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How Comity Makes Transnationalism Work

THOMAS SCHULTZ AND NICCOLÒ RIDI

Once upon a time, Real-World Pragmatism was a happy but wild and destructive fellow. After a particularly ferocious rampage, powerful forces decided it should get married. Sovereignty, they thought, would make a perfect spouse, bringing it order and control and peace. So the wedding was celebrated, with great fanfare – the fairy tale says it was in 1648, but fairy tales, as we know, are not to be trusted. What was bound to happen happened: very quickly the relationship descended into constant tension and bickering. The couple turned to a rabbi for counselling. The rabbi listened intently to Sovereignty and its complaints about territory and borders, about respect, about the importance of orderliness and maintaining appearances. And the rabbi said, 'Yes, you're right.' He then turned to Real-World Pragmatism and listened, just as intently, to grievances about the need for flexibility and spontaneity, about human relations that cannot systematically be boxed in and made to fit some theory, hard feelings about freedom. And again the rabbi said, 'Yes, you're right.' At that stage the rabbi's wife, who was listening in on the conversation from an adjacent room, stepped in and admonished her husband: 'You can't say that! You can't say they are both right!' The rabbi smiled benignly and answered, 'Yes, you, my dear, you are right too.' Slightly perplexed but essentially content with the recognition they received, all parties left the rabbi with earnest thanks. A friend then came in. 'I've bumped into Sovereignty and Real-World Pragmatism on my way over', he said. 'They both seemed reassured and pacified. How did you pull that off?' The rabbi chuckled and responded, 'I've used comity.' 'Huh?' came the response. 'Ah, comity – so you don't know what it is. That's good. Most people don't. That's part of why it works.'

A INTRODUCTION

Lawyers, normally, like law.

Lawyers, normally, understand law to be rules or at least principles, things that tell them what the (legal) solution is in a given situation, commands that

say what should now happen, as precisely as possible, in a concrete case or in a set of possible cases.

Lawyers, normally, like to articulate these rules and principles around categories (public law and private law, national law and international law, and a great many more), even if these categories have limited analytical purchase, even if they are somewhat artificial and dogmatic. Ordering the world may here not come second to understanding it. 'Doctrine' is not a dirty word for lawyers.

Jessup was not normal. That is a good thing. It means not being within the norm. An exceptional lawyer by definition is. And so Jessup thought about the 'universality of the human problems', precisely with the purpose of knocking down categories he perceived as artificial and dogmatic, or at least reconsidering them in light of the fact that the same problems arise across orders, across borders, across categories.[1]

And from problems Jessup went on to think about rules, and wrote this:

> To envisage the applicability of transnational law it is necessary to avoid thinking solely in terms of any particular forum, since it is quite possible, as we shall see, to have a tribunal which does not have as its own law either a body of national law or the corpus of international law. A *problem may also be resolved* not by the application of law (although equally not in violation of law) but *by a process of adjustment* – an extralegal or metajuridical means.[2]

A process of adjustment by which a problem is resolved; that is precisely what comity is. And that is precisely why comity is often (that is, normally) said to be 'grating to the ear when it proceeds from a court of justice'.[3] That these are the words of an eighteenth-century attorney from the US South is not out of line.

And this is the irony of comity. It is notable for its perceived obscurity and vagueness and for its unusually bad press. It is, as Lord Collins puts it, 'a discredited concept in the eyes of the text-writers'. Yet, as Lord Collins also points out, comity 'thrives in the judicial decisions'.[4] Indeed, as our own research confirms, literally thousands upon thousands of judicial decisions

[1] Philip C. Jessup, Transnational Law 8 (1956).

[2] *Id.* at 6.

[3] Samuel Livermore, Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations 26 (1828).

[4] Laurence Collins, *Comity in Modern Private International Law*, *in* Reform and Development of Private International Law: Essays in Honour of Sir Peter North 95 (James Fawcett ed., 2002).

refer to the notion, and many if not most of them turn on the notion.[5] Now if it is obscure and vague and incurs widespread odium, then why does it still sit so comfortably in the toolbox of (some of) those who have to make things legal work, namely courts? One reason may precisely be this: it just makes things work.

