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THE COOPERATIVE AND INTEGRATIVE MODELS OF INTERNATIONAL JUDICIAL COMITY: TWO ILLUSTRATIONS USING TRANSNATIONAL DISCOVERY AND BREARD SCENARIOS

Molly Warner Lien

American courts often confront questions of international judicial comity with a reticence that betrays timidity, apprehension, and occasional hostility. In the private law context, many decisions do not reflect the role of our courts as components in an informal global network of courts that resolve transnational commercial, intellectual property, family law, and

1. Comity has been described in many ways. For example, Joseph Story defined it as the "extent of the obligation of the laws of one nation within the territories of another." JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 37 (1834). The Judiciary broadly framed the definition of comity. See, e.g., Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("The extent to which the law of one nation... whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"). The Court continued by describing comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation..." Id. at 164; see also Philips Med. Sys. Int'l B.V. v. Bruetman, 8 F.3d 600, 604 (7th Cir. 1993) ("Comity – the respect that sovereign nations... owe each other – is a traditional, although in the nature of things a rather vague, consideration in the exercise of equitable discretion."); Howe v. Goldcorp Invest., Ltd., 946 F.2d 944, 950 (1st Cir. 1991) (explaining that comity should "help the world's legal systems work together, in harmony, rather than at cross purposes"); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) ([A] nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws."). Foreign courts have also had difficulty fashioning precise definitions. See, e.g., British Airways Bd. v. Laker Airways, Ltd., 3 All E.R. 375, 397 (C.A. 1983) ("Judicial comity is shorthand for good neighborliness, common courtesy and mutual respect between those who labour in adjoining Judicial vineyards.").

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other types of disputes. In the public law context, courts seize on the dualist perspective of the United States to subordinate the determinations and interpretations of international tribunals in favor of domestic norms and practices. Both dualist and

2. Stephen B. Burbank, The World in Our Courts, 89 Mich. L. Rev. 1456, 1456 (1991) (indicating the growing importance of international civil litigation). The amount of transnational litigation, of course, grows at a level commensurate with the degree of globalization in trade. For an interesting attempt at measuring the increases in globalization, see A.T. Kearney, Inc. and the Carnegie Endowment for International Peace, Measuring Globalization, Foreign Pol'y. Jan.–Feb. 2001, at 56 [hereinafter Kearney]. In the article, the authors survey fifty developed countries and selected emerging markets. Id. They quantify globalization by measuring personal contact across borders, international travel, international phone calls, cross border payments and transfers, the movement of goods and the share of international trade in each country’s economy, the permeability of borders, and the level of inward and outward directed foreign investment and portfolio capital flows. Id. at 56-57. The United States ranked twelfth, behind Singapore, the Netherlands, Sweden, Switzerland, Finland, Ireland, Austria, the United Kingdom, Norway, Canada, and Denmark. Id. at 58. In the area of economic activity linked to communications and information technology, however, North America far outpaced other countries. Id. at 60.

Globalization also influences the litigation process. In the context of commercial litigation, for example, Stephen Burbank has noted that cross fertilization takes place when, "[1] doctrine and techniques developed in the context of domestic cases are brought to bear on problems presented in international litigation, and (2) the increasingly international dimensions of litigation in our courts prompt changes in doctrine and techniques, which are then applied in domestic cases." Burbank, supra, at 1459. Transnational family law litigation is likewise on the rise, given the increasing opportunities for citizens of most nations to travel and marry abroad. See, e.g., Diorinou v. Mezitis, 247 F.3d 133 (2d Cir. 2001). The recent controversy involving an Internet adoption dispute between an English and American couple is another sad example. Damian Whitworth, Court Orders Return of Net Adoption Girls, Times (London), Mar. 3, 2001, at 5.

3. The United States has consistently viewed the relationship of international law and domestic law from a dualist perspective. Dualism refers to the notion that international law is separate and distinct from domestic law, and that it can be invoked in domestic courts only when it has been adopted or otherwise transformed into domestic law, through enactment, recognition in a judicial precedent, or through ratification of a treaty incorporating the relevant rule of international law. Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 Harv. L. Rev. 853, 864 (1987). The opposite condition, known as "monism," regards international law and domestic law as parts of a unitary legal system. Id. Putting the distinction succinctly, "[f]or one school, the dualists, municipal law prevails in case of conflict; for the other school, the monists, international law prevails." Edwin Borchard, The Relation Between International Law and Municipal Law, 27 Va. L. Rev. 137, 137 (1940). Although American courts often state that "international law is part of our law," the dualist stance of American law requires subordination of international norms to domestic ones in cases of
monist practices reflect an unwillingness to extend judicial comity.

Indeed, despite the frequent use of the term “comity,” the prevalent confusion over its scope has led some scholars to regard comity as either dead or moribund, and to pen eloquent and poetic eulogies to either celebrate or hasten its demise. The principal critique is that courts have used “comity” to avoid accurate analysis of legal issues. As Professor Michael Ramsey wrote, “international comity” is an “expression of unexplained authority, imprecise meaning, and uncertain application,” and it is a concept that is persistently misunderstood. More often than not it is either misapplied or invoked to support a decision in truth reached on the basis of federalism, separation of powers, or other grounds.

Nevertheless, this article presents workable models of international judicial comity that can and must be created. A common definition of comity, a word derived from the simple Sanskrit verb for “he smiles,” is that it refers to the informal and voluntary recognition that the courts of one nation accord to the judicial decisions of another. This article proposes two models of judicial comity. These models accommodate the domestic


The most prominent examples of dualist systems are nations with legal systems based on a particular set of religious or political beliefs. States with Islamic legal systems, for example, have great difficulty developing a theoretical construct for harmonizing international and domestic law because of the belief that all law, including international law, should follow Islamic principles. David A. Westbrook, Islamic International Law and Public International Law: Separate Expression of World Order, 33 Va. J. Int’l L. 819, 859-84 (1993) (discussing and critiquing this proposition).

4. See, e.g., Joel R. Paul, Comity in International Law, 32 Harv. Int’l L. J. 1, 77 (1991) (arguing that comity operates outside the parameters of both domestic and international law); Michael D. Ramsey, Escaping “International Comity,” 83 Iowa Law Rev. 893, 896-97 (1998) (arguing that comity should be discarded since it is most frequently used to obscure analysis); Spencer Weber Waller, The Twilight of Comity, 38 Colum. J. Transnat’l L. 563, 578-79 (2000) (arguing that comity is an aspect of extraterritoriality that has been “fought to a draw,” and that these problems are better resolved at the level of the Organization for Economic Cooperation and Development (OECD) or other international organizations).

5. Ramsey, supra note 4, at 893.


7. The classic statement of comity, as defined in a legal sense by the Supreme Court, is “the recognition which one nation allows within its territory
law obligations of American courts, while simultaneously easing the frustration of foreign and international tribunals over perceived American intransigence and disregard for foreign and international tribunals.

The first model, termed "cooperative comity," is a horizontal construct that should be employed when courts face actual or potential conflicts with foreign tribunals. The second model, "integrative comity," is a vertical and more deferential construct, which should shape responses to hierarchical conflicts between American courts and international or supranational tribunals. This article evaluates these models in the context of judicial comity. The question of how the comity doctrine should be applied in the legislative and executive contexts has been and

to the legislative, executive or judicial acts of another nation ...." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). Moreover, judicial comity is "the idea that U.S. courts will under certain circumstances defer to the rulings of foreign courts." Ramsey, supra note 4, at 897. Additionally, Professor Mark Janis states that "[c]omity ... is the foundation on which is built structures for the recognition and enforcement by national courts of the judgments of foreign courts and of the awards, of foreign arbitral tribunals." MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 331 (1999).

8. Examples of legislative comity revolve around the question of applicability of U.S. laws to conduct occurring outside the jurisdiction. The most frequent question in recent years concerns the increasingly limited scope of legislative comity in the application of U.S. antitrust law to conduct occurring outside of the United States. See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 767-70 (1993) (holding that the "principle of international comity does not preclude district court jurisdiction over the foreign conduct alleged"); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 2 (1st Cir. 1997) (analyzing the effect of the Sherman Act against a Japanese company). See generally Waller, supra note 4. But see Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 615 (9th Cir. 1976) (holding that a comity analysis is required before exercising jurisdiction under the Sherman Act). A complicating factor in many attempts to regulate foreign cartels under U.S. antitrust laws has been the United States government's difficulty in securing the cooperation of foreign governments in obtaining evidence against alleged conspirators. See Waller, supra note 4, at 573 (describing the difficulty the United States experienced while gathering evidence against the foreign corporation DeBeers); see, e.g., United States v. General Elec. Co., 869 F. Supp. 1285 (S.D. Ohio 1994) (challenging the world diamond domination by DeBeers and General Electric).

A second area where the question of extraterritorial application of U.S. law has arisen is in the context of employment relations. The United States Supreme Court, for example, held that Title VII, prior to its amendment in 1991, did not apply to a claim by an American employee against an American employer when the allegedly discriminatory conduct occurred in Saudi Arabia. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 246-47 (1991) (interpreting whether Title VII of the Civil Rights Act of 1964 applies extraterritorially to a domestic employer employing United States citizens abroad); see also Foley
will continue to be explored by others.

Part I of this article provides an overview of the general confusion surrounding court-to-court comity in various adjudicative contexts. Part II analyzes the application and focus of cooperative judicial comity and suggests definitional and operational solutions. The particular problem used to illustrate the model of cooperative comity is the nettlesome question of foreign litigants and their use of American courts to obtain discovery that would be unobtainable abroad. In deciding what assistance to give to litigants in foreign proceedings, American courts can and should become more sensitive to the decisions that other legal systems in general—and courts in particular—have made about the availability and efficacy of discovery. Part III focuses on the less frequently occurring problem of integrative comity, which is implicated where domestic courts subordinate the determinations, interpretations, and requests of international tribunals to domestic law considerations. A more developed understanding of the relationship of American courts and international tribunals is necessary if we are to bridge the chasm between American dualism and the monist construct of international law.

Bros. v. Filardo, 336 U.S. 281, 282 (1949) (presenting the question of "whether the Eight Hour Law applies to a contract between the United States and a private contractor for construction work in a foreign country"); Blackmer v. United States, 284 U.S. 421, 437 (1932) (noting that legislation, unless otherwise indicated, is not presumed to apply outside the territorial jurisdiction of the United States.

In another context, the Ninth Circuit held that a foreign creditor may not bring a foreign collection proceeding against a debtor who has obtained a discharge via the U.S. bankruptcy laws. In re Simon, 153 F.3d 991, 994 (9th Cir. 1998). In Simon, the discharge order contained an injunction against prosecution of claims by creditors. Id. Although the court was careful to note that the injunction did not reach the foreign courts, it did reach the foreign creditor who had sought a declaratory judgment as to the permissibility of further foreign proceedings. Id. at 997.

9. Examples of executive comity include the deference given to determinations by the executive branch in imposing sanctions and countermeasures. See, e.g., Cuban Liberty and Democratic Solidarity (Libertad) Act, 22 U.S.C. §§ 6021-6091 (Supp. II 1997) (empowering the executive branch to impose sanctions on corporations who acquire property from the Cuban government where the property was earlier expropriated from U.S. citizens). See generally Harry L. Clark, Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures, 20 U. PA. J. INT'L ECON. L. 61 (1999). One critic argues that these uses of comity are not actual examples of comity, rather they are allocations of foreign relations power to the executive branch. Ramsey, supra note 4, at 913.
I. THE CONFUSED CONTEXT OF JUDICIAL COMITY IN AMERICAN COURTS

Any introduction to the proposed cooperative comity model requires some analysis of the current doctrinal difficulties and scholarly critiques of comity. Although there is disagreement regarding the circumstances in which comity operates, application of judicial comity occurs in a wide variety of contexts, including the assertion of personal jurisdiction over foreign defendants,\(^\text{10}\) issues in interpreting forum selection clauses,\(^\text{11}\) decisions about whether to abstain when the interests

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11. See, e.g., \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.}, 473 U.S. 614, 640 (1985) (enforcing the agreement to arbitrate between the parties under the Federal Arbitration Act); \textit{Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1, 15 (1972) (holding the forum selection clause agreed to by the parties should control "absent a strong showing that it should be set aside"); \textit{Afram Carriers, Inc. v. Moeykens}, 145 F.3d 298, 301 (5th Cir. 1998); \textit{Richards v. Lloyd's of London}, 135 F.3d 1289, 1294 (9th Cir. 1998) (rejecting appellant's claim that the arbitration clause agreeing to arbitrate in London violates public policy because appellant's claims arise under United States Securities and RICO
of foreign sovereigns are at stake,12 dismissals in favor of foreign forums under the forum non conveniens doctrine,13 decisions about whether domestic, foreign or international norms or privileges should prevail,14 enforcement of arbitration clauses,15 service on foreign defendants,16 transnational discovery,17 the

statutes); Roby v. Corps. of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993) (finding that a forum selection clause is not invalid simply because the claim raised is not recognized under the laws of the forum selected); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992) (holding that the parties must abide by the forum selection clause agreed to by the parties); cf. Omron Healthcare, Inc. v. Maclaren Exports, Ltd., 28 F.3d 600, 603 (7th Cir. 1994) (enforcing foreign judgment by the High Court of Justice in England and rejecting the claim that procedures provided for in an arbitration agreement violated American public policy). See generally Stephen B. Burbank, The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection, 19 U. PA. J. INT'L ECON. L. 1 (1998) (discussing forum selection as it relates to service of process under the Hague Service Convention, personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2), and lis alibi pendens).

12. See, e.g., Torres v. S. Peru Copper Co., 113 F.3d 540, 543 (5th Cir. 1997) (granting federal question jurisdiction because plaintiff's complaint "raise[d] substantial questions of federal common law by implicating important foreign policy concerns"); Pravin Bankers Assocs., Ltd. v. Banco Popular del Peru, 109 F.3d 850, 854, 856 (2d Cir. 1997) (analyzing Peru's debt negotiations in light of American public policy in determining whether to grant judicial comity).

13. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981) (determining that the issue of substantive law "should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry); Capital Currency Exch. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 612 (2d Cir. 1998) (holding under forum non conveniens doctrine suits raised under the Sherman Antitrust Act are subject to dismissal); PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73-75 (2d Cir. 1998) (outlining the two step inquiry into forum non conveniens analysis); In re Union Carbide Gas Plant Disaster, 809 F.2d 195, 202 (2d Cir. 1987) (allowing transfer of a case to India under forum non conveniens grounds); In re Phillips Serv. Corp., 49 F. Supp. 2d 629, 633-34 (S.D.N.Y. 1999) (outlining the forum non conveniens analysis).


16. See, e.g., Volkswagenwerk, 486 U.S. at 696 (determining whether service on a subsidiary company in lieu of service on foreign parent corporation complies with the Hague Service Convention); United States v. Danenza, 528 F.2d 390, 392 (2d Cir. 1975) (enforcing subpoena of foreign dependent following Italian Service requirements); Chung v. Tarom, S.A., 990 F. Supp. 581 (N.D. Ill.
procedures for proving foreign law,\textsuperscript{18} staying proceedings in the United States pending the resolution of foreign or international proceedings,\textsuperscript{19} enjoining the prosecution of foreign or domestic legal proceedings,\textsuperscript{20} the enforceability of foreign judgments,\textsuperscript{21} and

\textsuperscript{18} Compare \textit{FED. R. Civ. P. 44.1} (requiring a party relying on foreign law to give notice), with \textit{N.Y. C.P.L.R 451 1(b)} (McKinney 1992) (allowing court to take judicial notice without request of the laws of foreign countries).


\textsuperscript{20} The most frequently cited example involves litigation by Laker Airways on both sides of the Atlantic. See \textit{generally} British Airways Bd. v. Laker Airways, Ltd., 1 A.C. 58 (1984). The case implicated both judicial and legislative comity, and in July 1983, the court of appeal in London issued an injunction restraining Laker from prosecuting his American action. \textit{Id.} at 58. The House of Lords subsequently reversed, [1984] 3 W.L.R. 413. Before the reversal, the Court of Appeals for the District of Columbia enjoined the other parties to the suit in the United States from joining a suit by British Airways in London. Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 955-56 (D.C. Cir. 1984) (stating that the conflict in jurisdiction is caused by a desire to implement legislation controlling anticompetitive and restrictive
the preclusive effect of foreign judgments.\textsuperscript{22}

Despite the myriad circumstances in which comity issues arise, courts have not articulated workable guidelines for the application of comity. One obstacle to a workable guideline stems from the courts' consistent characterization of comity as discretionary, as a concept "of practice, convenience and expediency."\textsuperscript{23} Indeed, comity has proved so malleable that the word "doctrine," which connotes a concept that is fixed, grounded, and established, seems inapposite.\textsuperscript{24} The current application suggests that it is more appropriately termed a "value," since it is at present more in the nature of something courts either take into account and consider important, or not.\textsuperscript{25}

Given that this value is sometimes understood and sometimes misunderstood, the definition of comity is prefaced with a brief summary of comity's historical antecedents, the views of scholars who both criticize and support comity, and a pragmatic proposal as to why comity informs decisions in some cases and not in others.

\textbf{A. Pedigree and Practice: Does Comity Exist?}

The discretionary approach to comity has a long pedigree, as a number of able historians have established.\textsuperscript{26} During the Middle Ages, glossators at Bologna, commenting on the role of foreign law in domestic decisions, observed that "foreign law, in
appropriate instances, should be applied to foreign cases.”27 Thus, comity's earlier applications involved legislative comity. The Dutch jurist Ulrich Huber set out three guiding principles to govern the operation of foreign law within the territory on a state: "First, all states have sovereign power within their territory but not beyond. Second, the state has sovereign power over any person within its territory. And third, when the court applies foreign law, the court acts on the basis of comity."28 Thus, international judicial comity was born as much into the world of politics as into the realm of law. It was applied, in Huber's words, as "the high authorities of each country offer each other a hand."29

In the United States, although Joseph Story in 1834 once described the doctrine as a duty to give effect to the laws of other nations,30 most of Story's confrontations with comity came in the context of federal/state comity in a nation in schism over slavery. Professor Joel Paul argued strenuously that under Story's nationalistic view, transnational comity was discretionary, and that the role of courts "[a]s the instrument of the sovereign . . . was to interpret and apply the sovereign's will, not to decide when to recognize foreign interests."31

In the modern era, courts continue to conclude that judicial comity is not mandated.32 As the frequently cited opinion of the United States Court of Appeals for the Third Circuit in Somportex Ltd. v. Philadelphia Chewing Gum Corp. observed:

Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be

27. Yntema, supra note 26, at 9 (emphasis added). Yntema also notes that modern comity doctrine owes much of its development to 17th century Dutch scholars, and credits the nature of the Netherlands as a seafaring and trading nation "with a more liberal attitude towards foreigners." Id. at 19.
29. Id. at 17 (quoting ULRICH HUBER, HEEDENSDAEGSE RECHTSGELEERTHEYT 13 (1699)).
30. STORY, supra note 1, at 37.
31. Paul, supra note 4, at 23.
withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.\textsuperscript{33}

Indeed, modern judicial references to comity and convenience are so frequently written that one wonders whether the convenience relates not to the circumstances by which courts apply comity, but rather to the relief of the jurist at not having to explain the court's reasoning any further.

The imprecision and occasional obfuscation of comity has generated considerable scholarly debate. Professor Michael Ramsey would banish comity as a consideration to be taken into account by courts.\textsuperscript{34} His concern is that courts often refer to comity vaguely rather than engaging in precise legal reasoning to resolve the issue before them.\textsuperscript{35} His adjectives represent the depth of his frustration: "uncertain," "vague," "not appropriate," "inaccurate," and "confused."\textsuperscript{36} In support of his thesis, Ramsey offers two cases: one involving the recognition of a foreign judgment, and the other concerning proof of foreign law as examples of the failure of judicial comity. With respect to the recognition of foreign judgments, Ramsey notes that courts enforcing foreign judgments often invoke comity as the basis of their decisions.\textsuperscript{37} Ramsey argues, however, that decisions regarding enforcement of foreign judgments are not in fact comity-driven because courts subject the foreign judgment to a greater degree of scrutiny than American judgments.\textsuperscript{38} As

\begin{itemize}
  \item \textsuperscript{33} Id. at 440 (emphasis added).
  \item \textsuperscript{34} Ramsey, supra note 4, at 893.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Id. at 902-05.
  \item \textsuperscript{37} Id. at 897-901 (referencing Somportex and Phillips USA, Inc. v. Allflex USA, Inc.).
  \item \textsuperscript{38} Id. at 899. In reaching this conclusion, Ramsey examines Phillips USA, Inc. v. Allflex USA, Inc., 77 F.3d 354 (10th Cir. 1996). Id. at 900. In Allflex, the court, invoking comity, gave preclusive effect to an Australian judgment on a breach of contract claim for the defendant on the theory of comity, and refused to allow a second suit in the United States on a fraud theory. Allflex, 77 F.3d at 361. Ramsey argues that this result was not dictated so much by comity (for how would the Australian government have been offended?), as it was by the policies underlying the doctrine of rés judicata. Ramsey, supra note 4, at 900. The value of comity informed the rés judicata determination that was made.
  
  Professor Ramsey correctly believes that the analysis is often less than clear where comity is invoked, but note below that such decisions often do involve some extension of comity, because foreign judgments are often enforced despite the fact that the proceedings departed substantially from American judicial
discussed below, this observation on the uselessness of comity is overly pessimistic.39

With respect to proof of foreign law, Professor Ramsey notes that in most cases the invocation of comity is illusory because the question is not one of comity, but rather how we prove foreign law.40 Thus, he contends that in most circumstances, the invocation of "notions of comity" serve to obscure rather than eliminate the issue.41 Although Professor Ramsey is accurate in his belief that proof of foreign law is largely an evidentiary question, the current evidentiary rules have developed by incorporating comity as a value. Comity has not been a factor in proof of foreign law for nearly ninety years, given that American courts in 1912 abandoned the outmoded and Americentric rule that foreign law is presumed to be identical to that of the forum.42

procedural norms. See, e.g., Ackermann v. Levine, 788 F.2d 830, 842 [2d Cir. 1986] (enforcing German judgment for legal fees out of comity where fee agreement would have been improper under New York law). See generally discussion infra Part I.B.

39. See infra notes 51-68 and accompanying texts.
40. Ramsey, supra note 4, at 905-06.
41. Id.
42. Cuba R.R. Co. v. Crosby, 222 U.S. 473 (1912). While issues have arisen as to how foreign law will be established and whether it is a factual or a legal issue, no modern decision has suggested that foreign law should not be applied in appropriate cases. This is primarily because the legislature has taken the issue from the courts in the form of Rule 44.1 of the Federal Rules of Civil Procedure in federal court and various statutes in the state systems. The Rule provides:

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

FED. R. CIV. P. 44.1. In addition, twenty-eight jurisdictions have adopted the Uniform Judicial Notice of Foreign Law Act, even though the Commissioners on Uniform State Laws withdrew their recommendations of the Act in 1966. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT, 9A U.L.A. 550 (1965). The Act is similar to Federal Rule 44.1, except that it expressly mandates that foreign law determinations are to be made by the court rather than the jury. Still, other states have adopted statutes providing for judicial notice of foreign law if supporting documents are provided to the court and the opposing party. If these conditions are not met, then judicial notice is discretionary. See, e.g., N.Y. C.P.L.R. 3016, 4511 (McKinney 1992); see also RUDOLPH B. SCHLESINGER, ET AL., COMPARATIVE LAW CASES AND MATERIALS 32-124 (1998) (providing an
Professor Joel Paul likewise would abandon comity. In part, he is frustrated with the doctrine for the same reasons as Ramsey, and in part because he believes comity to be an unworkable standard, and one that is neither mandated by international law or justified on the basis of reciprocity, utility, courtesy, or morality. By contrast, Professor Anne-Marie Slaughter supports judicial comity. While noting its "general and amorphous" nature, she writes that comity encompasses both respect for foreign courts and an awareness that they are entitled to their fair share of disputes. Slaughter suggests that this need not encompass deference, but that it should include an awareness of the interests of foreign tribunals. She also acknowledges that the process can be messy. When judicial comity and judicial globalization involve interactions among the courts of different nations, we are confronted by "examples of judges looking, talking, and sometimes acting beyond the confines of national legal systems . . . ."


45. Id.

The thesis presented here is that, with respect to judicial comity, Slaughter is correct and Ramsey and Paul are incorrect; although perhaps differences with the latter two able writers are complicated by the fact that their arguments are directed primarily to deficiencies in legislative and executive comity. I believe, however, that to the extent Professor Paul addresses judicial comity, he is in error of rejecting comity's utility, courtesy, and morality.

First, judicial comity can, as a utilitarian matter, foster an enhanced belief in the fairness of the United States' legal system and the extent to which foreign litigants trust it. Absent a belief of fairness and respectfulness in American courts, foreign litigants will continue to avoid them at all costs, a fact which complicates life for American businesses and citizens. Second, courtesy between courts will enhance transnational judicial cooperation, which becomes increasingly necessary with the transnational character of many disputes. An absence of courtesy and comity between courts may permit the aggressive litigant to engage in duplicative and even vexatious lawsuits in multiple forums. A defined model of cooperative comity would foster uniformity, dialogue, cooperation, and consistency in deciding which cases should proceed, and which cases should be stayed or dismissed on the basis of international abstention. A defined model would also allow courts to allocate responsibility in areas such as transnational insolvency.


49. Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post-
Finally, considerations of morality counsel that it is wrong and suggestive of a call to American hegemony for American courts to conduct litigation with transnational implications without fully considering and giving weight to the role of foreign courts. Thus, it is now appropriate for courts and scholars alike to expand comity's function from one of discretion and confusion to one of definition, deliberation, and deference.

1. Defining Comity and Examining How and Why Courts Apply It

Turning first to definition, cooperative comity as used here means that when issues arise in American courts which impact on or intersect with issues before foreign courts: (1) American courts should first identify the role and interests of the foreign tribunal; (2) analyze the requirements of the foreign procedures, values, orders, and judgments; (3) analyze the American court's interest in the proceedings; and (4) determine whether the foreign interests or domestic interests are greater. Where the foreign interests are stronger, the court should give deference to the foreign tribunal and its interests. This definition seems straightforward. Why, then is comity so problematic?

In determining the causes of the comity conundrum, I turn to the cynic that often perches on the shoulder of commentators on international law. The cynic whispers that the true root of the comity problem is a fear and distrust of what is foreign, and that courts are least inclined to extend cooperative comity when it will require them to become enmeshed in unfamiliar questions of foreign law or procedure. Judges are accustomed to speaking with authority and, being human, do not instinctively seek


50. Cf. LOUIS HENKIN, HOW NATIONS BEHAVE 49 (2d ed. 1979) (using the "cynic's formula" to note "since there is no body to enforce the law, nations will comply with international law only if it is their interest to do so . . .").
solutions that necessitate analysis of unfamiliar rules developed in a legal system where research is an unfamiliar process. The cynic suggests that because an increase in employing comity requires greater study and analysis of foreign law, comity is often grudgingly and sparingly applied.

In stating the cynic's case, it is not suggested that American courts are unable or unwilling to engage in an analysis of foreign law. Many judges analyze foreign law often and all judges inevitably must grapple with foreign law when it provides the rule of law in a case.\textsuperscript{51} A reluctance to engage foreign law is also understandable in light of the fact that the research materials have historically been difficult to locate.\textsuperscript{52} Nevertheless, many of the worst examples of a failure to accord comity result when comity requires analysis of and immersion in foreign law.\textsuperscript{53}


\textsuperscript{52} Cf. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 54-55 (5th ed. 1998) (stating the difficulties in researching state practice in determining international law can occur when it arises in municipal court and it is difficult to obtain convenient evidence regarding the state of the law).

