTO, Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, paras. 7.4–7.18, WT/DS308/R, Oct. 7, 2005.

153. Panel Report, *Tax Measures on Soft Drinks and Other Beverages*, paras. 51–53, WTO Doc. WT/DS308/AB/R (adopted Mar. 6, 2006).

154. Henckels, *supra* note 146, at 589–95.

155. *Id.* at 595, 597.

156. BROWN, *supra* note 12, at 250–52.

157. SHANY, *supra* note 12, at 74.

158. Pauwelyn & Salles, *supra* note 10, at 92–93; 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'L. ARB. 651 (2012).

159. Pauwelyn & Salles, *supra* note 10, at 83.

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." 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>160</sup> In contrast, the members of an 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>161</sup>

And, of course, even then mistakes may be made. For example, 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>162</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.<sup>163</sup> It is thus arguable that, had the tribunal decided otherwise, its exercise of jurisdiction would not have infringed comity as no one had initiated proceedings; perhaps, most importantly—the risk of leaving Ireland without *any* proceedings against the United Kingdom was a real one.<sup>164</sup>

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160. See Guillaume, *supra* note 72, at 391; Romano, *supra* note 71, at 80.

161. See Thomas Schultz, *Arbitral Decision-Making: Legal Realism and Law & Economics*, 6 J. INT'L DISP. SETTLEMENT. 231, 241-42 (2015).

162. *MOX Plant Case* (Order No. 4) (Perm. Ct. Arb. June 24, 2003).

163. McLACHLAN, *supra* note 68, at 334.

164. 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 68, at 334. For a different narrative, against the idea that the European Court proceeded some sort of usurpation, see Crawford & Nevill, *supra* note 85, at 254.

### III. 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, which use comity.

#### A. Comity as Opposed to “Legal Obligations”

First of all, in some of the 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 “in practice States accord deference to the twelve-mile limit as a matter of legal obligation and not merely as a matter of reciprocal tolerance or comity.”<sup>165</sup>

In *Nuclear Tests (Australia v. France)* the concept was only mentioned in passing in Judge 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 the atmosphere of the South Pacific.”<sup>166</sup> In his opinion, there was a legal dispute and that the Court’s finding that Australia application had no object was incorrect.<sup>167</sup>

Again, in *Avena*, the issue of comity was raised in Mexico’s argument at the provisional measures stage.<sup>168</sup> On the basis of a declaration by the President of the United States to the effect that the nation will “discharge its international obligations under the decision of the International Court of Justice . . . in accordance with general principles of comity.”<sup>169</sup> Mexico argued that the United States’ reference to comity made clear that it did not believe to have any legal obligation.<sup>170</sup> The Court did not address the issue.<sup>171</sup> 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>172</sup>

The European Court of Human Rights espoused a similar interpretation of the term in *Mamatkulov*.<sup>173</sup> In this case, the Court observed that previous practice had described the practice of complying with interim

165. *Fisheries Jurisdiction (U.K. v. Ice.)* Separate Opinion of Judge Dillard, 1974 I.C.J. 3, 58 (July 25).

166. *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 253, 446 (Dec. 20) (Barwick, J. dissenting).

167. *Id.*

168. Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2009 I.C.J.311 (Jan. 19) [hereinafter Request for Interpretation]. See also Request for Interpretation, (Judge Buergenthal dissenting).

169. I.C.J., Written Observations of the United States of America on the Application for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)* (Aug. 29, 2008), at 1-2.

170. *Id.*

171. See generally Request for Interpretation, *supra* note 168.

172. *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. 99 para. 53 (Feb. 3).

173. *Mamatkulov v. Turkey*, 2005-I Eur. Ct. H.R. 293, 349.

measures as “a matter of expediency and comity.”<sup>174</sup>

### 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>175</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>176</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>177</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>178</sup> The Court quickly dismissed the argument, stating that it amounted to questioning the Community’s jurisdiction to apply its competition rules.<sup>179</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 of legal proceedings there.<sup>180</sup> The Court did not address the claim, and dismissed it on other grounds.<sup>181</sup> 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>182</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*

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174. *Id.*

175. *Loewen Group Inc. v. United States*, ICSID Case No. ARB (AF)/98/3, Award, para. 230 (June 26, 2003).

176. *Id.*

177. Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125-29/85 (Wood Pulp Cases), *Ahlström Osakeyhtiö v. Commission of European Communities*, 1993 I-01307 ECR 1307.