As in the story of our rabbi, comity might not contribute much to the construction of a neat theoretical edifice, one that agrees with (predominantly Western) binary, Cartesian, logical thinking. It might even undermine such a construction. But it helps to just make things work. This indeed is why comity was developed in the first place – that is, to make sovereignty work in the face of the pragmatic transnationalism that characterizes so much of real-world life. And this is one of the purposes comity is used for today – that is, to make things work, as an adjustment process for mostly transnational things, things such as the global market, hyper-politicized situations, the proliferation of international courts and tribunals, and legal harmonization and coordination across borders.

This article is an experimentation of this idea. It starts with sovereignty – a nice idea in theory that required comity to work well in practice – and then proceeds with a discussion of how comity helps the operations of the transnational things we just mentioned.

B SOVEREIGNTY

Comity was to a large extent fathered by Dutch scholars in the seventeenth century, in the wake of – and as a reaction to – the development of the Westphalian paradigm. That story is simple: territorial sovereignty and freedom from interference were consecrated as fundamental pillars of the new 'Westphalian' system, in which the rule of personal statuses became largely trumped by the force of the territorial law of the state. Good fences make good neighbours; that was in essence the idea. But good fences (good in the sense of clear, strict, binary) proved to be at odds with the transnational relations of seventeenth-century European society and commerce.[6]

[5] Thomas Schultz & Jason Mitchenson, *Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts*, 12 J. Priv. Int. Law (2016); Thomas Schultz & Niccolò Ridi, *Comity and International Courts and Tribunals*, 50 *Cornell International Law Journal* 577–610 (2017).

[6] Kurt Lipstein, Principles of the Conflict of Laws: National and International 8 (1981); Thomas Schultz & David Holloway, *Retour sur la comity (Première partie)*, J. Droit Int. 863–66 (2011); Thomas Schultz & David Holloway, *Retour sur la comity, deuxième partie: La comity dans l'histoire du droit international privé*, J. Droit Int. 571, 571, 574 (2012);

The comity doctrine was then conceived as an instrument capable of mitigating these contrasts. In its most influential statement, contained in a treatise penned by Ulrik Huber, comity was presented as an exception to the territoriality rule: sovereigns were expected to 'so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such governments or of its subjects'.[7]

The idea, then, was that sovereigns graciously concede that their territorial law should be set aside, thus reconciling their sovereignty with mutual convenience. Yet a domestic public policy element remained at the heart of it, in the sense that deference would be granted only to the extent it was tolerable.

From there on, the doctrine influenced the development of the common law in the United Kingdom and, to a greater extent, in the United States, where it has been hailed as the foundation of American private international law.[8] It was also there that the currently most influential statement of the doctrine sprang from Justice Gray's majority opinion in *Hilton* v. *Guyot*, the 'lodestar for all transnational enforcement doctrines in the US'.[9] Here's the influential statement: Comity

> in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons was are under the protection of its laws.[10]

Hilton framed the problem of comity and private international law in general firmly within the realm of international law.[11] In that regard, these were different, less dogmatic times: Joseph Story, whose work was so influential in the adoption of the doctrine in the United States, did not believe in a

Rodolfo de Nova, Historical and Comparative Introduction to Conflict of Laws 441 (1966); Schultz & Ridi, *supra* note 5.

7 This translation can be found in Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws: One Hundred Years After*, Harv. Law Rev. 15–38, 403 (1934).

8 Joel R. Paul, *Comity in International Law*, 32 Harv. Int'l L.J. 1, 78 (1991); Joel R. Paul, *The Transformation of International Comity*, Law & Contemp. Probl. 19, 19 (2008) [hereinafter Paul, *The Transformation of International Comity*].

