Comity as a Step Towards the Unification of Private Procedural International Law

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June 2006
Nulla Via Invia Virtuti Est*. 

* Roman fragment without specific attribution “For Virtue no Path is Impossible.”
“WHEN WE LEARN, in the history of religions about human sacrifices offered by primitive peoples to their gods when we read that the Incas, these relatively civilized Indians, immolated even their own children on the altars of their idols in a most cruel manner, allowing the priests to cut the breasts of the victims and to take out their hearts while yet palpitating; when we try in vain to understand how parents could themselves voluntarily bear such misery, we feel relief in the comfortable consciousness of living in an enlightened age under the blessings of a higher religion which impresses upon us the supreme duty of preserving the life of man.

But have we men of a Christian civilization really the right to relax morally? May we really consider ourselves so greatly advanced in comparison with the aborigines of Peru? Has our twentieth century not brought to mankind, together with the most prodigious achievements of technique, two world wars whose human sacrifices by far eclipse the child murder of the pagan Incas? Can we refuse to comprehend these mothers and fathers whilst we ourselves are so proud to place the flower of our own youth on altars which differ from those of the Incas only in that no religion justifies the shedding of precious blood as a result of nothing but nationalistic folly?

He who, not as an active statesman but as a simple writer, tries to fulfill his duty in the struggle for world peace is no less responsible than the former. He must, in order not to compromise the great ideal, accommodate his postulates to what is politically possible; that means, not to what was yesterday possible and, consequently, is today real – this is, Heaven knows, little enough. Nor must his scheme point toward a goal which, if at all, can be reached only in a distant future; this is unreal and therefore politically less than nothing. A conscientious writer must direct his suggestions to what, after careful examination of political reality, may be considered as being possible tomorrow, although it, perhaps, seems not yet possible today. Otherwise there would be no hope for progress. His scheme should involve no revolution of international relations but reform of their order by an improvement of the social technique prevailing in this field.

The specific technique of the order regulating the relations between States is the Law of Nations. He who wishes to approach the aim of world peace in a realistic way must take this problem quite soberly, as one of a slow and steady perfection of the international legal order”.

*Peace through Law, Hans Kelsen*
I. INTRODUCTION

In the arena of human rights jurisprudence, without more, the last forty years have evinced greater developments, changes, formation, and transformation in the field of international law than in the preceding four hundred years. It is necessary to underscore and highlight that substantive legal precepts generally require the development of attendant procedural tenets to facilitate in the creation of a rubric that will render viable the strategic conception and tactical execution of these substantive principles. Here it becomes necessary to specify and bring into sharp relief this article’s modest objective.

There exist eight fundamental categories in which the United States’ contribution to the development of private procedural international law may be divided: 2

(i) The principle of *comity*, or the normative dictate greater than mere international courtesy but inferior to a binding obligation, which leads to eight precepts that find *comity* as an organizing first principle;

(ii) The extraterritorial application of United States statutory (positive law) within the framework of procedural private international law;

(iii) The metamorphoses from an *absolute theory* to a *restrictive theory* of foreign sovereign immunity;

(iv) Civil actions against sovereign states and the procedural defenses raised by foreign sovereigns as to such claims;

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1 See, for example, Robert F. Drinin, *Cry of the Oppressed: The History and Hope of the Human Rights Revolution*, Harper & Row publishers; *Human Rights in Cross Cultural Perspectives a Quest for Consensus*, edited by Alison Brysk, University of California Press; and Richard A. Falk, *Human Rights Horizons; The Pursuit of Justice in a Globalizing World*, Rutledge Press. It would be beyond the purview of this article to attempt to classify and delineate the multiple dimensions and specific legal disciplines that this development has had in the nature and character of contemporary international law.


3 Under this category five precepts are essential; (i) *reasonableness*, (ii) *uniformity*, (iii) *party-autonomy*, (iv) *judicial restraint*, and (v) *predictability* or *predictive value*.
(v) The original principles developed in the field of international arbitration;

(vi) The methodologies for the “gathering of evidence” and “discovery” in the United States for purposes of assisting foreign tribunals;

(vii) The recognition and enforcement of foreign judgments; and

(viii) The jurisdiction that United States Federal District Courts have exercised in the arena of human rights.