\textsuperscript{53} Sociét\'e Nationale Industrielle Aérospatiale, 482 U.S. 522, 552 (1987) (Blackmun, J., dissenting) ("[C]ourts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own. Although transnational litigation is increasing, relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood."). Perhaps this is why in the field of conflicts of law so much emphasis is given to applying the law of the forum. Section 6 of the Restatement (Second) on Conflicts of Law requires the application of the law of the state that is most significantly related to the issue in question. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971). To determine which law is most significantly related, the Restatement lists seven factors:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

\textit{Id.} Three of these factors will almost certainly weigh in favor of the application of forum law: the relevant policies of the forum; certainty, predictability and
Conversely, American courts seem most willing to apply comity when to do so will eliminate a need to analyze foreign law.

a. Applying Comity To Obviate Examination of Foreign Law

The cynic invites examination of a few representative cases to support its view. The first cases involve enforcement of foreign forum selection clauses and foreign judgments. In these cases, the courts accord a substantial measure of comity, generally enforcing forum selection clauses consistently and giving a substantial measure of comity to foreign judgments.

In *Omron Healthcare, Inc. v. Maclaren Exports, Ltd.*, the appellant raised a number of objections to enforcement of a forum selection clause calling for all disputes between the parties to be referred to the High Court of Justice in England. Judge Easterbrook rapidly and correctly disposed of the contention that enforcement of the forum selection clause would violate the public policy of the United States. He stated, "[w]hat policy in particular? The dominant policy in contract cases is enforcing the parties' agreement, the better to promote commerce. American firms can hardly expect to do international business if American courts permit them to welch on their commitments to their trading partners." The decision was unremarkable, given the straightforward nature of the forum selection clause in question.

Another recent case, also out of the Seventh Circuit, is noteworthy because of its spirited invocation of comity. In *Society of Lloyd's v. Ashenden*, Judge Posner, writing for the court, granted enforcement of English judgments in Illinois. Illinois, like twenty-nine other states, adopted the Uniform Foreign Money-Judgments Recognition Act, so the extent of comity to be accorded had, to some extent, been legislated.

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54. The cases also illustrate that Professor Ramsey is incorrect and argue that courts do accord a fair degree of comity to foreign judgments.
55. 28 F.3d 600 (7th Cir. 1994).
56. Id. at 600.
57. Id. at 603.
58. Id. at 601-02.
59. 233 F.3d 473 (7th Cir. 2000).
60. Id. at 476.
The Uniform Act provides that final and appealable foreign judgments are generally enforceable to the same extent as the judgments of sister states. It provides grounds for non-recognition in a variety of circumstances relating to defects in jurisdiction, insufficient notice, fraud, or other aspects that would likewise prevent enforcement or permit vacation of a domestic judgment. The only criterion in the Act that is unique to foreign judgments is the provision that a foreign judgment will not be deemed conclusive if it was "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." Given that the judgment in *Society of Lloyd's* had been entered by the Queen's Bench and affirmed by the English Court of Appeal and House of Lords, and given the importance in England of impartiality and "scrupulous regard for procedural rights," Judge Posner dispatched the defendants' contentions that the British legal system had not accorded them due process, noting that the suggestion "bordered on the risible." What is more interesting is Judge Posner's reasoning concerning the meaning of due process in the applicable statute. In determining whether the English court acted consistently with due process, Judge Posner explained that:

It is a fair guess that no foreign nation has decided to incorporate our due process doctrines into its own procedural law; and so we interpret 'due process' in the Illinois statute... to refer to a concept of fair procedure


63. **Uniform Foreign Money-Judgments Recognition Act** § 4, 13 U.L.A. 268. Judgments in the federal courts may be vacated on the basis of "mistake, inadvertence, surprise, or excusable neglect, newly discovered evidence which could by due diligence not have been discovered [previously], ... fraud," or other reasons. FED. R. CIV. P. 60(b).


65. *Society of Lloyd's*, 233 F.3d at 476.
simple and basic enough to describe the judicial processes of civilized nations, our peers.\textsuperscript{66}

He then proceeded to analyze not whether the foreign judgment comported with American notions of due process, but rather whether it met a second international notion of due process. The regard given to the foreign court system was substantial, and the court made it clear that a similar level of comity would be extended to the legal system of any civilized nation.\textsuperscript{67}

\textit{b. Applying Comity Where an Examination of Foreign Law Is Necessary}

In another decision, \textit{Ackermann v. Levine},\textsuperscript{68} the court accorded comity to the judgment of a foreign court in a context that is more problematic for the cynic, because the court applied foreign law.\textsuperscript{69} In \textit{Ackermann}, the United States Court of Appeals for the Second Circuit enforced a German default judgment for legal fees.\textsuperscript{70} The fees had been calculated in conformity with Germany's attorney's fee statute, but under American standards, the fee would have been deemed exorbitant.\textsuperscript{71} It also appeared that the American defendant had never been informed of the fee requirements, as would have been required under American law.\textsuperscript{72} Nevertheless, in a decision motivated in

\textsuperscript{66.} \textit{Id.} at 476-77.
\textsuperscript{67.} \textit{Id.} at 477. Of course, determining what constitutes a civilized nation raises a host of other issues, many of them political. For example, Judge Posner noted that evidence would have been required had the judgment been rendered in Cuba, North Korea, Iran, Iraq, the Congo, or some other nation where there was a serious question about commitment to due process and the rule of law. \textit{Id.}
\textsuperscript{68.} 788 F.2d 830 (2d Cir. 1986).
\textsuperscript{69.} \textit{Id.} at 843.
\textsuperscript{70.} \textit{Id.} at 845.
\textsuperscript{71.} \textit{Id.} at 837. The German statute, known as the Bundesrechtstanwaltsgebuehrenordnung, or BRAGO, establishes a fee unit for each action taken in conjunction with legal representation. \textit{Id.} The fee is based in part upon the value of the transaction and the amount of the allowable BRAGO fee that the lawyer elects to charge. \textit{Id.} Since the American defendant had sought legal advice in conjunction with a large transaction, the fees were much higher than they would have been on a per hour basis in the United States. \textit{Id.} See generally Rudolph B. Schlesinger, \textit{The German Alternative: A Legal Aid System of Equal Access to the Private Attorney}, 10 CORNELL INT'L L.J. 213 (1977) (assessing the policies behind the fee system in Germany).
\textsuperscript{72.} \textit{Ackermann}, 788 F.2d at 842. Interestingly, perhaps the \textit{Ackermann}
substantial part the basis of comity, the court affirmed the judgment in all respects but one. The court noted that the increasing international nature of commerce required that "American courts recognize and respect the judgments entered by foreign courts to the greatest extent consistent with our own ideals of justice and fair play." Other courts have followed similar approaches.

Another exception to the practice of applying comity to foreign judgments occurs in defamation cases, where courts frequently refuse enforcement of foreign judgments because the defamation claim would offend the First Amendment protections afforded by New York Times v. Sullivan. In Matusevitch v. Telnikoff, the court's extension of comity engendered reciprocity. American contingent fee arrangements are deemed to violate the public policy of Germany, yet in 1992, the German Supreme Court enforced an American judgment for a contingent fee. Decision of the German Federal Court of Justice (BGH) from June 4, 1992, 32 I.L.M. 1327, 1334 (1993); see also Michael J. Maloney & Allison Taylor Blizzard, Ethical Issues in the Context of International Litigation: "Where Angels Fear to Tread," 36 S. Tex. L. Rev. 933, 945-49 (1995) (examining the question of competing ethical standards with respect to attorneys' fees in transnational litigation).

73. Ackermann, 788 F.2d at 845.

74. Id. at 845 (quoting Tahan V. Hodgson, 662 F.2d 862, 868 (D.C. Cir. 1981)).

75. See, e.g., Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997) (subjecting Native American tribal judgment to due process analysis); Guinness PLC v. Ward, 955 F.2d 875, 900 (4th Cir. 1992) (finding an injunction issued by the High Court of England comparable to a temporary restraining order issued by a United States court and therefore does not violate due process). Courts also are somewhat less inclined to grant comity when the action of the foreign court is a provisional remedy rather than a final judgment. In Pilkington Bros. P.L.C. v. AFG Indus., Inc., 581 F. Supp. 1039 (D. Del. 1984), the court declined to enforce a preliminary injunction issued by a court in England because the measure was temporary, not based on a full hearing of the evidence, and because:

Were this Court to issue Pilkington's requested relief, it would interfere unnecessarily in those foreign proceedings . . . . For example, upon a future application to this Court for a sanction against violations of its order, this Court would be compelled to interpret and apply an injunction which was drafted by the English High Court . . . .

Id. at 1045. A domestic courts interpretation of a foreign injunction may lead to inconsistent interpretation and enforcement of foreign injunctions. Id. This case nevertheless seems to support the cynic because the American judge feared becoming intertwined in English law and procedure. See generally George A. Bermann, Provisional Relief in Transnational Litigation, 35 COLUM. J. TRANSNAT'L L. 553 (1997) (addressing some of the major problems related to enforcement of transnational litigation).

Court of Appeals for the District of Columbia affirmed a district court decision denying enforcement of a British libel judgment.\textsuperscript{77} The question of whether the judgment would be incompatible with the public policy of Maryland had been certified to a Maryland court, which had examined British law and concluded that British law contravened the constitutional and policy requirements of the state by not requiring proof of fault and by virtue of a presumption that all defamatory statements are false.\textsuperscript{78} It is arguable, however, that in \textit{Telnikoff} the decision was driven not by a failure to apply comity but rather by the strength of the legal rules governing the First Amendment implications of defamation claims.

The cynic reminds us that the results in two of the above cases were in situations where it was easy to incorporate comity into the analysis. The application of comity in \textit{Ackermann} was less easy in light of the need to analyze German law, but once the job was done, the opinion dealt with the issue with such finality that a legal rule was established and future Second Circuit decisions relating to German courts' attorney's fee awards need not repeat the exercise. The result in \textit{Telnikoff}, where the foreign judgment was not enforced is at first glance most problematic for the cynic's "fear of the forum" thesis, since the resolution did involve an examination of foreign law. British law, however, is relatively easily researched due to the availability of British materials in many libraries and on-line databases, and due to the absence of language difficulties. The defamation cases also involve clear policy issues because of the importance of the First Amendment as a core constitutional value.\textsuperscript{79} Finally, the cynic points out that the court making the ultimate determination in \textit{Telnikoff} did not itself have to grapple with foreign law, but was rather able to certify the question to the state courts.

Next, the cynic asks about a particular group of cases where some courts have avoided evaluation of foreign tribunals and foreign law.\textsuperscript{80} These cases concern the extension of cooperative


\textsuperscript{78} Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997).


\textsuperscript{80} \textit{See}, e.g., Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099 (2d
comity to the process of assisting interested foreign litigants in obtaining discovery in the United States. The extent to which such assistance is given implicates courts willingness to both consider the interests of foreign courts and engage foreign law and has divided the courts of appeals.

II. APPLYING COOPERATIVE COMITY

One of the thorniest questions that arises in the context of court-to-court comity relates to the circumstances under which foreign litigants may obtain discovery from an American court for use in foreign proceedings. The specific question that has split the federal courts of appeals is whether an American court should give civil discovery assistance when the documents or testimony would not as a matter of law be discoverable in the foreign action. 81

The applicable statute, 28 U.S.C. § 1782 is silent on the question and provides:

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81. See, e.g., In re Metallgesellschaft, 121 F.3d 77 (2d Cir. 1997); Euromepa, 51 F.3d at 1099; In re Aldunate, 3 F.3d 54 (2d Cir. 1993); In re Malev Hungarian Airlines, 964 F.2d 97 (2d Cir. 1992); cf. John Deere Ltd. v. Sperry Corp., 754 F.2d 132 (3d Cir. 1985) (concluding that there is no requirement that discovery sought in United States be admissible in foreign proceeding). For examples of cases holding that district courts asked to give aid to foreign litigants may inquire into discoverability of the materials in the foreign proceedings, see In re Asta Medica, S.A., 981 F.2d 1 (1st Cir. 1992); In re Lo Ra Chun, 858 F.2d 1564 (11th Cir. 1988); In re Trygg-Hansa Ins. Co., Ltd., 896 F. Supp. 624 (E.D. La. 1995).
The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or in part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.\(^8\)

In the first years after the passage of the act, courts or investigative bodies in the course of criminal investigations invoked it most frequently.\(^3\) With respect to the provision allowing civil litigants access to American discovery, for the reasons discussed in the following pages, cooperative comity should be applied, since the statute involves American courts directly in a court proceeding pending abroad. Analyzing the question in cooperative comity terms, the district courts should render expeditious assistance under § 1782 when the request for assistance comes from a foreign court and that in all but the


\(^{83}\) See Tariq Mundiya, U.S. Court Invites Foreign Litigants To Use U.S. Discovery Laws, 42 INT'L & COMP. L.Q. 356, 357 (1993). See, e.g., In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago, 848 F.2d 1151, 1155 (11th Cir. 1988) (upholding district court's decision to grant discovery motion brought by Ministry Legal Affairs of Trinidad and Tobago for bank records needed in Criminore investigation); In re Order for Judicial Assistance In a Foreign Proceeding in the High Court of Justice, Chancery Div., England, 147 F.R.D. 223, 226 (C.D. Cal. 1993) (noting the purpose of § 1782 is to foster jurisprudential cooperation between the United States and foreign countries); In re Ct. of Comm'r of Patents for Republic of S. Afr., 88 F.R.D. 75, 77 (E.D. Pa. 1980).
most extraordinary circumstances, they need not inquire into the discoverability of the information in the foreign proceeding but rather should accord deference to the foreign courts interpretation of its own law of discoverability. When the request comes from a civil litigant, however, the district court in exercising its discretion should ask that party to make a prima facie showing that the testimony, document, or other item would be discoverable in the foreign proceeding, and in the event of a question, to ask for briefing or, in appropriate cases, to send a letter rogatory to the court where the proceeding is pending.84

This, however, has not been the construction of civil discovery requests adopted by some courts, most notably by the United States Court of Appeals for the Second Circuit. Indeed, because analysis of these cases illustrates why a new model of comity is needed, the following discussion examines them in some detail.