9 Harold Hongju Koh, Transnational Litigation in United States Courts 206 (2008).

10 Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

11 *Id.*

sharp division between public and private international law and cited Vattel alongside the Dutch scholar.[12] The latter too was very much a Grotian thinker and described the operation of his comity doctrine very much in terms of an international usage, if not as a custom, an operation not so far away from what the Permanent Court of International Justice's held in *Serbian and Brazilian Loans*.[13] *Hilton* too proceeded along these lines. Comity could thus remain a sound basis for private international law, which it did, until the rise of 'positivism' (to level the charge broadly) reduced it to a vestige of historical interest only – or so it claimed.[14]

For, indeed, today comity is still employed quite often to address situations in which transnationalism bumps into sovereignty and is thereby centrally instrumental to the development of what Harold Koh calls the 'transnationalist jurisprudence' of certain countries.[15] For example, comity has been invoked as an upper limit to restrain the reach of domestic law, in cases concerning issues as diverse as competition and human rights; it has been considered a relevant factor in the granting of recognition to foreign and international judicial decisions and interpreted as counselling restraint in passing judgment on the sovereign acts of other states; and it has also been considered a compelling reason to refrain from adjudicating in cases of international litispendence (actual or simply foreseen) and a significant parameter for the granting of anti-suit injunctions. In yet other cases, it has been considered the foundation of sovereign immunity and the privilege of bringing suit.

Such is the conventional nature of comity, or comity in its sovereignty-related dimension: a doctrine (or a principle) in the name of which states – mostly through their courts – often fine-tune the reach of their national substantive law and jurisdictional rules, refrain from questioning the lawfulness of another sovereign state's acts and restrict themselves from issuing such judgments and orders when to do so would amount to an unjustifiable interference.[16] All of this comity has been enabled by paying homage to sovereignty.

[12] Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic: In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments § 11 (1834).

[13] Hessel E. Yntema, *The Comity Doctrine*, Mich. Law Rev. 9, 30 (1966). Serbian and Brazilian Loans (Fr. v. Yugoslavia, Fr. v. Braz.), 1929, P.C.I.J. (ser. A) Nos. 20–21).

[14] Albert Venn Dicey, A Digest of the Law of England with Reference to the Conflict of Laws 10 (1896).

[15] Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int. Law 43, 52–53 (2004).

[16] Adrian Briggs, *The Principle of Comity in Private International Law*, 354 Recueil des Cours de l'Académie de Droit Int'l 65, 85–86; Schultz & Ridi, *supra* note 5.

Then again, perhaps comity has enabled this by paying lip service, rather than homage, to sovereignty.

Let us consider, for example, those cases in which the pendency of foreign proceedings concerning the same dispute prompts local courts to discontinue local ones – or decline to exercise their jurisdiction altogether. Comity is often invoked as a justification for doing so, counselling restraint when the local proceedings would amount to an undue interference with the activity of the foreign court, an affront to sovereignty by reason of the sovereign nature of the act of adjudication. But looking closely at the modern life of the concept, is this really the best explanation? Does comity only have a sovereignty-related dimension?

Quite possibly not.

Comity has quite possibly gone beyond being a simple remedy to the inflexibility of sovereignty. To a significant extent, it has become unstuck from the latter notion, of which it was once a corollary. As the following sections will endeavour to highlight, the way comity has been used casts real doubts upon the idea of sovereignty as the only – or even the main – protected good.

C THE GLOBAL MARKET

Comity, we observed, entered the picture as a way to pay homage to sovereignty. But is that it? One way to tackle the problem is to follow Jessup in considering the topic of his second essay in *Transnational Law*, titled 'The Power to Deal with the Problems'.[17] The piece, it will be recalled, meant 'to examine which authorities deal effectively with which transnational situations. In familiar language this question may be approached as a matter of jurisdiction'. The term was here adopted in its public international law sense, that is as 'an aspect of sovereignty: it refers to a state's competence under international law to regulate the conduct of natural and juridical persons. The notion of regulation includes the activity of all branches of government: legislative, executive, and judicial.'[18]

In Jessup's days, the traditional view of jurisdiction in international law was still founded on the PCIJ decision in *Lotus*, notable for being 'based on a highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent States'.[19]

[17] Jessup, *supra* note 1, at 35.
[18] James Crawford, Brownlie's Principles of Public International Law 456 (8th ed. 2012).
[19] James L. Brierly, *The Lotus Case*, 44 L.Q. Rev. 154–56, 155 (1928).