The task of analyzing meticulously all eight procedural categories would take tomes and can hardly be reduced to a single effort. The goal here is considerably more modest and, therefore, attainable. The solitary purpose of this analysis is to sharpen the contours of some of

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4 See, for example, 28 U.S.C. §§1330, 1332, 1391,1441, 1602 et seq. (the Foreign Sovereign Immunities Act, “FSIA”).

5 International arbitration finds itself in a unique historical moment that causes it to be in constant development and transformation consonant with the need to integrate principles of civil law systems (the Roman-Germanic tradition also commonly referred to as “continental law”) as well as common law doctrines governing the procedural rules to be applied by arbitrators in both the application of substantive law to the arbitral proceeding and the actual governance of the arbitration itself. See, e.g., Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 Vand J. TransNat’l L. 1313, 1322 (2003) (highlighting that the development of liberal arbitral rules has precipitated the fashioning of rules that represent an attempt at converging procedural rules from different legal systems concerning, for example, the gathering of evidence such as those promulgated by the International Bar Association (IBA Rules on Evidence), the UNCITRAL arbitration rules, the “institutional rules” such as those of the ICC, AAA (ICDR), and the LCIA. The absence of international tribunals with jurisdiction over private civil or commercial disputes among private parties has bestowed upon international arbitration, despite its long and distinguished history dating to the Greek Hellenistic Period (See *Interstate Greek Arbitration Clauses* 347-19 BC, by Sheila Ager), the status of a preferred and most reliable methodology for international dispute resolution. Put simply, arbitration has bridged the gap caused by the absence of transnational courts of civil procedure vested with universal jurisdiction over commercial cross-border private disputes. The American Law Institute’s (ALI) noble and laudable effort to craft transnational rule of civil procedure with the goal of creating a harmonious tapestry that integrates multiple legal systems beyond just those endemic to western sovereignties, but also systems that govern the administration of justice in the middle and far east, is understandably progressing at a pace that is directly inversely proportional to its marvelous and ambitious objective. Economic globalization and the perennial development of porous economic barriers have given rise to the exigent need to create immediate and practical solutions amenable to cross-border international disputes. Hence, economic globalization has rendered necessary the development of juridic globalization. International arbitration, at least in theory, comprises this paradigm. It is the temporal bridge toward transnational courts of civil procedure.

6 Title 28 U.S.C. § 1782 is perhaps the most important and transcending U.S. contribution to procedural international private law in this field.

7 See e.g., 28 U.S.C. § 1350 (commonly referred to as the Alien Tort Claims Act).

8 This article, for example, does not address sui generis United States procedural international law contributions in such important areas defining competency to adjudicate such as (i) general in personam jurisdiction, (ii) specific in personam jurisdiction, (iii) “tag” jurisdiction, (iv) the doctrine of forum non conveniens in the field of international law, nor (v) an in-depth analysis of the Alien Tort Claims Act. Because, however, of the growing relevance and
the developments and most significant contributions to procedural international private law that repeatedly arise in the context of cross-border dispute resolution. Even though some of these developments certainly are not “new”, if merely measured by the passage of time, their application and use in an international community pervaded by globalization and where these very doctrines are openly challenged on a recurring basis in international tribunals, perhaps for the first time in the juridic history of western legal systems, we are now obliged to analyze them anew in an unprecedented global economic configuration, and from a more novel perspective.

It is also necessary to develop a principle or principles that may serve as organizing precepts bestowing conceptual coherence and, therefore, better analytical and practical application to these procedural norms that are virtually impossible to avert in the arenas of cross-border litigation and international arbitration. In the following pages we shall explore a different proposed analytical rubric for the concept of comity that may serve as a protagonist and fulcrum of intelligibility and for unification of these seemingly disparate and only superficially related categories. The proposition is doubtless challenging and perhaps even bold. Yet, as with every first step, sometimes one can only reach a geographic destination in the west by traveling oversea from Palos de la Frontera towards the east, despite our visceral intuition and the suggestions of more visual appearances.

It is the aim of this article to serve as a theoretical and practical point of departure for those jurists, commentators, and lawyers whose careers command constant recurring reference to rules of international private law in the defense or prosecution of cross-border civil disputes. But for the revision of procedural international doctrines pursuant to a new prism purporting to promote unity, reasonableness, predictability, party-autonomy, judicial restraint, and doctrinal uniformity, these concepts would remain as free-standing fragmented norms less than suitable for a world order compelling judicial globalization.