178. *Id.* at para. 524.

179. *Id.*

180. Case C-60/81, *IBM v. Comm’n*, [1981] E.C.R. 2639, 2650.

181. *Id.* at 2655.

182. Case T-406/08, *Industries chimiques du fluor (ICF) v. Comm’n* [2013] E.C.R. 00000 (June 18), [http://curia.europa.eu/juris/celex.jsf?celex=62008TJ0406&lang1=en&type=TEXT&ancre=\[https://perma.cc/6Q87-F5MB\]](http://curia.europa.eu/juris/celex.jsf?celex=62008TJ0406&lang1=en&type=TEXT&ancre=[https://perma.cc/6Q87-F5MB]); *Wallishauser v. Austria*, App No. 156/04, Eur. Ct. H.R. (July 17, 2012), <http://hudoc.echr.coe.int/eng?i=001-112194> [<https://perma.cc/4CC7-GTRU>].

*Properties*.<sup>183</sup> The dispute at issue had been referred to arbitration before the International Chamber of Commerce and only later ICSID proceedings were initiated.<sup>184</sup> 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.<sup>185</sup> 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.”<sup>186</sup> 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>187</sup>

Questions relating to comity were considered again in the *MOX Plant* case.<sup>188</sup> There the Permanent Court of Arbitration (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>189</sup> Such an occurrence would have excluded the Tribunal’s jurisdiction under Article 282 of the UNCLOS.<sup>190</sup> 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>191</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 litispence, as well as considerations of economy of legal activity and of comity between courts and tribunals’ had not been included in the order.”<sup>192</sup>

Comity arguments were also raised in *Itera International Energy*.<sup>193</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.<sup>194</sup> These proceedings had been initiated by the claimant and had been going on for three years.<sup>195</sup> 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>196</sup>

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183. *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, Decision on Jurisdiction, ICSID Case No ARB/84/3 (Nov. 1985).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *MOX Plant Case* (Order No. 3) (Perm. Ct. Arb. June 24, 2003).

189. *Id.*

190. *Id.*

191. *MOX Plant Case*, Separate Opinion of Judge Treves.

192. *Id.* at para. 5.

193. *Itera International Energy LLC & Itera Group NV v. Georgia*, Admissibility of Ancillary Claims, ICSID Case No ARB/08/7 (Dec. 3, 2009).

194. *Id.*

195. *Id.*

196. *Id.* at para. 81.

Eventually, the claims were not found to arise from the same dispute and the Tribunal did not address the issue of comity.<sup>197</sup>

The issue of comity was raised again in *Achmea*.<sup>198</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.<sup>199</sup> 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 [Bilateral Investment Treaty].”<sup>200</sup> Ultimately, the Tribunal concluded that while the it 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 at issue “so far coextensive with the claims in the present case” to warrant a suspension of the proceedings.<sup>201</sup> Yet, the tribunal left open the possibility of a later 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>202</sup>

Finally, questions concerning comity and the management of multiple proceedings were discussed, rather thoroughly, in *British Caribbean Bank*.<sup>203</sup> In that case, the Respondent 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>204</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.”<sup>205</sup> However, the Tribunal also observed that any such discretion “must be carefully exercised,” for to do otherwise would have amounted to “[permitting] 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>206</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

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197. *Id.* at para. 100.

198. *Achmea B.V. v. The Slovak Republic*, UNCITRAL, Case No. 2008-13 (Perm. Ct. Arb. 2008).

199. *Id.* at paras. 148-50.

200. *Id.* at paras. 195-96.

201. *Id.* at para. 292.

202. *Id.*

203. *British Caribbean Bank Limited (Turks & Caicos) v. Gov’t of Belize*, PCA Case Repository No. 2010-18 paras. 179, 187 (Perm. Ct. Arb. 2014).

204. *Id.* at para. 179.

205. *Id.* at para. 187.