One of the early decisions to endorse an expansive view of civil discovery under § 1782 was the Second Circuit's opinion in In re Malev Hungarian Airlines.85 In that case the question was not whether American courts would grant discovery beyond the scope of what was allowed in the foreign proceeding, but rather the narrower question of whether the discovery had to be sought first in the foreign court.86 The case involved a breach of contract action brought by Pratt & Whitney, a manufacturer of

84. The issue has split the commentators as well. Compare Mundiya, supra note 83, at 362 (arguing that granting discovery without inquiring into foreign law will not result in reciprocity of cooperation), and Steven M. Saraisky, Comment, How to Construe Section 1782: A Textual Prescription To Restore the Judge's Discretion, 61 U. CHI. L. REV. 1127, 1145-50 (1994) (promoting a three-part test judge's should employ before determining whether the discovery motion under § 1782 should be granted), with Jennifer S. Bales, Initiating and Responding to Discovery in Transnational Litigation: Procedures and Challenges, 66 TENN. L. REV. 765, 779 (1999) (noting the Fourth Circuit did not require inquiry into foreign country's discovery laws), and Hans Smit, Recent Developments in International Litigation, 35 S. TEX. L.J. 215, 235 (1994) (arguing that § 1782 neither explicitly nor implicitly requires United States courts to determine admissibility under foreign law), and Jeffrey A. Wortman, Note, In Search of Discovery: The Split Between the Circuits Surrounding a Threshold Discoverability Requirement to Provide Assistance Under 28 U.S.C. § 1782, 30 TEX. INT'L L.J. 583, 597 (1995) (noting that by a court granting a § 1782 discovery motion, it does not necessarily require the discovery be admissible in the foreign proceeding).

85. 964 F.2d 97 (2d Cir. 1992). The Second Circuit held that nothing in § 1782 required a litigant to exhaust foreign remedies. See id. at 100.

86. Id. at 100. The district court held that Malev should have first sought discovery from the Hungarian courts before relying on § 1782. Id.
aircraft engines, in the municipal court of Budapest against Malev, the national Hungarian airline.\textsuperscript{87} Within four days of answering the complaint and without seeking discovery in Hungary, Malev invoked the assistance of the American court under § 1782 and sought discovery from a number of Pratt & Whitney employees in Connecticut.\textsuperscript{88} The district court refused discovery based on Malev’s failure to make any attempt to obtain discovery in the court where the action was proceeding.\textsuperscript{89} The Second Circuit reversed, relying first on a brief introductory “Statement” at the beginning of the Senate Report on the comprehensive bill relating to transnational litigation that contained, among other things, the provision that ultimately amended § 1782.\textsuperscript{90}

The Senate report indicated the hope of the drafters that the measures in the bill would encourage other countries to adjust their procedures.\textsuperscript{91} The Second Circuit concluded that foreign litigants need not seek the discovery first in the foreign proceeding in light of the statute’s “twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts. . . .”\textsuperscript{92}

This interpretation of the Act, based on a vision of the United States as a leader in opening up its courts to assist parties in foreign litigation, was well-intentioned. Unfortunately, the interpretation failed to give weight to either the express language of the act vesting a broad discretion in the district court or to the interests of comity. The first question should have been whether the involvement of an American court at such a preliminary stage would facilitate the procedures of the foreign court properly exercising jurisdiction over the matter. Ironically, what the Second Circuit took away from the district court in Malev in terms of discretion to afford comity to the foreign court by staying out of the proceeding, it gave back in discretion to determine the method of affording relief. In giving instructions

\textsuperscript{87} Id. at 98.
\textsuperscript{88} Id. at 98-99.
\textsuperscript{89} Id. at 100.
\textsuperscript{90} Id. at 99.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 100 (emphasis added).
as to the proceedings on remand, the Second Circuit held that the district court could require Malev to prepare a plan for discovery and submit it to the Budapest court for a determination of relevance before coming to the district court for the actual discovery. While the ultimate result in Malev was therefore not problematic, the observation that § 1782 provided an open door for foreign litigants provided the basis for future mischief.

In Euromepa, the Court of Appeals for the Second Circuit quoted Malev, and adopted the most rigidly anti-comity perspective of any court that has considered the § 1782 discovery issue. The court held that a district judge abused his discretion in denying American discovery to a litigant in a French proceeding pending before the Cour d'Appel de Versailles. The district judge refused the litigant's request for discovery under § 1782 because the judge's review of French procedural law yielded the clear conclusion that the discovery would not be allowed under French law.

The Second Circuit opinion is notable in that prior opinions focused on the question of whether the district court was

93. Id. at 102. There was a strong dissent by Judge Feinberg, who not only disagreed with the majority's interpretation of the statute, but who was incredulous at the fact the majority held to the interpretation while allowing the district court to send the litigants ultimately to Budapest. Id. at 105 (Feinberg, J., dissenting). Judge Feinberg questioned, "[i]f the district judge can impose such a sensible requirement [of establishing relevancy] later, why bar it at the outset?" Id. (Feinberg, J., dissenting). Judge Feinberg continued by stating that "[district court Judge Clariel] denied discovery because there was no showing of need and he was concerned over the burden of involving a Connecticut district court in granting routine discovery for foreign litigation." Id. (Feinberg, J., dissenting).

94. 51 F.3d 1095 (2d Cir. 1995).

95. Id. at 1099-1100. The Second Circuit held that United States courts should only deny a § 1782 request if there is "authoritative proof" that the foreign court would reject the evidence obtained under § 1782. Id.

96. Id. at 1100-01.

97. Euromepa S.A. v. R. Esmerian, Inc., 155 F.R.D. 80, 84 (S.D.N.Y. 1994), rev'd, 51 F.3d 1095 (2d Cir. 1995). In reaching this conclusion, the district court reasoned that the statute by its language vested the court with broad discretion, citing In re Gianoli, 3 F.3d at 59. The court noted that the language in Senate Report No. 1580, encouraged the courts to take into account the attitudes of government from which the request emanates. Id. at 82. The court then reasoned, based on a careful analysis of both the applicable rules of French procedure and the fact that Euromepa had not even tried to employ French procedures, that the discovery should not be granted. Id. at 83-84.
required to determine the availability of the discovery in the foreign tribunal.98 In Euromepa, by contrast, the district court engaged in a thoughtful review of French law and was reversed precisely for engaging in such inquiry.99

As had the Malev court, the Second Circuit relied upon the statement in the legislative history. Additionally, the court noted an article by Professor Hans Smit, an architect of the comprehensive bill, commenting on the same Statement in the legislative history. Professor Smit wrote that the drafters of the statute thought that "making the extension of American assistance dependent on foreign law would open a veritable Pandora's box... [and would] turn [a request for cooperation] into an unduly expensive and time-consuming fight about foreign law."100

98. See, e.g., In re Gianoli, 3 F.3d at 57 (holding that § 1782 does not require a finding of discoverability in foreign court); John Deere, Ltd. v. Sperry Corp., 754 F.2d 132, 134 (3d Cir. 1985) (holding that district court improperly exercised its discretion by relying on foreign court's admissibility rules to deny discovery).

99. Euromepa, 155 F.R.D. at 83-84. In cases where the discovery is sought in aid of a private commercial arbitration, the Second and Fifth Circuits have limited the use of § 1782 in order to avoid a conflict with the policy of limiting discovery under the Federal Arbitration Act. See, e.g., Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 191 (2d Cir. 1999) (quashing a subpoena for third party discovery under § 1782 in a case where the foreign proceeding was a private arbitration administered by the International Chamber of Commerce). The Second Circuit reasoned that the provision in § 1782 providing courts to order persons in the jurisdiction to produce documents, testimony or statements for use in "foreign or international tribunals" did not extend to private arbitrations. Id. at 190-91. To extend the act to arbitration proceedings, the court reasoned, was neither within the definition of "foreign or international tribunals" within the meaning of the act, nor was it in accord with § 7 of the Federal Arbitration Act, which confers the authority to seek discovery from the federal courts upon the arbitrators, not parties. Id. at 187, 189-90; see also Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) [concluding "the term 'foreign and international tribunals' in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations"]). Prior to these decisions, there was extensive scholarly argument positing that the meaning of "foreign and international tribunals" should be read to include arbitral tribunals. See Hans Smit, American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited, 25 SYRACUSE J. INT'L L. & COM. 1, 5-8 (1998) (discussing the tribunals and litigants to which assistance may be granted).

100. Hans Smit, Recent Developments in International Litigation, 35 S. TEX. L. REV. 215, 235 (1994). The references to these types of difficulties, of course, has caused the cynic to nod knowingly.
With regard to prior precedents, the *Euromepa* court observed that in *Gianoli*, "we held that the discoverability of requested material under foreign law is simply one factor that a district judge may consider in the exercise his or her [sic] discretion."[^101] The breadth of this discretion, however, narrowed as the opinion progressed. The court held that "[w]e do not believe that an extensive examination of foreign law regarding the existence and extent of discovery in the forum country is desirable in order to ascertain the attitudes of foreign nations to outside discovery assistance."[^102] Ultimately the Second Circuit only approved consideration of foreign declarations that "specifically address the use of evidence gathered in foreign procedures,"[^103] and held that district courts should generally afford discovery assistance "absent specific directions to the contrary from a foreign forum."[^104] The opinion in *Euromepa* is particularly puzzling in that it was authored by Judge Calabresi, who in other decisions urged American judges to consider foreign law and who generally has a reputation as an internationalist.[^105]

Other Second and Fifth Circuit cases concurred in limiting the discretion of district courts to include consideration of foreign law in the analysis of § 1782 and such circuits continue to subscribe to the view that "[w]e have rejected any requirement that evidence sought in the United States pursuant to § 1782(a) be discoverable under the laws of the foreign country that is the locus of the underlying proceeding."[^106] In one extreme example of the excesses that *Euromepa* invites, a Spanish corporation litigating before a court in Spain, emboldened by the Second Circuit's *Euromepa* invitation to exploit expansive American discovery, petitioned a judge in the Southern District of New

[^101]: *Euromepa*, 51 F.3d at 1098.
[^102]: *Id.* at 1099.
[^103]: *Id.* at 1100.
[^104]: *Id.* at 1102. In his dissent, Judge Jacobs argued that "[t]his rigid formulation narrows useful discretion and invites friction with the courts of other countries . . . ." *Id.* at 1104 (Jacobs, J., dissenting).
[^105]: United States v. Then, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (discussing the value of looking to foreign courts for assistance); see also *Slaughter*, supra note 44, at 709.
[^106]: *In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997); see also *In re Letter Rogatory from the First Ct. of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310-11 (5th Cir. 1995) (discussing limitations on inclusions of consideration of foreign law in § 1782 analysis).
York to order a Chase Manhattan European affiliate to produce documents in Spain.\textsuperscript{107} The district court stated that it was unwilling to find that § 1782 required it to order the production of documents located in the foreign country where the action was pending.\textsuperscript{108}

The Third Circuit, in \textit{In re Bayer AG},\textsuperscript{109} also rejected a "discoverable-abroad" requirement, holding that applicants under § 1782 must make a prima facie showing that the application is made: (1) by either a "foreign or international tribunal" or by an "interested person"; (2) that it be for use in a foreign or international proceeding; and (3) that the entity or person "from whom the discovery is sought [should] be a resident of or be found in the district in which the application is filed."\textsuperscript{110}

The Third Circuit, however, evidenced some concern for comity where the substance of the discovery was objectionable, as in cases where discovery would be privileged in the foreign jurisdiction.\textsuperscript{111} In this regard, the court placed the burden on the party opposing discovery to demonstrate the circumstances that would justify a denial of discovery.\textsuperscript{112} The court continued by giving the district court discretion to consider any foreign legal materials applicable to the question.\textsuperscript{113} While this view gives more weight to the policies and procedures of foreign courts than \textit{Euromepa}, it is puzzling why the value judgments another country has made about the role of discovery are entitled to so little weight, since American discovery is, to say the least, both unique and not widely admired.\textsuperscript{114}

The First, Eleventh, and D.C. Circuits express a contrasting view. In \textit{In re Asta Medica S.A.},\textsuperscript{115} the First Circuit emphasized the importance of court-to-court cooperative comity and imposed a burden on the party seeking discovery under § 1782 to show

\textsuperscript{108} Id. at *10.
\textsuperscript{109} 146 F.3d 188 (3d Cir. 1998).
\textsuperscript{110} Id. at 193.
\textsuperscript{111} Id. at 195.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} See discussion \textit{infra} notes 158-62.
\textsuperscript{115} 981 F.2d 1 (1st Cir. 1992).
that the information would be discoverable in the foreign system.\textsuperscript{116} If this was unduly difficult, the district court could either ask the foreign court for assistance or retain a foreign law expert.\textsuperscript{117} The court reasoned that if Congress' goal had been to facilitate transnational litigation, it would hardly have intended a construction that would put U.S. courts on a "collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation."\textsuperscript{118}

Similarly, in \textit{In re Request for Assistance from Ministry on Legal Affairs of Trinidad and Tobago},\textsuperscript{119} the Eleventh Circuit stated that while a court granting a request for assistance under § 1782 need not decide whether the information would be admissible in a foreign court, it did need to determine that the information "would be discoverable in the foreign country before granting assistance."\textsuperscript{120} In reaching this conclusion the court noted that in adopting the recommendations of a Commission on International Rules and Judicial Procedure that led to the enactment of § 1782, the hope was to adjust practices "in order to improve practices of international cooperation in litigation."\textsuperscript{121}

\textsuperscript{116} \textit{Id.} at 7. The case involved patent infringement claims that were pending in France, England, Belgium, and the Netherlands and, more specifically, requests by the European defendants to obtain discovery from non-party witnesses which would, according to uncontested affidavits from foreign law experts, have been unavailable in the foreign proceedings. \textit{Id.} at 2-3.

\textsuperscript{117} \textit{Id.} at 7 n.7.

\textsuperscript{118} \textit{Id.} at 6.

\textsuperscript{119} 848 F.2d 1151 (11th Cir. 1988).