II. FUNDAMENTAL PRINCIPLES THAT GOVERN U.S. PROCEDURAL INTERNATIONAL LAW

A. In Search of the Elusive Concept of Comity.

Even the most cursory analysis of (i) the extra-territorial application of United States statutory authority, (ii) assistance to foreign tribunals in the investigation, defense, or prosecution of civil or criminal actions, or (iii) in the very recognition of the exercise of the concept of sovereignty by a foreign sovereign the concept of comity cannot be obviated. This concept,

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9 Professor Koh, for example, has suggested that United States jurisprudence concerning international transactions is comprised of five basic principles: party autonomy, national sovereignty, comity, uniformity, and the separation of powers. Professor Koh explains that these principles bond and unite the critical judicial decisions issued in the last few years on the subject of international commercial transactions. See Koh, supra at 27 and 32.

10 The etymological root of the term comity is generally attributed to the Latin comitas. The Corpus Juris reads:
which centuries later still has managed to avoid a precise and universally accepted definition, constitutes the first and foremost premise in the application of the fundamental principles that govern private procedural international law in the United States. The first time that the concept of comity is even referenced in U.S. jurisprudence is in 1895. In that case, the U.S. Supreme

Liber autem populus est is, qui nillius alterius populi potesti ast subjectus: sive foederatus est item, siveaequa foedere in amicitiam venit sive foedere comprehensum est, ut is populus alterius populi majestatum comitter conservaret. Hoc enim adicitur, ut intellegatur alterum populum sueriorem esse, non ut intellegatur alterum non esse liberum.

The Roman Digest, XLIX, xv, 7, 1 (Proculus; lib. VIII epistularum) observes that this passage conveys the general idea that one nation should respect the sovereignty of another nation by dint of “comitas,” in such a way that the respect should not constitute a factual basis from which to infer that the foreign sovereign recognized pursuant to the doctrine of comitas is not free or is subject to compulsion.

11 See Joel R. Paul, Comity in International Law, 32 HARV. INT’L L.J. 1 (1991). Professor Paul explains that the origins of the modern concept of comity is associated with a group of Dutch scholars of the XVII century interested in examining the extra-territorial application of the laws of one state within the territory of another sovereign (citing Hessel Yntema, The Historic Bases of Private International Law, 2 AM. J. COMP. L. 297 (1953). This group of scholars included Paul and John Voet, Christian Rodenburg and perhaps the most significant of all, Ulrich Huber. Professor Paul adds that Huber’s theory of private international law as well as that of the other Dutch jurists came into being in the context of a historical moment when Holland had just obtained its independence from Spain and thus needed a legal methodology that would allow it to harmonize the laws of each Dutch province with the aim of promoting their unification while maintaining flexibility. In his treaty on private international law, De Conflictum Legum, Huber set forth three principles to elucidate the manner in which foreign law is to be applied within the geographic territory of another sovereign; first, a territorial approach is identified pursuant to which all states are assumed to have sovereignty exclusively within, but never beyond, their national territory. Second, a state has a sovereign’s authority over all persons found within its territory. Third, and finally, in applying foreign law, courts are administering justice based upon comity such that the laws of one nation retain their force and effect everywhere so long as they do not prejudice the rights or privileges of other states or their colonies (citing Ernest Lorenzen, Huber’s De Conflictum Legum, 13 ILL. L. Rev. 375 (1919)).

See also Hessel E. Yntema, The Comity Doctrine, 65 Mich. L. Rev. 9 (1966-67), detailing a comprehensive history of the doctrinal development of the concept of Comity and artfully suggesting that respect for the manifestation of the exercise of sovereignty pursuant to the equitable administration in a judicial system constitutes an obligation and therefore, more than mere discretionary courtesy.

12 Even though Huber’s influence in continental Europe was admittedly rather limited, his theories did prove to be influential in the development of Anglo Saxon law primarily because of Lord Mansfield and Joseph Story see Paul, supra at 18. See J.H. Morris, The Conflicts Of Laws 211 (2d ed. 1980); CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 17 (11th ed. 1987).