Lacking an international law prohibition, the dictum may be paraphrased as 'states can do whatever pleases them' – no longer quite true, if it ever was, one might point out.[20] Jessup, in any event, went beyond that, skipping the otiose question of whether *Lotus* was correct and rather tested its helpfulness in understanding the allocation of authority in cross-border issues.[21]

Now how does comity enter the picture? In very general terms, the doctrine of comity has provided the basis for rules of private international law and rules of jurisdiction, the former being a species of the latter.[22] Further, comity has frequently been invoked as a canon of statutory construction to determine the reach of the domestic law of a state. While it might be argued that such construction canons are qualitatively distinct from questions of jurisdictional power properly-so-called, the distinction is quite immaterial for a transnational outlook on the point: either way, comity has been a key concept in the treatment by domestic courts of their jurisdictional limits.

In *Transnational Law*, Jessup cited Justice Holmes's decision in *American Banana* – an opinion notable for the bewilderment of his drafter at the plaintiff's 'several rather startling propositions' suggesting that a matter occurring in Costa Rica should be subject by United States antitrust law.[23] But it was precisely down this road that the United States became the 'world's antitrust policeman'.[24]

Indeed, come the early 1990s, comity had lost much weight in competition matters on both sides of the Atlantic. *Deference*, deference to sovereign authorities as expressed by comity, had lost much of its weight in competition matters on both sides of the Atlantic, with one shore calling comity irrelevant, the other appearing unsure of what it was to begin with.[25] In the American

[20] *See generally* Alex Mills, *Rethinking Jurisdiction in International Law*, 84 Brit. Y.B. Int'l. L. 187–239 (2014).

[21] Jessup, *supra* note 1, at 36.

[22] Alex Mills, The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law 303 (2009).

[23] Am. Banana Co. v. United Fruit Co. 213 U.S. 347, 355 (1909).

[24] Spencer Weber Waller, *The Twilight of Comity*, 38 Col. J. Transnat'l L. 563, 566 (1999).

[25] *See* Case C-89/85, Ahlström v. Comm'n (Woodpulp II), 1993 E.C.R. 1307 ('As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected'); Hartford Fire Ins. Co. v. Cal. 509 U.S. 764, 798 (1993) (we need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct (or, as Justice Scalia would put it, may conclude by the employment of comity analysis in the first instance that there is no jurisdiction), international comity would not counsel against exercising jurisdiction in the circumstances

context, Koh saw this approach as a product of what he called 'nationalist jurisprudence', one that 'refuses to look beyond US national interests when assessing the legality of extraterritorial action'.[26]

Yet, in the following decade, a few shouts of 'full reverse astern' were given to steer this jurisdictional approach towards a more cooperative model, transcending – to some extent – parochial and domestic interests and rather invoking comity to consider the 'mutual interests of all nations in a smoothly functioning international legal regime' and must 'consider if there is a course that furthers, rather than impedes, the development of an ordered international system'.[27] More recent cases have confirmed as much.[28] And if the application of comity has progressively become less overt, one may argue that this is only because 'its advocates won'.[29]

Now could we possibly think that this result has been achieved in pursuit of 'a harmony particularly needed in today's highly interdependent *commercial* world'?[30] Could we possibly consider that 'the market' is a new 'sovereignty' that comity is designed to pay homage to?[31]

The idea seems credible in the operation of comity as a principle of recognition. As we observed, comity has also provided a basis for courts to give effect to choice-of-law provisions, but concerns of domestic public policy had traditionally constituted the upper limit of any such accommodation, for indeed foreign sovereignty was to be respected but not at the cost of giving up one's own. And yet, some cases clearly seem to fail to be explained by this paradigm. Let us consider, for example, the 1985 landmark case *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*. In its decision, the US Supreme Court chose to give effect to an arbitration clause that covered antitrust matters, traditionally considered non-arbitrable. To justify its holding, the court argued that

> [c]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the *need of the international commercial system* for predictability in the resolution of disputes, all require

alleged here – the only substantial question in this litigation is whether 'there is in fact, a true conflict between domestic and foreign law').

[26] Koh, *supra* note 15, at 53.

[27] Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn St. Int'l L. Rev. 745, 749 (2005).

[28] F. Hoffman-LaRoche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

[29] Waller, *supra* note 24, at 566.

[30] *Empagran*, 542 U.S. at 166 (emphasis added).