\textsuperscript{120} \textit{Id.} at 1156 (involving a criminal investigation). In a subsequent decision, \textit{In re Lo Ka Chun}, 858 F.2d 1564, 1566 (11th Cir. 1988), the court reaffirmed the \textit{Trinidad and Tobago} holding and remanded a discovery request under § 1782 for a specific determination of whether the information would be discoverable in the foreign proceeding. \textit{Id.} at 1566.

\textsuperscript{121} \textit{Trinidad and Tobago}, 848 F.2d at 1153 (citing Letter from Rep. Oscar Cox, Chairman of Commission on International Rules of Judicial Procedure, to John McCormack, Speaker of the House (May 28, 1963), \textit{reprinted in} 1964 \textit{U.S.C.C.A.N.} 3792-94). Indeed, Chairman Cox's letter would seem to have expressed a hope that the enactment of the measures would encompass notions of comity:

Enactment of the proposed bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.

The Court of Appeals for the District of Columbia likewise took the view that the document sought should be discoverable in the foreign tribunal in In re Letter of Request from the Crown Prosecution Service.¹²² That case held, in an opinion by Judge Ruth Bader Ginsburg, that a request for discovery by the Crown Prosecution Service would require the district court to fashion an order for the taking of evidence appropriate in a British proceeding and reversed the district court for not inquiring "more closely [into] whether the projected evidence-taking procedure 'represents British practice.'"¹²³

The Euromepa and Malev decisions, as well as the decisions that followed them, were wrong, and the Asta Medica and Trinidad and Tobago decisions, and the cases that follow them, were right.¹²⁴ To demonstrate how cooperative comity would fit into such an analysis, I advance five arguments as to the proper construction of § 1782, two of which are informed by cooperative comity.

1. Section 1782 Expressly Vests Discretion in the District Courts

First, the unambiguous language of the statute vests discretion in the district judge.¹²⁵ The inclusion of express permissive language in the act grants district courts a broad range of discretion, including the discretion to determine whether their actions would interfere with the policies and practices of the foreign or international tribunal with jurisdiction over the case.¹²⁶ District judges may order testimony or documents related to a foreign or international proceeding; they may order the discovery either pursuant to a letter rogatory or request of an interested person; and may prescribe the practice or procedure of the foreign country or international tribunal for

¹²² 870 F.2d 686 (D.C. Cir. 1989).
¹²⁴ But see Christopher Walker Sanzone, Extra-Statutory Discovery Requirements: Violating the Twin Purposes of 28 U.S.C. Section 1782, 29 Vand. J. Transnat'l L. 117 (1996); Smit, supra note 84, at 234-35. Both authors argue strenuously that no discoverability requirement should be either read into the statute or imposed by a district court in the exercise of its discretion.
¹²⁵ See supra notes 83-85 and accompanying text.
the taking of testimony statements or documents.\textsuperscript{127} In addition, district judges \textit{may} give any applicable privileges effect, including the privileges of the foreign forum.\textsuperscript{128} Thus, the plain language of the statute seems to permit and suggest a broad range of discretion in the district courts to determine what cooperative comity requires. Specifically, the language in the statute allows the district court to identify the issues pending before the foreign court, and to require the party seeking the assistance to demonstrate the permissibility of the discovery under the laws of the foreign forum. Where the foreign litigant cannot or will not provide this information, the court itself has the power to inquire into foreign law.

2. The Legislative History Does Not Support Mandatory Discovery Under Section 1782

\textit{Euromepa} and its progeny have not only improperly looked to the straightforward legislative history, but have also, even assuming reference to the legislative history is appropriate, misread that history. With respect to the first point, even opponents of textualism would agree that the real or imagined goals of the legislature should not guide the decisions of courts when the meaning of a statute is clear.\textsuperscript{129} As discussed above, \S 1782 expressly protects both the discretion of the district court and suggests in its references to the procedures and privileges of the foreign tribunal that the statute is meant to foster comity.

Second, the legislative history is not supportive of the position endorsed in \textit{Euromepa}. The \textit{Malev} court interpreted the comprehensive legislation as the "twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} (prescribing that the practice or procedure of a foreign or international tribunal is suggestive of the cooperative comity model).
\item \textsuperscript{128} \textit{Id.}; \textit{In re Letter of Request from the Crown Prosecution Service, 870 F.2d 686, 693 (D.C. Cir. 1989)} (noting that \S 1782 "permits" but does not "command" following foreign law).
\item \textsuperscript{129} The most vocal proponent of textualism is Justice Scalia, who has repeatedly emphasized that it is what legislatures write rather than what they mean that is important. \textit{See, e.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989)} (Scalia, J., concurring); \textit{see also} Frank H. Easterbrook, \textit{Symposium, On Statutory Interpretation: What Does Legislative History Tell Us?, 66 CHI.-KENT L. REV. 441, 442 (1990)} (analyzing Justice Scalia's concurring opinion in \textit{Green}); \textit{see also generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW} (1997).
\end{itemize}
to provide similar means of assistance to our courts,” which originated from the preface not merely to § 1782 but to the entire bill.\footnote{130} The bill contained a broad range of purposes, including service of documents in the United States, obtaining evidence abroad, proving foreign official documents in American proceedings, subpoenaing witnesses in foreign proceedings, and transmitting letters rogatory between United States and foreign courts.\footnote{131} The statement noted that the comprehensive legislation emanated from a Commission on International Rules of Judicial Procedure appointed by the executive and developed with the assistance of Columbia Law School.\footnote{132} The statement in the Senate Report provided in full that:

> Until recently, the United States has not engaged itself fully in efforts to improve practices of international cooperation in litigation. The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation. Enactment of the bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.

> It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.\footnote{133}

Thus, the intent of the legislature in enacting the bill as a whole was to adjust procedures to those of foreign courts—not to act in disregard of their procedures and policies. Moreover, the legislative history applicable specifically to § 1782 supports giving judges the authority to consider the policies of the foreign tribunal with respect to discovery. The Senate Report regarding

\footnote{132}{Id.}
\footnote{133}{Id.}
§ 1782 states:

"It leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable. In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country..." \(^{134}\)

Thus, the legislative history applicable to § 1782 does not mandate a construction of the Act that would extend our well-intentioned generosity with discovery so far as to preclude inquiry into whether the generosity is appreciated by the foreign forum.

C. Comity Precludes the Imposition of American Discovery Rules on Foreign Tribunals

A third argument against the Euromepa interpretation of § 1782 is based on the principle that cooperative comity requires American courts to harmonize their proceedings under the Act with the procedures of other countries. The injection of American discovery procedures into foreign proceedings will otherwise be both counterproductive to efficiency interests in both forums and may well trigger charges of American interference, chauvinism, or legal imperialism. Is American discovery so inherently valuable that foreign litigants should be allowed to obtain discovery here if they could not obtain discovery under the applicable legal procedures where the case is pending?

No other nation is as wedded to discovery as the United States. \(^{135}\) Broad discovery, to be sure, gives the parties increased access to information and if used effectively may further the goal that cases are resolved based on the facts rather than determining on which litigant has superior access to information. \(^{136}\) Yet even in the United States, there have been

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134. Id. at 7 (emphasis added).
136. See, e.g., United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958) ("modern instruments of discovery... make a trial less a game of
concerns over the abuse of discovery, the extent to which it contributes to the cost of litigation, and the fact that despite the delay and expense involved in the procedure, it still does not accomplish its goals.\textsuperscript{137}

Foreign systems have, of course, made very different policy judgments about the extent of discovery allowed in civil cases and, in virtually all civil systems, have left the process in the hands of judges rather than lawyers.\textsuperscript{138} In France, for example,
the role of the parties is limited to supplying the court with the evidence that the party intends to rely on, and to directing the attention of the court to documents in their possession and in the possession of the other party. Parties do exchange evidentiary documents in advance of the proceeding, but they do so under judicial supervision and there is no procedure for requiring the production of documents from an adversary without judicial intervention. With respect to third party discovery, Article 138 of the Nouveau Code de Procedure Civile permits discovery only of the documents that a party proposes to use in a pending case, and the request goes to the judge, not the witness or the opposing party.

Germany goes even further than most civil systems and vests the judge with a very active role. Article 139 of the Civil Procedure Code of Germany, Zivilprozessordnung, imposes a duty on the judge rather than the parties to ensure that all factual and legal positions are fully supported, to elaborate on other evidence can be elicited through the judge’s questioning. See John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 111-123 (2d ed. 1985). By contrast, discovery is necessary in common law systems, in order to eliminate surprise in the trial proceeding. As Merryman observed: “There is no necessity for pretrial proceedings because there is no trial; in a sense every appearance in the first two stages of a civil law proceeding has both trial and pretrial characteristics.” Id.

Andreas Lowenfeld has also stressed that the differences in procedure in other countries, and particularly differences relative to the role of discovery, have inevitably played out in “procedure neutral” tribunals, such as private arbitration, to include the “better” features of American discovery. Andreas F. Lowenfeld, An Introduction: The Elements of Procedure: Are They Separately Portable?, 45 Am. J. Comp. Law 649, 653 (1997). Such features include ensuring that “relevant documents in the parties’ possession or control ought to be available to both sides and to the decision makers”; however, the “extravagant aspects of American-style discovery” are simply not adopted or used in international arbitration. Id. at 643-54; cf. generally Lisa Bernstein, Law, Economics & Norms: Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms, 144 U. Pa. L. Rev. 1765 (1996) (tracing the reasons why specific industries and groups prefer dispute resolution procedures tailored to the needs and structure of commercial systems).


140. Id. at 7-30 to –31 (translating Article 138).
insufficient statements of fact and to indicate any doubts to the parties.141

One common and important factor in civil law litigation is that when documents are produced, they are produced in the course of the proceeding. In the interests of protecting the reliability of the truth-finding process, parties are not permitted to pick and choose what evidence the trier of fact will be allowed to consider. There is no vehicle for allowing parties to inspect documents and decide which shall or shall not be put into the record. Eliciting evidence, whether in testimonial or documentary form, generally puts it into the record.142 Thus, permitting a party to inspect documents and later determine whether they will or will not place them in evidence contradicts a core value of the civil law litigation and national judgments about what best serves the truth-finding process.143 In drafting orders for discovery under §

141. Specifically, Article 139 of the Civil Procedure Code of Germany provides:

(1) The presiding judge shall see to it that the parties make full statements about all material facts and make appropriate motions, especially to elaborate on insufficient statements regarding the facts alleged and to indicate the means of proof. For this purpose, so far as necessary, he shall discuss with the parties the case and issues, in their factual and legal aspects, and ask questions.
(2) The presiding judge shall bring to the parties attention doubts that the court has because of its duty to take certain points into account on its own motion.
(3) He shall permit each member of the court to ask such questions as that member requests.

Civil Proc. Code of Germany, art. 139, available at <http://www.zivilprozessordnung.de/1.htm> (German version). Additionally, Article 422 of the German Code of Civil Procedure provides that a party may be compelled to furnish documentary evidence only if there is a substantive legal obligation or the party being asked to furnish the evidence has relied on it in support of the pleadings advanced in the case. Id. art. 422.

Germany, like France, requires litigants to identify the evidence on which they intend to rely; discovery in an American form is simply unknown. In Germany, parties cannot be forced to testify by their opponent, and the court will reject the testimony of any witness who is listed simply for the purpose of finding out what the witness knows about the case. See John C. Reitz, Why We Probably Cannot Adopt the German Advantage in Civil Procedure, 75 IOWA L. REV. 987, 1001-05 (1990). For a complete comparison of the two systems, see David J. Gerber, Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States, 34 AM. J. COMP. L. 745, 748-69 (1986).

142. FRENCH LAW, supra note 139, at 7-30 to -34 (translating Articles 132-37, 146, 157, 160).

143. Lowenfeld, supra note 138, at 650 (stating that procedural mechanisms resulting from deliberate decisions reflect "particular priorities, values, choices,
1782, cooperative comity would dictate that judges make every effort to accommodate those values.

D. The Difficulty of Finding and Evaluating Foreign Law Has Been Exaggerated

A fourth argument I advance in support of my construction of § 1782 described in this article is that those courts and writings that have assumed it would be too problematic for American lawyers and judges to determine the discoverability of the evidence in the foreign forum are, at this point in time, wrong. The belief stated by the court in Euromepa that “making the extension of American assistance dependent on foreign law would open a veritable Pandora's box” is incorrect. First, presumably Professor Smit did not mean to discourage the preliminary type of inquiry suggested by this article. Second, with respect to gaining some knowledge of foreign law, at the time the statute was drafted in 1964, Professor Smit's view may have been well taken: Judicial research on any question of foreign law was difficult and often required the costly and time consuming appointment of a special master.

In the modern era, foreign law, or at least the nature of the foreign legal system has become much easier to research. As the citations in this article demonstrate, the laws of many foreign countries are easily available on the worldwide web. Further, district courts exercising discretion under § 1782 do not need to master foreign law. Rather, they need only understand the basic principles of discovery in the relevant foreign system. The burden could easily be put on the parties to brief the court about foreign law. In the rare case where this inquiry proves troublesome, courts have a variety of procedures, such as the letter rogatory, to communicate on these issues.

144. Euromepa, 51 F.3d 1095, 1099 (quoting Smit, supra note 89, at 235).
145. See supra notes 139 & 141 and accompanying text.
Further, a requirement that district courts ask foreign litigants to demonstrate the discoverability of the materials sought under foreign law would harmonize the interpretation of § 1782 with the approach of Rule 44.1 of the Federal Rules of Civil Procedure. Rule 44.1 provides that where a party intends to rely on foreign law as the basis of a claim, the party must give notice by pleadings or other reasonable written notice. It further empowers the court to conduct its own independent research and to consider any "relevant material or source... whether or not submitted by a party or admissible under the Federal Rules of Evidence." 

Similarly, in examining the scope of the *forum non-conveniens* doctrine in a case where the alternative forum was foreign, the Supreme Court, in *Piper Aircraft Co. v. Reyno*, held dismissal was appropriate despite the fact foreign law was less favorable to the plaintiff than the law of the American forum. The Court noted, however, that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight...." If a decision about the merits of a *forum non-conveniens* motion on occasion requires a determination of a multiplicity of foreign law issues, this inquiry is more sophisticated than the relatively simple determination of

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147. FED. R. CIV. P. 44.1 (relating to proof of foreign law, as well as the procedures that are necessitated in several other areas of transnational litigation).