13 It is in the venerable chestnut referenced in every course on international procedural law, but rarely submitted to sustained analysis, Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), that an attempt is made to define the precept of comity. The definition of comity that the Supreme Court articulated in that case has remained as a lapidary standard for its progeny. Regrettably, these latter cases have remained doctrinally stagnant, notwithstanding international economic developments that have nurtured the concept of comity and further suggest that the doctrine must acquire a more conceptually rigorous meaning if it is to be materially availing in the resolution of international disputes.
Court addressed the issue of deciding whether a final judgment issued by a foreign sovereign, here France, would be accorded *per se* complete full faith and credit indistinguishable from that afforded to interstate U.S. judgments. The specific facts configuring the case merit analysis.

In *Hilton v. Guyot*, a French plaintiff sought to execute a judgment issued in France against U.S. citizens conducting substantial and not isolated commerce in France, in the United States (United States Federal District Court for the Southern District of New York). Significantly, the defendants had commercial property in France and affirmatively participated in the management of that property. It was precisely that very management that gave rise to the material facts underlying the claim filed in France, and thus, the execution effort undertaken in New York. After engaging in a painstaking analysis of the facts as averred by all parties, the Supreme Court observed that defendants premised their defenses on four specific theories in opposition to the recognition and enforcement of the French judgment.

First, defendants asserted that their appearance before French tribunals was *not voluntary*. Second, defendants highlighted and underscored that the French tribunal allowed

It has been suggested that the first time that the Supreme Court referenced the doctrine of comity among nations was in *Emory v. Grenough*, 3 Dall. 369, 370, N., 1 L.Ed. 640 (1797) citing a passage from a treatise by Ulrich Huber (1636-1694):

> By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of other governments, or their citizens.

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> Nothing would be more convenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere by diversity of law. (2 U. Huber, *Praelectiones Juris Romani Et Hodiemi*, Bk, 1, tit. 3, pp. 26-31 (C. Thomas, L. Menke, & G. Gebauer eds. 1725)

Although it appears to be close to a direct allusion to comity, it is important to note that the word “comity” nowhere appears in the opinion. Moreover, unlike the very succinct formulation by Justice Marshall in *Hilton v. Guyot*, the opinion does not place into distinct focus the nature of comity as being more than just the mere courtesy accorded to foreign sovereigns but less than a normative binding obligation or legally cognizable juridic precept. As more fully discussed, it is precisely in the careful crafting of this unique domain between two (2) polar opposite points that the genius and controversy of comity rests.

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* Article IV of the U.S. Constitution provides that full faith and credit shall be granted to each state concerning those public acts, registers, and judicial proceedings performed in any other state.

* 159 U.S. at 116-120.

* This proposition was summarily rejected by the Supreme Court inasmuch as both the Second Circuit Court of Appeals and the Supreme Court were of a single voice in concluding that the record palpably established that transacting business systematically in France, enjoying common commercial ventures with the plaintiff, and sharing equal participation in the management of a commercial enterprise that constituted an essential part of the claims *sub*
plaintiffs to testify without penalty of perjury. In this same vein, defendants also averred that they were foreclosed from cross-examining plaintiff and, therefore, the possibility of establishing the legal and factual insufficiencies of the claims was wrested from them. Third, defendants vigorously asserted that the contract at issue violated United States tax laws because the agreement did not require those goods sold to be invoiced consonant with their fair market value. Finally, defendants alleged that French law lacked reciprocity in the recognition and enforcement of foreign judgments. As an eloquent and revealing example of this proposition, defendants relied upon the *Royal Ordinance* dated June 15, 1629, Article 121.

Upon observing that the case was not subject to any international treaty, covenant, or agreement concerning the recognition and execution of a foreign judgment, the Supreme Court sought analytical support in the concept of comity and enunciated for the first time the legal definition of this precept, which even today governs the relationship of international law among nations and private parties. The following definition continues to be dispositive and a perennial source of controversy with respect to every case that has been decided since issuance of this definition in the arena of international law:

> ‘Comity’, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and justice, were more than enough to overcome the defense that defendants lacked personal volition and only pursuant to the juridic will of the French court did they find themselves defending claims before that tribunal. *Id.* at 204.

17 While in the common law system the rules of evidence accord parties the right to examine and cross-examine witnesses under penalty of perjury, the practice is not followed in the majority of civil code countries where the inquisitorial system only allows a judge to interrogate witnesses. Put simply, the continental Roman-Germanic tradition places less weight on the rigors of party opponent conducted cross-examinations and the considerable sanction of perjury (a crime susceptible to immediate prosecution) as methodologies for ensuring a greater likelihood of eliciting truthful testimony. In this cause, defendants unsuccessfully attempted implicitly and explicitly to challenge the entire French system of administering justice by placing in sharp relief the more salient differences between the common law and the civil law systems. *Id.* at 204-205.