[31] Paul, *The Transformation of International Comity*, *supra* note 8, at 36.

> enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context.[32]

So: cases such as this show the limits of a theory of comity strictly focused on the concept of sovereignty.

D HYPER-POLITICIZED SITUATIONS

Part of the very nature of comity is that it offers a pot of flexibility that can be dipped into when needed. Accordingly, comity may help mitigate the ill effects of adjudication in hyper-politicized situations. Let us consider, for example, the string of cases in the Third Reich industry litigation. Recall: a 'foundation' was created in Germany in the year 2000 to hear the claims and provide compensation of the victims of Nazi forced labour programs, 'the product of intense diplomatic negotiation in which officials of the United States as well as representatives of German industry and government played the most important roles'.[33] When claims were also filed in the United States, American courts by and large declined to hear them: the purpose was to channel litigation into the foundation. As Scott and Wai argue, this was textbook transnational legal process, in both the creation of the mechanism and the effort of feeding cases into it.[34] Comity, in this regard, was the perfect tool.

This was expressly confirmed in one of the more recent decisions in the same string of cases, where the traditional reliance on the political question doctrine left its place to a more elaborate and transnationally oriented conception of 'prospective' comity, based on 'the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum'.[35]

Now does, or should, the same approach apply to transnational human rights litigation? The conclusion and aftermath of the *Kiobel* case seem to serve as a cautionary tale on this very problem. Let us consider the facts of the

[32] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 615 (1985) (emphasis added).

[33] Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1, 2 (2002).

[34] Craig Scott & Robert Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 309 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004).

[35] Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004).

case to be known. What matters in this context is that there was no question of the substantive law that should have applied to the case (the 'law of nations'): the killer blow to the Alien Tort Statute was struck by a decision not to extend its application extraterritorially. Indeed, Horatia Muir-Watt described this resurfacing of territoriality as 'a spectacular backlash against the open-ended or functional approaches which these intrinsically deterritorialised jurisdictional conflicts seemed to call for'.[36] Once again, comity contributed a good deal to achieving this result.

In a sense, comity made things work in these cases too. But making things work comes at a price. For is it appropriate for the same jurisdictional approaches that guide 'antitrust imperialism' to also inform judicial protection of human rights? In one case a remedy was granted; in the other no solution was given to the dispute. A reminder, to be sure, that the substantive law of the case must matter and that the regulation of jurisdictional competence is not value agnostic.

E PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS

There is one more situation where it is not helpful to reduce the notion of comity to a mere corollary of sovereignty: its use within international dispute settlement.

For a long time, the idea of competition among international jurisdiction was not perceived to be a problem of any real significance. And yet, had Jessup discussed the topic in the early 2000s, international dispute settlement might have proved a rather good setting for a scene in one of his 'little dramas'.

Its heading might have read as follows: 'Exterior, the International System – soon after the publication of the International Law Commission's report on the "fragmentation" of international law.'[37] The plot would have revolved around the phenomenon of the proliferation of international courts and tribunals: in the days of old, international jurisdictions were not numerous, and it was difficult enough to bring a state to accept the competence of one. But in recent years, states have been more willing to submit to international

[36] Horatia Muir Watt, *A Private (International) Law Perspective: Comment on 'A New Jurisprudential Framework for Jurisdiction'* 109 Am. J. Int'l L. Unbound 75, 77–78 (2015).

[37] Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

dispute-settlement mechanisms, bringing about a plurality of international jurisdictions to better cope with the growing quantity and complexity of the rules of international law.[38] This disposition has further brought about a shift from a consensual to a compulsory paradigm in international adjudication, which has made international jurisdictions more extensive and difficult to elude.[39] And to add to the mix, these jurisdictional rules of international courts and tribunals are usually characterized by some rigidity so that jurisdictional conflict is a definite possibility.[40] In other words, what could once qualify as an embarrassment of riches is now a full-fledged issue with significant consequences. Does comity help make things work?