148. *Id.* Rule 44.1 is illustrative of the change in the way the American judicial system has dealt with foreign law issues. The Supreme Court has long rejected the provincial view that American courts should assume that foreign law conformed to the law of the American forum. *See* Cuba R.R. Co. v. Crosby, 222 U.S. 473, 477-79 (1912). However, the approaches to the problem of reliance on foreign law have caused varying responses. Half of the states have statutes that address the question of whether the court may take judicial notice of foreign law, or whether the parties must specifically invoke it. *See* Rudolph B. Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 6, 16 (1973); *see generally supra* note 42 and accompanying text.


150. *Id.* at 238, 261.

151. *Id.* at 254. At a minimum the court that is asked to dismiss will be required to determine whether the defendant is amenable to service of process under the laws of the foreign jurisdiction and whether the remedy offered by the foreign forum is "clearly unsatisfactory." *Id.* at 254 n.22.
foreign discovery procedures suggested here.\footnote{152}

This threshold inquiry would be no more difficult the one involved when a court must determine the applicability of a foreign privilege when requiring discovery from a foreign litigant under Société Nationale Industrielle Aérospatiale.\footnote{153} In that case, the Supreme Court was confronted with an argument by a French defendant subject to personal jurisdiction in the United States, that discovery of documents in France should adhere to the procedures in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.\footnote{154} The court rejected that argument, holding that discovery could proceed under the Federal Rules of Civil Procedure, but noted: “American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.”\footnote{155} If courts are able to make these inquiries in the Aérospatiale context, why not under § 1782?

It is not, in short, unusual or unduly burdensome for courts to confront foreign law issues. They do so frequently in far more challenging contexts, the most difficult of all being cases where foreign law supplies the rule of decision.\footnote{156} In the § 1782 scenario, the burden imposed upon a district court to exercise discretion when presented with a § 1782 discovery request need not be a substantial one. District courts could simply ask the

\footnote{152. In the famous case involving Union Carbide's plant disaster in India, the district court in New York's decision to grant forum non conveniens motion was reversed on the stipulation that the Federal Rules of Civil Procedure would govern the discovery in India. In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 205-06 (3d Cir. 1987). The Second Circuit found this condition too broad and beyond the power of the American court. See id.}

\footnote{153. 482 U.S. 522 (1987). The Court of Appeals for the Third Circuit has acknowledged that comity must be considered when the discovery would be privileged in the foreign litigation.}

\footnote{154. Id. at 524-26; see also Hague Convention, supra note 146. Both France and the United States are parties to the Convention. See id.}

\footnote{155. Société Nationale, 482 U.S. at 546.}

\footnote{156. See, e.g., Itar-Tass Russ' News Agency v. Russ' Kurier, Inc., 153 F.3d 82, 92-93 (2d Cir. 1998) (applying Russian and American law to varying issues in the case). Modern choice of law rules often require courts to apply the laws of multiple states, depending on the laws applicable to different claims and issues, a practice known as dépeçage. See generally Willis L.M. Reese, Dépeçage: A Common Phenomenon in Choice of Law, 73 COLUM. L. REV. 58 (1973) [providing an elaborate discussion of dépeçage].}
foreign litigant or "interested party" petitioning for discovery in the United States to make a _prima facie_ showing that the material would be discoverable in the foreign proceeding. Parties opposing discovery would be permitted to rebut that evidence, and the court, consistent with the approach envisioned under Federal Rules 44.1, would also be free to engage in its own research. Rule 44.1 has presented few practical difficulties, and, for this reason, provides a workable model for § 1782 proceedings.\(^{157}\)

**E. American Discovery Is an Unlikely Export**

Finally, if the aim of § 1782 is, as the _Euromepa_ line of cases suggests, to evangelize and introduce the rest of the world to the American method of discovery in the hope that, to quote Professor Smit, "the United States would communicate to the world at large what it regarded as the proper example to emulate in extending international cooperation . . . ." the invitation has been declined.\(^{158}\) Foreign procedural systems and international arbitrators alike have consistently rejected American discovery.\(^{159}\)

An illustration of the chasm between American procedure and that of other countries is found in the multinational responses to the Hague Evidence Convention, noted above in conjunction with _Aérospatiale_. The Convention establishes a framework for facilitating extraterritorial discovery requests. Article 23

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158. Smit, _supra_ note 84, at 235; see also _supra_ notes 95-106 and accompanying text (providing discussion of _Euromepa_).

159. "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States." _Restatement (Third) of the Foreign Relations Law of the United States_ § 442, reporters' note 1 (1987).
provides: "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."\textsuperscript{160} This provision was included in order to gain the Convention's acceptance by civil law nations with a deep aversion to American document discovery. The inclusion of Article 23, and the fact that nearly all the signatories did declare their unwillingness to participate in document discovery, is again illustrative of the deeply held beliefs in foreign legal systems about the disruptive effect of American document discovery.\textsuperscript{161}

While there is much to be said for the truth-producing and field leveling goals of American discovery, there is no aspect of American procedure that has generated and continues to generate so many calls for reform.\textsuperscript{162} It is reasonable to ask why American courts should, as a matter of course, allow discovery to foreign litigants under § 1782, when most other countries have chosen not to follow the American example, and when the model has far from unanimous support even in the United States.

\textbf{F. Conclusion: Other Applications for Cooperative Comity}

In conclusion, unquestionably, the text and legislative history

\begin{itemize}
\item \textsuperscript{160} Hague Convention, \textit{supra} note 146, at art. 23.
\item \textsuperscript{161} Twenty-three countries are signatories to the Convention: Argentina, Australia, Barbados, Cyprus, Czech Republic, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, Mexico, Monaco, Netherlands, Norway, Portugal, Singapore, Slovak Republic, Spain, Sweden, United Kingdom, and the United States. Only Barbados, the Czech Republic, the Slovak Republic, and the United States will unreservedly execute requests for production of documents. Mexico will execute such requests under certain conditions. The reservations of the parties may be found in the notes following 28 U.S.C. § 1781 (Supp. 1999).
\end{itemize}
of § 1782 make it clear that where a foreign court asks for assistance in obtaining evidence in the United States, both the text of the Act, the legislative history and notions of cooperative comity should suggest that a court should render all possible assistance to the foreign tribunal. Where, however, it is a foreign litigant who is requesting the American court's assistance in obtaining discovery, arguments informed by a comity-driven reading of the statute would suggest that the U.S. court supports the rules, policies, and values of the foreign procedure and not accord discovery prohibited abroad.

This model of cooperative comity has applications in a variety of other procedural contexts. In the case of forum non-conveniens inquiries, for example, courts, including courts considering dismissals in favor of foreign forums, have been instructed to weigh the possibility of a dismissal under both public and private factors. The private factors would remain unchanged by a cooperative comity analysis and include ease of access to proof, the availability and cost of obtaining witnesses, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive." The public factors have

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163. See, e.g., In re Letter Rogatory From First Ct., 42 F.3d at 310-11 (5th Cir. 1995) (stating that the fear of offending a forum nation does not exist when a foreign court requests information because that court arbitrates the procedural rules regarding discovery). In light of this observation, it is especially puzzling as to why the Fifth Circuit has not imposed a discoverability requirement where the request comes from a foreign litigant.

164. Another aspect which has spawned disagreement and which likewise implicates comity concerns is the statutory requirement that the discovery be sought for use in a foreign proceeding. 28 U.S.C. § 1782(a) (Supp. 2000). Generally, courts have required that there be a foreign adjudicative proceeding pending. See, e.g., Lancaster Factoring Co. v. Mangone, 90 F.3d 38, 41 (2d Cir. 1996). In the alternative, courts have required that "adjudicative proceedings be imminent—very likely to occur and very soon to occur." In re Request for Int'l Judicial Assistance for the Federative Republic of Brazil, 936 F.2d 702, 706 (2d Cir. 1991); see also In re Al Fayed v. United States, 210 F.3d 421, 424 (4th Cir. 2000) (denying discovery assistance under § 1782 to obtain documents in the hands of the National Security Administration pertaining to the car accident that killed Dodi Al Fayed and Princess Diana, on the grounds that where the applicant was appealing the determination of a French magistrate investigating the accident, there was no proceeding within the meaning of the statute). Under a cooperative comity model the question of whether something is or is not an adjudicative proceeding should be determined under the law of the foreign country where the putative proceeding is pending.

included the administrative problems associated with court congestion, and the avoidance of unnecessary application of conflict of law problems and application of foreign law. In *Piper Aircraft*, the Court included the interests of the foreign forum as a part of the analysis. An even more useful formulation of the *Piper Aircraft* test would be to include in the list of public factors an identification of the interests of the foreign forum, including its interests in trying a local case local and application of local procedures.

Another context ripe for a more sophisticated cooperative comity approach remains the problem of duplicative litigation in the courts of different countries. Historically, these cases have been resolved too often by either staying the later filed action, thereby rewarding the winner of the race to the courthouse, or by an unseemly battle between courts dueling for jurisdiction of the case. In this and many other circumstances of potential conflicts between American and foreign courts, a recognition of cooperative comity is an important value and will facilitate more efficient, more cordial, and more harmonious decisions. Comity can be a device that enables judges to understand, to communicate and—true to the Sanskrit derivation of the word “comity,”—to smile.

III. OTHER DIRECTIONS: INTEGRATIVE COMITY AND THE RELATIONSHIP OF AMERICAN COURTS TO INTERNATIONAL AND SUPRANATIONAL TRIBUNALS

Having explored the function of cooperative comity, applicable when American courts are in horizontal conflict with the courts of sister nations, I now come to another possible application of judicial comity, specifically, the role of comity in cases where the decisions of American courts intersect with the subject matter of cases before international and supranational tribunals. Because there are far fewer international tribunals than courts of sister nations, this problem by its very nature arises less frequently. Further, because the jurisdiction of most international and supranational tribunals is strictly circumscribed and agreed to in the forms of treaties or consents by nation states, the

166. *Id.*
167. *Id.* at 260.
168. *See generally supra* note 20 and accompanying text.
potential for conflict between domestic and international tribunals in the past has been more limited. The International Court of Justice (ICJ), for example, provides only two types of jurisdiction: the power to decide contentious cases based on Article 36 of the Court's Statute; and, the authority to render advisory opinions at the request of either the General Assembly or the Security Council of the United Nations pursuant to Article 96 of the U.N. Charter. Thus, the occasions for conflict between American courts and the ICJ prove rare.

The number of supranational tribunals, however, is growing. These tribunals include the Dispute Settlement Bodies of the World Trade Organization (WTO), the Inter-American Court of Human Rights, the dispute resolution mechanisms under Chapters 11, 19, and 20 of NAFTA and, should the United States ratify the Rome Treaty, the International Criminal Court.

169. The Statute of the Int'l Ct. of Justice (ICJ), (June 26, 1945, art. 36, para. 1), 59 Stat. 1055, 1060.
170. U.N. CHARTER art. 96, para. 1.
171. See generally JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (2d ed. 1997) (stating that pursuant to a treaty, these bodies placed the WTO in a position of supremacy with respect to the global trading network); John H. Jackson, The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections, in TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS (Niels Blokker & Sam Muller, eds. 1994); see also generally AMERICAN BAR ASSOCIATION, THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION (Terence P. Stewart, ed. 1996).
Legal analysis by U.S. courts remains in a nascent state of development due to the courts' relative lack of experience in blending and accommodating the decisions of domestic and international tribunals. Therefore, it is not necessary to examine effective international and supranational adjudication, the constitutional impediments to ceding jurisdiction to supranational tribunals, the much larger tensions between sovereignty and international law, nor the dualist posture of the United States towards international law.


A model of integrative comity will be useful to harmonize conflicts between international and domestic courts, despite the model’s theoretical and doctrinal problems. A historical difference of opinion exists as to how courts should treat conflicts between international law and domestic law. In many legal systems outside the United States, “law” is a unitary concept, requiring the harmonization of international and domestic law. Since only one law can dictate a particular circumstance, many legal systems give international law primacy, often through an express constitutional mandate. This concept reflects a monist philosophy.

The United States, by contrast, is a dualist system that considers international and domestic law as separate, except to the extent that international law is enacted as a part of domestic law. In dualist systems, if an international law conflicts with

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179. For example, in Germany, Article 25 of the Basic Law provides that “[t]he general rules of international law . . . shall override laws and directly establish rights and obligations for the inhabitants of the federal territory.” Gisbert H. Flanz, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 117 (Albert P. Blaustein & Gisbert H. Flanz eds., 1994) (translating Article 25 of the Grundgesetz or Basic Law of the Federal Republic of Germany). Two scholars have observed that “the general rules of international law are norms which are recognized by a predominant majority of countries (but not necessarily by the FRG itself).” Wildhaber & Breitenmoser, The Relationship Between Customary International Law and Municipal Law in Western European Countries, 48 ZEITSCHRIFT FÜR AUSLÄNDISCHES RECHT UND VÖLKERRECHT 163, 179-204 (1988), translated in LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER, & HANS SMIT, INTERNATIONAL LAW, CASES AND MATERIALS 154-55 (3d ed. 1993).

Other countries follow a similar approach. The Greek Constitution of 1975 provides that “[t]he generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.” Gisbert H. Flanz, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 26 (Louis Pagonis trans., Gisbert H. Flanz, ed. 1988) (translating Article 28(1) of the Constitution of 1975 of the Greek Republic). The Russian Federation goes the farthest of all, providing for supremacy of customary norms, peremptory norms, and treaty obligations over domestic law. It provides that “[i]f an international treaty of the Russian Federation establishes rules other than those stipulated by the law, the rules of the international treaty apply.” Constitution of 1993 of the Russian Federation, translation in British Broadcasting Corporation, Summary of World Broadcasts, Nov. 11, 1993.