18 The Supreme Court rejected this proposition asserting that based upon the procedural posture of the case, the contractual issue that defendants raised was but a *diminimus* part of the merits when the case was viewed in the totality of all material facts. *Id.* at 205.

19 The Royal Decree dated June 15, 1629, Art. 121, reads:

> “Judgments issued contracts or obligations recognized, in foreign kingdoms or sovereignties, based upon whatsoever charge or cause, shall not be binding or susceptible to execution in our kingdom. Therefore, these contracts and documents shall only possess the binding effect conferred upon simple promises; and, notwithstanding final judgments, our citizens against whom such final judgments have been entered shall be able to challenge them in their entirety (de novo) and raise their rights and legal entitlements before our judges.” Touillier, *Droit Civil*, lib. 3, tit. 3, c. 6, sect. 3, no. 77. (Translation by the author).
convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. (Emphasis in original). 20

The Supreme Court held that under the specific facts of this case that, (because, inter alia, want of reciprocity on behalf of France), a foreign judgment is not immediately recognized as binding even in the absence of fraud or other irregularities on behalf of the issuing foreign court when such a judgment is entered in a jurisdiction that rejects reciprocity among nations concerning the recognition and enforcement of foreign judgments. Pursuant to these circumstances, a foreign judgment would be recognized by United States courts as prima facie proof of the validity of that judgment but not as an actual binding foreign judgment to be accorded the same full faith and credit that is granted to interstate U.S. judgments.

B. The Creation of a New Normative Legal Principle.

Comity is unique in the development of jurisprudence. The concept of comity gives rise to a penumbra situated between an absolute juridic obligation and the deference arising from mere courtesy that is accorded to an act of a sovereign. This “new space” in jurisprudence may easily lend itself, as it has on multiple occasions, to irregularities, lack of uniformity, uncertainty, and want of predictive value concerning the recognition, enforceability, and binding effect of foreign judgments. Likewise, it also has introduced these issues into analyses that U.S. courts have undertaken in other fields of procedural international private law, such as the extraterritorial application of United States legislative enactments.

Notwithstanding these possible conceptual debilities in the interpretation of the doctrine, the concept is sufficiently flexible so as to be susceptible to application in numerous contexts that require a more rigorous juridic analysis instead of the viscerally reflexive and mechanical application of doctrines to complex issues arising from multi-faceted economic scenarios appearing and reappearing differently under diverse paradigms. It is precisely by virtue of this extraordinary penumbra between light and shade, a new space occupying the previously ignored realm that separates a binding obligation and a mere courtesy, that the concept of comity finds a paramount place in the equitable administration of justice in the realm of procedural international private law. 21

The recognition and enforceability of a foreign judgment by dint of comity is not limited to circumstances where at issue is a final judgment representing the end of all judicial labor. 22

20 Id. at 163-164.

21 The use of comity is applied (without limitation) in the extraterritorial application of U.S. law (jurisdiction to prescribe), in personam jurisdiction over foreigners, parallel proceedings or lis pendens international, the recognition and execution of foreign judgments, and the specialized field of providing judicial assistance to foreign tribunals beyond just the assistance contemplated by conventions and also to that assistance seeking to fulfill the twin aims of educating foreign sovereigns on U.S. Rules of Federal Procedure concerning discovery, such as Fed.R.Civ.P. 26, 30, 33, and 34, and fostering reciprocity.
The jurisprudence concerning comity in the context of final judgments has been extended to non-final interlocutory orders. By way of example, in *Nahar v. Nahar* Florida’s Third District Court of Appeal faced a recognition and execution issue arising from a judgment entered in favor of a beneficiary who had challenged decedent’s will allegedly in favor of his widow and a child from a second marriage. Both child and widow averred that it was necessary and critical that certain funds not be transferred from Florida to the Netherland Antilles. The trial court issued an order in favor of the son who sought recognition by a Florida court of a Dutch order providing for injunctive relief.