206. *Id.*

included in a contract (as in *Société Générale de Surveillance* (“SGS”) or the exclusive jurisdiction vested in a certain forum by a treaty.<sup>207</sup> What is more, its determinations did not depend from the result of any action before the domestic court, and, even then, none were currently pending.<sup>208</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>209</sup> The question concerned certificates of nationality issued by the Italian government.<sup>210</sup> 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.<sup>211</sup> 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>212</sup> Nabulsi went on to ask whether the “Act of State” doctrine applied to the issue.<sup>213</sup> 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.<sup>214</sup> He answered the question in the negative, finding that the doctrine did not apply to international tribunals whose jurisdiction depends on the parties’ nationality.<sup>215</sup> So the power of the tribunal to go beyond official certificates was not up for debate.<sup>216</sup> 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>217</sup>

A similar reference to comity and evidence, though dealing with a qualitatively different issue, was made in *Tokios Tokelės* (also an investment arbitration).<sup>218</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>219</sup>

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207. *Id.* at para. 188.

208. *Id.* at para. 189.

209. *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Separate Opinion and Statement of Dissent by Omar Nabulsi (June 5, 2007).

210. *See id.* at para. 36.

211. *See id.* at para. 51.

212. *Id.* at para. 62.

213. *See id.* at 84.

214. *Id.*

215. *See id.*

216. *See id.*

217. *Id.*

218. *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Award (July 26, 2007).

219. *Id.* at para. 124.

In *CCL*, a commercial arbitration decided by a Stockholm Chamber of Commerce Tribunal, the issue of comity was raised with reference to the possibility of reviewing the conduct of a foreign state.<sup>220</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.<sup>221</sup> The Tribunal “should at least give the sovereign, non-commercial acts of Kazakhstan the deference that comity requires.”<sup>222</sup> The claimant was 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.”<sup>223</sup> A tribunal not being a sovereignty state, it followed that the reference to comity was misplaced.<sup>224</sup> The Tribunal tagged along, holding that the concept of comity had no applicability in arbitration.<sup>225</sup> 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.”<sup>226</sup> 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>227</sup>

While less straightforward, the reference to comity in the Second Procedural Order in *ADF* can also be included under this heading.<sup>228</sup> 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>229</sup> In particular, the Tribunal relied on the deferential approach epitomised in *Mitsubishi v Soler*, which we discussed *supra*, I B. 3.<sup>230</sup>

A comity argument was again raised by the respondent state in *Rail-*

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220. *CCL v. Kazakhstan*, SCC Case No. 122/2001, 1 SIAR 123, Jurisdictional Award (Jan. 1, 2003).

221. *Id.* at para. 138.

222. *Id.*

223. *Id.*

224. *See id.*

225. *See id.*

226. *Id.*

227. *See id.* at para. 139.

228. *See generally* *ADF Group Inc. v. United States*, ICSID Case No ARB(AF)/00/1, Procedural Order No. 2 Concerning Place of Arbitration (July 1, 2001).

229. *See id.* at para. 9.

230. *See id.* at para. 14.

road Development Corporation.<sup>231</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.<sup>232</sup> Guatemala maintained that this process was not in itself contrary to the minimum standard of treatment.<sup>233</sup> 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>234</sup> The investment arbitral tribunal dodged the issue of comity and merely found that the procedure had been abused.<sup>235</sup>

A similar argument was raised by one of the parties in *Hesham T.M. Al Warraq*.<sup>236</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>237</sup> Accordingly, "[t]he principle of comity alone" required the Tribunal to act on the presumption that the Indonesian Court had acted properly.<sup>238</sup>

More recently, comity arguments were also considered by a PCA tribunal in *Chevron and Texaco v. Ecuador*.<sup>239</sup> The decision on Track 1B is 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."<sup>240</sup> 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."<sup>241</sup> Such an approach, the Tribunal was eager to remark, "would extend beyond courtesy, comity and due respect for the Respondent's judicial branch."<sup>242</sup> Ultimately, the Tribunal 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>243</sup>

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231. *R.R. Dev. Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, para. 75 (June 29, 2012).

232. *See id.* at para. 41.

233. *See id.* at para. 73.

234. *Id.* at para. 175.

235. *Id.* at para. 233.

236. *Hesham T.M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, para. 405 (Dec. 15, 2014).

237. *Id.*

238. *Id.*

239. *Chevron Corp. v. Republic of Ecuador*, PCA Case No 2009-23, Decision on Track 1B, para. 102 (Mar. 12, 2015).

240. *Id.*

241. *Id.* at para. 140.