180. E.g., Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31-32 (1998). Others have argued that the rigid dichotomy of the monist-dualist debate is not helpful. E.g., Edwin Borchard, The Relation Between International Law and Municipal Law, 27 VA. L. REV. 137, 143-44 (1940) (arguing that the
domestic legislation, the courts will enforce the domestic law, and attempt to harmonize the constructions by recognizing that "international law is part of our law." 181

The constant tension between the dictates of international and domestic law has produced profuse commentary by international lawyers and political scientists alike, yet this attention has failed to create a workable model for the courts. 182 Perhaps the problem was never more squarely presented than in the 1889 Chinese Exclusion Case. 183 Here, the Supreme Court held that the Constitution does not prohibit the enactment of laws inconsistent with international obligations and that the courts shall enforce an act of Congress that is inconsistent with an earlier treaty. 184

Due to this unsteady platform for reconciling international and domestic legal norms, the relationship between domestic and international tribunals also rests on a tenuous foundation. The United States' constitutional structure developed at a time when today's internationalism and the United States' role as the international economic leader could not have been foreseen. 185

domestic mechanisms employed to perform international obligations are not of international concern, and that states that do not conform to international obligations are simply in violation of international law. For an interesting perspective on how monism and dualism have been viewed in other disciplines, see Jean Bethke Elshtain, How Should We Talk, 49 CASE W. RES. L. REV. 731, 732 (1999) (characterizing liberal monism in the theologian's church-state debate as "the view that all institutions internal to a democratic society must conform to a single authority principle . . . and to a single vocabulary of political discussion").

181. The Paquete Habana, 175 U.S. 677, 683 (1900).
183. 130 U.S. 581 (1899).
185. E.g., Missouri v. Holland, 252 U.S. 416 (1920). Justice Holmes explains that "when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." Id. at 433.
The relationship between American courts and international courts is of a different nature and quality than the relationship between American courts and the courts of other nations. International law binds all nations, even where domestic norms are given precedence within a domestic system.

These conflicts could be resolved by a vertical model of integrative comity that would direct the courts' analysis in the event of a conflict between domestic and international law. This model would mandate that where American courts are confronted with a decision of the ICJ or other international tribunal, and where the United States has consented to the jurisdiction of that tribunal, American courts should accord a high degree of comity, deference, and respect for that court and should generally aid it in protection of its jurisdiction and enforcement of its judgments unless to do so would violate a clear and express constitutional or statutory prohibition under U.S. law. This degree of deference is necessary because international dispute resolution cannot function if nations cannot predict and rely upon other nations to abide by international obligations created by an international tribunal.  

Two cases serve to illustrate the current interactions between the International Court of Justice and the United States Supreme Court and how comity could have eliminated conflict. The first case concerned an execution by the State of Virginia of a Paraguayan national named Angel Francisco Breard.  

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186. Koh, *International Law*, supra note 182, at 2600 (stating that if nations carry out their international legal obligations erratically, it will be impossible to achieve "multilateralism" as opposed to the current regime of bipolar politics).

187. Breard v. Greene, 523 U.S. 371 (1998). The *Breard* case arose when Angel Breard was arrested for the murder and attempted rape of Ruth Dickie in Arlington County, Virginia. Breard, by his own testimony, was in fact guilty of the crimes. At his trial, Breard testified, against the advice of counsel, that he had accosted Dickie on the street, followed her to her apartment, argued with her, gained entry to the apartment, stabbed her, and got "on top of her" in an attempt to have sex. *Breard v. Virginia*, 445 S.E.2d 670, 674 (Va. 1994). Before he could complete the act, he was frightened by a knock on the door and subsequently fled through a kitchen window. *Id.* Breard was arrested some months later in conjunction with another attempted rape, and was tried with the Dickie murder after DNA analysis connected his hair, blood, and body fluids to those found at the scene. *Id.* His conviction was affirmed and his state habeus corpus petition was denied. *Id.* The Supreme Court of Virginia affirmed the conviction, the constitutionality of the trial court's review of the death sentence, and addressed various other matters relating to the conduct of the trial. *Id.* at 674-82. The United States Supreme Court denied Breard's petition
second case concerned the execution by the State of Arizona of two German nationals, Karl and Walter LaGrand. Both cases involved an arrest, trial, and conviction that occurred without notifying the accused of his rights as a foreign national under the Vienna Convention on Consular Relations to contact his consulate and obtain assistance. In both cases there was little doubt about the guilt of the accused. The governments of the accused learned of the convictions only after the appeals were exhausted. The governments sought relief in the United States for a writ of certiorari. Breard v. Virginia, 513 U.S. 971 (1994). The Circuit Court of Arlington County denied his state petition for habeus corpus, and the Supreme Court of Virginia refused the petition for appeal. Breard v. Netherland, 949 F. Supp. 1255, 1260 (E.D. Va. 1996). See Vienna Convention on Consular Relations (Paraguay v. United States), Order of 10 Nov. 1998, 1 C.J. Reports 1998, at 426.

188. Fed. Republic of Germany v. United States, 526 U.S. 111 (1999). The LaGrand brothers were sentenced to death in conjunction with first degree murder, attempted murder, attempted robbery, and kidnapping convictions arising out of an attempted bank robbery. Arizona v. LaGrand, 734 P.2d 563, 565 (Ariz. 1987). The LaGrands were never notified by the authorities of their rights under the Vienna Convention, although the authorities were aware of their German nationality in 1982. Id. The LaGrands never raised the failure to accord them their rights under the Consular Convention during the trial and appellate phases of the proceeding. See Cara S. O'Driscoll, Comment, The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations, 32 ARIZ. ST. L. REV. 323, 331-32 (2000); see also Vienna Convention on Consular Relations (Germany v. United States), Order of 5 Mar. 1999, I.C.J. Reports 1999.


1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

   (B) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Id. The Convention entered into force on March 19, 1967. The United States, Paraguay, and Germany are all parties.

States' legal system and before the ICJ. In both cases, shortly before the scheduled execution, the ICJ issued identical orders as Provisional Measures stating that "[t]he United States should take all measures at its disposal to ensure that [the defendant] is not executed pending the final decision in these proceedings, and should inform the Court of all measures which it has taken in implementation of this Order." In Germany v. United States, the ICJ also ordered that "[t]he Government of the United States of America should transmit this Order to the Governor of the State of Arizona." The ICJ also noted that "the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States."

In the Supreme Court proceedings, the Department of State and the Department of Justice submitted an amicus brief to the Court arguing against the stay. With respect to the ICJ's interim government became aware of the conviction and sentence and held a series of meetings with the United States State Department. On July 7, 1997, the State Department acknowledged the breach of the Convention and apologized for it. See Brief of Amicus Curiae for the United States, at 8-9. Breard v. Greene, 523 U.S. 371 (1998). The Paraguayan consulate instituted an action, also in the District Court for the Eastern District of Virginia, seeking a declaration that the Vienna Convention and the Paraguay-U.S. Treaty of Friendship, Commerce, and Navigation had been violated. The consulate also sought an injunction against further violations, and an order vacating Breard's conviction and sentence. The court found that the ambassador had standing, but concluded that the Eleventh Amendment precluded the court's assumption of subject matter jurisdiction. Republic of Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996), aff'd, 134 F.3d 622 (4th Cir.), cert. denied sub nom, Breard v. Greene, 523 U.S. 371 (1998).

Meanwhile, in Breard's federal habeas proceeding, the district court held that Breard had waived this claim because he failed to raise it during the state trial, appellate, and habeas proceedings. The court did note, however, that it was "troubled" by what it characterized as "Virginia's persistent refusal to abide by the Vienna Convention." Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998). Ultimately the appeals were exhausted and Breard's execution date was set. In the LaGrand case, during the pendency of a Mercy Committee hearing in Arizona, the German government used diplomatic means to prevent the execution of Karl LaGrand, including demands for a stay of execution from the Chancellor and president of Germany. They were not successful and Karl LaGrand was executed the day after the meeting. See O'Driscoll, supra note 188, at 332.

192. Germany, 38 I.L.M. at 313 (indicating provisional measures); Paraguay, 37 I.L.M. at 819 (indicating provisional measures).
193. Germany, 38 I.L.M. at 313.
194. Id.
measures order, the departments argued that "there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding." This was based on the fact that Article 41 of the ICJ Statute, relating to Provisional Measure, was not couched in mandatory terms. The brief contended:

The better-reasoned position is that such an order is not binding. Article 41(1) of the ICJ statute provides that the ICJ shall have the power to indicate any provisional measures which *ought to be taken* to preserve the respective rights of either [party]. Article 41(2) further states that "pending the final decision [of the ICJ], notice of the measures *suggested* shall forthwith be given to the parties and the Security Council."  

Nevertheless, the Court denied Breard's petition for a stay, dismissed the petition for a writ of certiorari, and held that neither Paraguay nor the Consul General of Paraguay were authorized to bring suit. In a per curiam opinion, from which Justices Stevens, Ginsburg and Breyer dissented, the Court first noted that while it would always give "respectful consideration" to treaties such as the Vienna Convention on Diplomatic and Consular Relations, the implementation of treaties was generally governed by the procedural rules of the forum state, which in this case was the United States. Since Breard failed to raise his rights under the Vienna Convention in state court, he waived the claims. Further, the Court noted that while the Constitution recognizes treaties such as the Vienna Convention as the law of the land under the Supremacy Clause, acts of Congress are deemed to be in full parity. The Court concluded that Breard could not raise the claim of prejudice resulting from the failure to advise him of his rights under the Consular Convention since he failed to develop that claim in the state

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196. *Id.*
198. *Id. at 375.*
199. *Id. at 375-76.*
200. *Id. at 376* (citing *Reid v. Covert, 354 U.S. 1, 18 (1957)* (stating that "when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null").
proceedings.\textsuperscript{201}

As to the question of the ICJ Order, the Court said only this:

It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative.\textsuperscript{202}

The day before the Supreme Court decision, Secretary of State Madeline Albright sent a letter asking the Governor of Virginia to stay the execution.\textsuperscript{203} She noted that although the Department of State defended Virginia's right to proceed with the sentence in both the ICJ and the Supreme Court, the execution presented difficult foreign policy issues. While acknowledging the "aggravated character of the crime for which Mr. Breard has been convicted,"\textsuperscript{204} she noted that the execution of Breard would cause other countries to argue that the United States did not take its obligations under the Convention seriously and "could be seen as a denial by the United States of the significance of international law . . . and thereby limit our ability to endure that Americans are protected when living or traveling abroad."\textsuperscript{205} In the end, however, the Governor of Virginia refused to stay the execution, noting that the ICJ did not have the authority to interfere in the criminal justice system of Virginia, that Breard's guilt was beyond question, and that the crime had been heinous and depraved.\textsuperscript{206}

\begin{flushleft}
\textsuperscript{201} See id. at 376-77.
\textsuperscript{202} Id. at 378.
\textsuperscript{204} Id. at 672.
\textsuperscript{205} Id.
\end{flushleft}
The Supreme Court’s response to the ICJ order in LaGrand was even more terse. The actions were filed by the German government in both the ICJ and the Supreme Court on the day set for LaGrand’s execution. The ICJ issued its Order, based upon Germany’s ex parte application and the United States had not had an opportunity to respond.\textsuperscript{207} The German action in the United States Supreme Court invoked the original jurisdiction of the Supreme Court under Article III, section 2, vesting original jurisdiction in the Supreme Court in cases affecting ambassadors, ministers, and consuls.\textsuperscript{208} In rejecting the German government’s petition for relief, the Court noted first that original jurisdiction would apply only to claims on behalf of ambassadors and consuls, and not to their claims relating to the treatment of German nationals.\textsuperscript{209} The Court also noted the Eleventh Amendment difficulties in allowing a suit against the State of Arizona to be brought in federal court.\textsuperscript{210} Ironically, on the same day, the Arizona Board of Executive Clemency recommended a reprieve so that Germany would have more time to pursue its case before the ICJ, but the Governor, Jane Hull, rejected the recommendation and Walter LaGrand was executed in the gas chamber the same day.\textsuperscript{211}

The ICJ hearings in Germany v. United States were conducted between November 13th and 18th, 2000.\textsuperscript{212} First, Germany argued that the United States violated its legal obligations by not informing the LaGrands of their rights under Article 36 of the Consular Convention, thus depriving Germany of its right to provide consular assistance.\textsuperscript{213} Second, Germany argued that

\begin{itemize}
\item \textsuperscript{207} Germany, 38 I.L.M. at 308; see also id. at 315-16 (Separate Opinion of President Schwebel) (noting the limited nature of the Court’s power to issue ex parte provisional measures).
\item \textsuperscript{208} U.S. CONST. art. III, § 2, cl. 2.
\item \textsuperscript{209} See Germany v. United States, 526 U.S. 111, 112 (1999).
\item \textsuperscript{210} Id. at 112.
\item \textsuperscript{211} O’Driscoll, supra note 188, at 334 (citing Jerry Kammer & Mary Beth Warner, Germans Knock U.S. Justice: Media, Citizens Decry Death as Form of Punishment, Criticize Hull, ARIZ. REPUBLIC, Mar. 4, 1999, at A2 (quoting the State Department as saying “Germany has known about the consular notification issue for a number of years but did not raise it with us until very recently”)).
\item \textsuperscript{212} The text of the oral hearings, written pleadings, and other case materials is available at the ICJ web site. See ICJ, http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.
\item \textsuperscript{213} Id. at Verbatim Record 2000/26—Translation.
\end{itemize}
when the United States applied its domestic law of procedural default and waiver, it violated its obligation to Germany to give full legal effect to the object and purposes for which Article 36 was intended. 214 Finally, Germany argued that the United States' refusal to take all measures necessary to comply with the ICJ order and to prevent the execution of Walter LaGrand violated international law. 215 Germany then sought an order from the ICJ to ensure that the United States provide Germany with assurances that the referenced unlawful acts would not be repeated. 216 The United States, conversely, sought an order in which the ICJ would acknowledge that the United States had breached its legal obligations and apologized to Germany, thus dismissing all other claims. 217

The ICJ's decision shall first address the question of the mandatory nature of the ICJ's power, at least with respect to its power to order provisional measures. Second, the opinions are likely to address the extent to which the domestic law of a state, in this case procedural law relating to waiver of criminal defenses not raised at trial, and the nature of the federative structure of the state, may relieve the state of its obligation to comply with orders of the ICJ.