Lacking clear jurisdiction-regulating rules, there is no reason why, as a matter of principle, an international judicial body should not be able to use comity as a *technique*. Indeed, international courts and tribunals normally do have the power *not* to exercise 'a jurisdiction they have'.[41] And if securing a theoretical underpinning matters, the argument is easily made that while traditional comity reasoning, based on respect for sovereignty and non-interference, is incompatible with the context of international adjudication, the true basis of comity is in fact the horizontal arrangement of jurisdictions – which is, respectively, a consequence of the Westphalian paradigm of sovereign equality in the interstate system, of the lack of hierarchical principles in the international one.[42]

International judicial bodies have occasionally employed comity in this sense, discussing, for example, 'considerations of mutual respect and comity which should prevail between judicial institutions' to justify a stay of proceedings in the face of a virtually certain involvement of another international

[38] Chester Brown, A Common Law of International Adjudication 22 (2007); Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals 10 (2003); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Piece of the Puzzle*, 31 N.Y.U. J. Int'l L. & Pol. 709 (1999); Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID Rev. 1–25 (1986); Geir Ulfstein, *International Courts and Judges: Independence, Interaction, and Legitimacy*, N.Y.U. J. Int'l L. & Pol. 858–59 (2014).

[39] Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. Int'l L. & Pol. 791, 795 (2006).

[40] James Crawford, Chance, Order, Change: The Course of International Law, General Course on Public International Law 211 (2014).

[41] Legality of the Use of Force (Serb. & Montenegro v. Belg.), Judgment on Preliminary Objections, 2004 I.C.J. Rep. 1307, 1361, para. 10 (Dec. 15) (separate opinion of Judge Higgins).

[42] Crawford, *supra* note 18, at 445; Campbell McLachlan, Lis Pendens in International Litigation 229–30 (2009).

forum.[43] Conversely, resorting to considerations of comity might also contribute to mitigating the ill effects of certain strong assertions of exclusive jurisdictions, which seem to be at odds with the principle of *Kompetenz-Kompetenz* in international adjudication, and help neutralize attempts to conduct abusive litigation and forum shopping.[44] Interestingly, references to comity have not been less common when the relation between jurisdictions was less obviously horizontal. For example, arbitration tribunals dealing with investor-state disputes have sometimes discussed comity to justify a stay – or decision not to stay – of their proceedings on comity grounds when the matter was pending before a domestic court.[45]

Generally, there are indications that international tribunals have been welcoming of uses of comity that benefit the propagation of a transnational system but less so of comity as a matter of homage and respect for sovereign authority, mitigating to a great extent the traditional 'stress on the state or nation factor' in international dispute settlement.[46]

F HARMONIZATION

When the rules of the game are not satisfactory, changing them usually seems the best solution. It is certainly not by chance that Jessup devoted the third essay in his landmark book to issues of choice of law or, rather, of applicable law.[47] The surfacing of transnational legal orders may be qualified as one such operation: it occurs slowly, if unavoidably, all the players trying to make the most of their position in the field while the rule book is amended. Much has been written on these topics, and we will restrict ourselves to a couple of remarks, advancing one specific – at this point unsurprising – proposition: in this context too, comity makes things work.

Indeed, broadly speaking, comity constitutes an important principle for the alignment of different legal orders and, on a different plane, the making of transnational ones. So what is the nature of comity's contribution?

[43] MOX Plant (Ir. v. U.K.), Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 42 I.L.M. 1187 (Perm. Ct. Arb. 2003).

[44] *See generally* Schultz & Ridi, *supra* note 5; Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 Cornell Int'l L.J. (2009); McLachlan, *supra* note 42, at 455.

[45] S. Pac. Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction (Nov. 27, 1985).

[46] Jessup, *supra* note 1, at 11.

[47] *Id.* at 72.

As a first example, courts have in some cases referred to comity to adopt transnationally consistent interpretations of international instruments, not only public[48] but private too, so long as they have transnational application.[49] In so doing, courts have appeared mindful of this necessity to the extent that they have felt obliged to follow foreign precedents.[50]