242. *Id.*

243. *Id.*

### 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>244</sup> The parties had referred the Tribunal to prior decisions of various international judicial bodies.<sup>245</sup> Here is what the Tribunal thought of it: “[a]lthough not bound by such citations . . . as a matter of 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 [Bilateral Investment Treaty].”<sup>246</sup>

Interestingly, the Tribunal also considered issues of hierarchy: the respondent submitted that the Tribunal accord preference to the decisions of the International Court of Justice; the claimant maintained that ICSID tribunal decisions were more relevant.<sup>247</sup> The Tribunal concluded that both sources could inform its interpretation of the terms of the BIT according to their rigour and persuasiveness.<sup>248</sup>

### F. Comity as Neighborliness, 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*, Judge Broms mentions comity in a separate opinion, arguing that the dispute at issue could be resolved by the use of negotiations if the parties negotiated “in the best Nordic spirit of comity and co-operation.”<sup>249</sup> Nordic spirits notwithstanding, it is hard to ascribe any certain meaning, beyond the general idea of co-operation, to this invocation of comity.

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 to access a court.<sup>250</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.<sup>251</sup> Since 2001, the Court has

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244. *Tulip Real Estate Inv. & Dev. Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, paras. 45–47 (Mar. 5, 2013).

245. *Id.* at para. 45.

246. *Id.*

247. *Id.* at para. 46.

248. *Id.* at para. 47.

249. *Passage through the Great Belt (Fin. v. Den.)*, Order, 1991 I.C.J. 12 (July 29).

250. *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 6. Nov. 4, 1950, E.T.S. No. 005, 213 U.N.T.S. 243.

251. *Id.* art. 18.

consistently argued that the grant of sovereign immunity does just that.<sup>252</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>253</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>254</sup>

The concept was also invoked in an unclear fashion in *Certain Questions of Mutual Assistance in Criminal Matters*.<sup>255</sup> The issue of comity was raised in an argument by Djibouti about a witness summons issued under French law to the Djiboutian head of state.<sup>256</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).<sup>257</sup> 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>258</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>259</sup>

More recently, mentions of the principle in the European Court of Human Rights case law have arguably leaned toward 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>260</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>261</sup>

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

252. *Jones and Others v. United Kingdom*, 2014-I Eur. Ct. H.R.1; *Wallishauser v. Austria*, App. No. 156/04 (Eur. Ct. H.R. Nov. 19, 2012), <http://hudoc.echr.coe.int/eng?i=001-112194> [<https://perma.cc/B9KV-3684>]; *Oleynikov v. Russia*, App. No. 36703/04 (Eur. Ct. H.R. Mar. 3, 2013), <http://hudoc.echr.coe.int/eng?i=001-117124> [<https://perma.cc/HNR5-TF3U>]; *Sabeh el Leil v. France*, App. No.34869/0 (Eur. Ct. H.R., June 29, 2011), <http://hudoc.echr.coe.int/eng?i=001-105378> [<https://perma.cc/XK7N-UTZM>]; *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79; *Cudak v. Lithuania*, 2001-XI Eur. Ct. H.R. 121; *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. 157; *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37.

253. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79.

254. *Id.*

255. *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, Judgment, 2008 I.C.J. 177 para. 162 (June 4).

256. *Id.* at para. 162.

257. *Id.* at para. 165.

258. *Vienna Convention on Diplomatic Relations* art. 29, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

259. *Certain Questions of Mutual Assistance in Criminal Matters*, paras. 172-75.

260. *X v. Latvia*, 2013-VI Eur. Ct. H.R. 319 (Judge Albuquerque, concurring).

261. *Stamose v. Bulgaria*, 2012-VI Eur. Ct. H.R. 1.

Commission's argument that "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>262</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 for the protection of workers.<sup>263</sup> The case concerned the closure of a United States military base in the United Kingdom, where 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>264</sup> The Court, however, did not decide the issue on the grounds that it did not have jurisdiction, as the situation did not fall within the scope of the directive.<sup>265</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 tends to be uncommon. We submit that, as long as other solutions are not in place, the principle can be successfully employed to assist international courts and tribunals in mediating jurisdictional conflicts between themselves by 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

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262. *Kadi v. Council*, Case T-315/01, 2005 E.C.R. II-364.

263. *Case C-583/10, United States v. Nolan*, 1 C.M.L.R. 32 (2012).

264. *Id.* at para. 24.

265. *Id.* at para. 25.

assumption that it is just an unhelpful complication: its history and rediscovery suggest otherwise.