There are many troubling aspects to the Breard and LaGrand decisions, which have already drawn considerable and able scholarly comment. 218 One of the most significant questions is whether a conviction based on evidence obtained in the face of a clear violation of a treaty obligation should stand. 219 This issue

214. Id. at Verbatim Record 2000/27—Translation.
215. See id.
216. Id.
217. Id. at Verbatim Record 2000/28—Translation.
218. See, e.g., supra note 153.
219. Most cases conclude that these convictions are valid. See, e.g., United States v. Jimenez-Nava, No. 99-11300, 2001 U.S. App. LEXIS 2766 (5th Cir. Feb. 26, 2001) (holding that suppressing evidence in a criminal trial did not further the purposes of the Vienna Convention on Consular Relations); United States v. Santos, 235 F.3d. 1105 (8th Cir. 2000) (holding that defendant had five months to exercise his right to consular participation and his failure to do so cannot be charged to defects in the government's procedure); United States v. Lawal, 231 F.3d 1045 (7th Cir. 2000) (holding that exclusion of evidence was not a proper remedy for a violation of defendant's right under the Vienna Convention to be informed of a right to contact the consul); United States v. Lombera-Comorlinga, 206 F.3d 882 (9th Cir. 2000) (holding that a violation of the Vienna Convention's consular notification requirement does not require suppression of subsequently obtained evidence); United States v. Nai Fook Li,
is further complicated by the difficulties posed by America's dualist posture. One perceptive commentator observed:

[We may] proceed[] on the assumption that the ICJ order involved in the Breard case was binding as a matter of international law. Based on this assumption, the United States as an entity was obliged to obey the ICJ order, incurring international responsibility if it failed to do so.

It does not follow, however, that this international legal obligation required American courts to carry out the ICJ's order. The fact that the United States had an obligation does not indicate which officials within the federal and state governments had the responsibility of implementing the obligation.  

Another commentator argued that, "[among the most puzzling aspects of the Breard episode was the Clinton administration's claim that the decision whether or not to comply with the Order of the International Court of Justice . . . lay exclusively in the hands of the Governor of Virginia."  

It is, after all, understood that "a state cannot plead its own law as an excuse for noncompliance with international law . . . ."

Certainly the optimal solution would be the harmonization of international law and domestic law. This involves the timeless tension between international law and sovereignty. This solution seeks the end of religious and nationalistic tensions, clean and pure sources of energy, universal shelter, food, and

206 F.3d 56 (1st Cir. 2000) (holding that regardless of whether the treaties created rights to consular notification and access, failure to notify defendant of the right does not result in suppression of evidence); Faulder v. Scott, 81 F.3d 515 (5th Cir. 1996). But see Delaware v. Reyes, 740 A.2d 7, 14 (Del. 1999) (holding that statement made during interrogation suppressed due to failure to advise foreign national defendant of his rights under the Vienna Convention). appeal denied, No. 527, 2000 Del. LEXIS 492 (Dec. 12, 2000).

220. Weisburd, supra note 175, at 882 (emphasis added).


223. Corfu Channel (United Kingdom v. Albania), 1949 I.C.J. 39, 43 (Apr. 9) (stating that, "[w]e can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist régime, according to which States were only bound by the rules which they had accepted."); LOUIS HENKIN, HOW NATIONS BEHAVE 17 (2d ed. 1979) (noting that "[e]xcept as limited by international law or treaty, a nation is master in its own territory").
health care. It is unlikely this goal will be achieved in our lifetimes.

For these goals to be achieved U.S. courts must show the ICJ and other international and supranational tribunals a more developed sense of comity. The United States recognizes the ICJ's jurisdiction as a judicial body established within the U.N. Charter to resolve disputes between nation-states. Nevertheless, there may be a question about whether the ICJ's authority to grant provisional remedies is drafted in permissive

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224. Article 36(1) of the Statute of the ICJ refers to the non-compulsory jurisdiction of the Court and provides: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties or conventions in force." The United States recognizes such jurisdiction. Article 36(2) of the Statute of the ICJ provides that:

[States may] declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court to hear legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute breach of an international obligation; [and] (d) the nature or extent of the reparation to be made for the breach of an international obligation.

Article 36(3) provides that the declarations "may be made unconditionally or on the condition of reciprocity." Statute of Int'l Ct. of Justice, June 26, 1945, art. 36, 59 Stat. 1055. The United States initially accepted this jurisdiction in 1946 as existing without any other special agreement and in relation to any other state accepting the same obligation. The United States, however, made the following reservations:

Provided, that this declaration shall not apply to-

(a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

(c) disputes arising under a multilateral treaty unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to the jurisdiction.

Id.; see also Military and Paramilitary Activities, (Nicaragua v. United States), 1984 I.C.J. 392 (Order on Jurisdiction and Admissibility). When the ICJ rejected the American claim that the court lacked jurisdiction, the United States withdrew from the proceedings and withdrew its consent to Article 36(2) compulsory jurisdiction. While the withdrawal had no effect in the Nicaragua case, since six months notice is required to withdraw, the United States holds to that posture today. Statement of the United States Secretary of State, 24 I.L.M. 1742 (1985).
rather than mandatory language. Further, even if the Breard and LaGrande orders were not binding, they were urgent requests that implicated respect for the jurisdiction of the ICJ. Professor Anne-Marie Slaughter wrote, if the courts are looking internationally for guidance then the ICJ "would [be] a fine place to look."226

It is difficult to define the relationship between American law and international law, thus the relationship between American courts and international and supranational courts is likewise confusing. Although the decisions of the ICJ, by the terms of its own statute, do not constitute binding precedent,227 it is the primary court designated in the international legal order for resolving international disputes. Accordingly, the American courts should afford some measure of deference to the opinions of the ICJ by recognizing the basis of the ICJ’s jurisdiction.

Breard and LaGrand both involved heinous crimes coupled with clearly guilty defendants in circumstances in which the assistance of the foreign consulate would not have changed the result. But these cases cannot be dismissed as cases limited by their facts. Instead, the Court completely eliminated the principal basis for its jurisdiction over what was the most important part of the claims of Paraguay and Germany. Even where the subject matter jurisdiction of a federal court must be prescribed by Congress, the Supreme Court held, in Chambers v. NASCO,228 that courts have inherent power to impose sanctions where a party acts in bad faith and impairs the basis of the Court’s jurisdiction.229 Deference should have been shown to the ICJ’s attempt to accomplish the same thing.

Consequently, we return to the model of integrative comity and ask whether it may have resolved these issues. For integrative

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225. Statute of Int’l Ct. of Justice, June 26, 1995, art. 41, 59 Stat. 1055. Article 41 provides: “The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.” Id.
226. Slaughter, supra note 44, at 711.
227. The Statute of the ICJ, article 38(1)(d), provides that the Court may apply judicial decisions as “subsidiary means” for the determination of international legal rules. For a comprehensive discussion of the fact that ICJ decisions are not viewed as binding precedents by municipal courts, see Weisburd, supra note 175 at 882-91.
229. Id. at 35, 41, 55, 57-58.
comity to be mandated, the first element of the formula requires American courts to address those decisions by which international tribunals confront them. Both *Breard* and *LaGrand* involved such a confrontation because the United States Supreme Court received an Order from the ICJ that the United States take all measures in its disposal to ensure that the defendants avoid immediate execution.\(^{230}\) The second element of the integrative comity formula is that the United States consents to the international court’s jurisdiction. This was likely in the *Breard* proceedings instituted by Paraguay, since the United States never filed an objection to jurisdiction and it appointed an agent to represent it during the proceedings.\(^{231}\) The proceedings involving Walter LaGrand, however, involved an *ex parte* order of the ICJ and there was no express consent; but there would have been jurisdiction within the terms of Article 36(1) and 41. Further, the United States has not objected to jurisdiction in the proceedings that continued.\(^{232}\)

The final part of the test requires that international tribunals be accorded a high degree of deference, and that American courts aid them in the protection of their jurisdiction and enforcement of their judgments, unless to do so would violate a clear and express constitutional or statutory prohibition under American law. Professor Weisburd made a thoughtful argument that comity would not have been required in the *Breard* or *LaGrande* matters, because the criminal processes in the United States were complete and execution was scheduled. As he observes:

> If the Court’s authority to grant a stay is limited to situations in which the sentence to be stayed was imposed in a judgment that the Court is likely to review, how could it grant a stay in a case in which it had determined that there would be no review?\(^{233}\)

Professor Weisburd’s argument has some merit if we assume that the United States would ignore a clear and dispositive ICJ


\(^{233}\) Weisburd, supra note 175, at 927.
ruling that nation-states may not impose criminal sentences in the face of extreme violations of the Vienna Convention on Consular Relations. The problem with Professor Weisburd's argument is the assumption that whatever the ICJ might have held does not matter and that by implication the ICJ is a tribunal to be acknowledged only when convenient. With this, we return to Louis Henkin's formula that such a lack of comity merely indicates a reluctance to defer to that which can, as a pragmatic political matter, can be resisted. The cynic might also whisper that this is simply the reality that international courts are not given deference and international law will be ignored where it is in the short-term national interest to do so.

Perhaps it is unrealistic to suggest a domestic doctrine of comity and deference to international courts, but I hope that this is not so. In other contexts the United States has been able to function within the jurisdictional reaches of supranational tribunals such as the Dispute Settlement Bodies of the WTO, or the dispute resolution procedures under NAFTA. Our friend the cynic notes that this may be because, since America is the unquestioned global economic leader, it is in the American national interest to stabilize trade relationships. Yet has it not also been the consistent hope of the United States that international law will be observed and will temper the self interest inherent in resolving international disputes along purely political lines? To refuse even the modest degree of international comity suggested here would suggest that in the dispute between the language of law and the language of power, law is losing ground.

IV. CONCLUSION: THE BENEFITS OF THE COOPERATIVE AND DUALIST MODELS OF COMITY

Introducing greater clarity into the value of comity is a matter of some urgency. The amount of transnational litigation in American courts has been exacerbated by the fact that the United States is viewed as a haven for foreign litigants because of the attractiveness of its substantive law, the liberality of its pleading and discovery procedures, and the perceived generosity

234. Professor Louis Henkin has called this the "cynic's formula." LOUIS HENKIN, HOW NATIONS BEHAVE 49 (2d ed. 1979); see also id. at 74-76 (outlining pragmatic reasons why nations break international law).
of American juries. This does not suggest that American courts have solicited or embraced this tendency. Questions of comity often do not become part of the analysis. Under a model of cooperative comity, American courts should recognize the cooperative aspects of international judicial comity and give due regard to their role as participants in an international scheme of dispute resolution. This recognition requires an acknowledgment of the presence and role of foreign courts. Asking the questions that cooperative comity demands be asked will also end vagueness and uncertainty about what is influencing the court in a given case.

Finally, a posture of integrative comity will both contribute to the effectiveness of international and supranational tribunals, and the effectiveness of international law itself. Professor

235. See generally Smith Kline & French Laboratories, Ltd. v. Bloch, 2 All E.R. 72, 74 (C.A. 1983). The most famous observation on this score is the first paragraph of Lord Denning's opinion:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case “on spec” as we say, or on a “contingency fee” as they say.

Id. at 74. In Smith Kline, a British litigant had filed suit in the United States, alleging that a British subsidiary and its United States parent breached an agreement. Id. at 75. Smith Kline successfully sought a British injunction against prosecution of the United States action. What aroused Lord Denning’s pique was the suggestion of the British litigant that he should not be deprived, in an action involving an American parent corporation, of American fee arrangements, American measures of damages, and American discovery devices. Id. at 78. The case is often cited as an example of a British failure of comity, and Lord Denning’s strong views do not continue to dominate the English courts.

236. The concept of forum shopping is often characterized, particularly in the context of analyzing issues under the Erie doctrine, as an “evil” to be avoided. See, e.g., Abex Corp. v. Maryland Cas. Co., 790 F.2d 119, 125 (D.C. Cir. 1986) (outlining the “evils of forum shopping”); Hamilton v. Roth, 624 F.2d 1204, 1210 (3d Cir. 1980) (discussing the Erie doctrine generally); Applied Micro, Inc. v. SJ1 Fulfillment, Inc., 941 F. Supp. 750, 755 (N.D. Ill. 1996) (applying the Erie doctrine). This view has been criticized, as Friederich Juenger observed, we should not be too quick to condemn forum shopping because it is legitimate for lawyers to serve the needs of clients by obtaining every advantage. Friederich Juenger, The Internationalization of Law and Legal Practice: Forum Shopping, Domestic and International, 63 TUL. L. REV. 553, 570 (1989); see also Goad v. Celotex Corp., 831 F.2d 508, 512 n. 12 (4th Cir. 1987) (stating that forum shopping is not inherently evil since both diversity jurisdiction and venue statutes are implicit approvals of affording range of forum selections).

237. One objection to an increased role for international comity is that there
Harold Hongju Koh, for example, writing on the perennial problem of the means of ensuring compliance with international norms, has argued that compliance depends on "a complex process whereby international norms seep into, are internalized, and become embodied in domestic legal and political processes." Perhaps it can be better stated by saying that our courts must become better international citizens.

is a limited history of effective international litigation, meaning that enforcement and recognition of the judgments and orders of international tribunals has been far from automatic. See generally Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 273 (1997). Rather, the most notable success has been in the area of supranational adjudication. Id. at 290-98 (outlining the successes of the European Court of Justice and the European Court of Human Rights). Supranational adjudication, however, takes place in a very different context, namely one in which the participating or member states have specifically authorized by treaty the tribunal to exercise certain functions that otherwise would be reserved to the member states. Id. at 276. The most successful of these tribunal include the European Court of Justice and the European Court of Human Rights. Id. Moreover, as Professors Helfer and Slaughter noted, the nations that form the European Union "share a common core of social, political, and legal values that European jurists themselves have linked to the effectiveness of the two tribunals." Id.