Secondly, and perhaps most importantly, comity constitutes a key concept for the understanding of judicial networks. Anne-Marie Slaughter's work has convincingly relied on the notion to explain certain dynamics.[51] To Slaughter, comity constitutes one of the building blocks of judicial dialogue occurring in the 'global community' of national and international courts. Indeed, according to her model, courts would respect foreign courts 'qua courts, rather than simply as the face of a foreign government', recognizing them as co-equals in the global task of judging', though with a distinctive emphasis on individual rights and the judicial role in protecting them.[52] To be sure, Slaughter's theory is not without its critics, and it has been suggested that it is, to a large extent, quite starry-eyed.[53] It bears noting that this author first addressed the topic discussing the implications of the *Breard* case[54] and – specifically – the fact that, regardless of the nature (binding or not) of the provisional measures granted by the International Court of Justice, domestic courts should have accorded (and did not accord) them 'full faith and credit'.[55]

Irrespective of the above, there are strong indications that comity is becoming an important item in the toolboxes of international courts. This, it must be observed, goes beyond both simple institutional dialogue[56] and a qualification

[48] Morris v. KLM Dutch Airlines [2002] 2 AC 628 [81] (Lord Hope) (UK).
[49] Leonie's Travel Pty Ltd v Qantas Airways Ltd [2010] FCAFC 37 (Austl.).
[50] *See generally* Schultz & Mitchenson, *supra* note 5.
[51] Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int'l L. 1103 (1999) [hereinafter Slaughter, *Judicial Globalization*]; Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L.J. 191 (2003) [hereinafter Slaughter, *Global Community of Courts*]; Anne-Marie Slaughter, A New World Order (2004).
[52] Slaughter, *supra* note 51, at 87; many of these aspects had been dealt with in Slaughter, *Judicial Globalization*, *supra* note 51, and Slaughter, *Global Community of Courts*, *supra* note 51.
[53] *See* Alex Mills & Tim Stephens, *Challenging the Role of Judges in Slaughter's Liberal Theory of International Law*, 18 Leiden J. Int'l L. 1–30 (2005).
[54] Breard v. Greene, 523 U.S. 371 (1998).
[55] Anne-Marie Slaughter, *Court to Court*, 92 Am. J. Int'l L. 708 (1998).
[56] *See, e.g.*, Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 Int'l & Comp. L.Q. 791–804 (2006); Cesare P.R. Romano, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 N.Y.U. J. Int'l L. & Pol. 755 (2008); and, relying almost exclusively on the concept of comity, Elisa D'Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?*, 9 Int'l J. Const. L., 394–424 (2011).

as 'an emerging general principle of international procedural law'.[57] More significantly, it is not confined to a role of a flexible jurisdictional-regulating rule we have discussed above, showing the potential to counteract the ill effects of fragmentation, thus going – as Elisa d'Alterio puts it, from *judicial* comity to *legal* comity.[58] Granting certain decisions the force of res judicata does, of course, go a long way; but there have been examples of tribunals referring to the concept to justify the need to rely on external precedent – and, specifically, precedent set by the judicial institution perceived as central in the international legal system.[59]

G CONCLUSION

Despite what some private international lawyers may choose to believe, comity's demise does not seem to be approaching. The doctrine is very much alive and constitutes an important tool in the management of cross-border and cross-regime situations. To be sure, it has evolved; inescapably, its contours have become blurred and fused with those of other principles. Yet, it remains part of the judicial and legal discourse of national and international courts dealing with transnational issues and regime interaction.

Lawyers are not normally thrilled by a game ending in a draw. And yet, never ceasing to pay homage to the very essence of positivism, in the sense of 'an adherence to what is, rather than to what a priori principle says should be'[60], we have attempted to highlight how comity makes this result easier to attain. The current study tends to suggest that comity does so by greasing cogs and gears that are prone to friction and preventing the resulting heat. This does not mean that there was something wrong with the two models in whose quarrel we stumbled at the outset. Rather, it means that sometimes some indeterminacy can be of assistance in the quest for compromise, to make things work, between two opponents. Especially when they are both right.

[57] Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 Eur. J. Int'l. L., 265, 287 (2009).

[58] D'Alterio, *supra* note 56.

[59] Tulip Real Estate Inv. & Dev. Neth. BV v. Turk., ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, ¶ 45 (Mar. 10, 2014).

[60] Roger O'Keefe, *Curriculum Vitae: A Prequel (Part I)*, EJIL: Talk! (Jan. 4, 2016), http://www.ejiltalk.org/curriculum-vitae-a-prequel-part-i/.