The Third District Court of Appeal articulated that in another opinion issued by the very court, decided five years earlier concerning the recognition and execution of an interlocutory foreign order, held:

> It is well settled that, as a general rule, only the final judgments of courts of a foreign country are subject to recognition and enforcement in this country, provided certain jurisdictional and due process standards are observed by the foreign court; non final or interlocutory orders of foreign courts, however, are generally not entitled to such recognition or enforcement. (Emphasis supplied).

Despite this holding, the Third District also sought analytic support in the Restatement (Second) of Conflicts of Laws and concluded that the command in *Cardenas* was unavailing because of its lack of conceptual flexibility. In accordance with this reasoning, the Third District adopted the rubric set forth in the Restatement (Second) that comports with the Supreme Court’s precepts enunciated in *Hilton v. Guyot*:

> [I]t appears that any foreign decree should be recognized as a valid judgment, and thus be entitled to comity, where the parties have been given notice and the opportunity to be heard, where the foreign court had original jurisdiction and where the foreign decree does not offend the public policy of the State of Florida.

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22 It is necessary to make clear that “the end of all judicial labor” refers to the exhaustion of all appellate remedies such that the final judgment may in fact be deemed final and binding in the country of origin.

23 See 656 So.2d 225 (Fla. 3d DCA 1995). This case is the only state court proceeding referenced in this essay. The illustrative academic import of the decision, however, commands inclusion.


25 *Id.* at 228.

26 *Id.* at 229. It merits noting that Sections 92 and 98 of the Restatement mandate that in practically all cases foreign judicial decrees should be recognized. The text of these critical sections merit citation in their totality:
Bottomed on this analysis the Third District recognized the Dutch court’s interlocutory order for injunctive relief and issued an opinion transferring the formerly frozen funds from a U.S. bank account to an escrow arrangement under the auspices and control of the Dutch tribunal.

This same analysis was applied to an order issued by a French court on behalf of plaintiff, a Barclays Bank, S.A. subsidiary located in France, against Greek citizens who had guaranteed loans that Barclays Bank issued against collateral (property) located in the United States, which collateral curiously was part of an apartment complex, now infamous, known as “Watergate.” In this case the Federal District Court for the District of Columbia reversed the trial court’s findings and held that the French interlocutory order imposing an injunction on the Watergate property would be recognized in order to preserve the status quo ante while the merits of the case were adjudicated in France.

Even though the court did not explicitly premise its analysis on comity, it did assert tenets having foundation in universally accepted principles of justice such as the equitable procedural administration of claims. Specifically, the court held that “[t]here must be a balancing of the special equities in each case.”

A global economic environment progressively characterized by porous commercial barriers among sovereigns deeply comports with a jurisprudence that tends to be as flexible as possible and that, therefore, will be more amenable to the recognition and execution of binding

§98 Recognition of Foreign Nation Judgments
A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned.
Comment:
a. Valid Judgment. The rule of this Section is limited to valid judgments, that is, to judgments which meet the requirements of §92...

To aid the reader in determining which “judgments” are to be considered “valid” and thus entitled to comity the Restatement states:
§92. Requisites of a Valid Judgment
A judgment is valid if
(a) the state in which it is rendered has jurisdiction to act judicially in the case; and
(b) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and
(c) the judgment is rendered by a competent court; and
(d) there is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.
Comment:
a. Meaning of “Judgment.” As used in the Restatement of this Subject, “judgment” is a general term which includes not only judgments at law but also the orders, injunctions or decrees of equity courts, and the judgments of probate courts, admiralty courts and other special courts.

28 Id. at 174.
final judgments and interlocutory orders issued by foreign sovereigns where due process and fundamental fairness have been preserved at the trial court level of the foreign jurisdiction. The Supreme Court’s contribution in the now old and venerable *Hilton v. Guyot* case in 1895 ironically finds greater geopolitical relevance today, over one hundred years after issuance of the opinion, by dint of articulating for the first time the concept of comity. It would be inimical to the developing global economic paradigm to retreat from comity instead of using it as a conceptual point of departure facilitating procedural international law, i.e. the legal relationship among sovereigns and private juridic entities.

C. Judicial Restraint or Sovereignty.

The definition of *sovereignty* has been developing since time immemorial, despite the academic prominence that the concept received based upon the writings of Jean Bodin. It follows that if the concept of *sovereignty* eludes definition with apodictic certainty, its use and abuse with respect to violations of the rights of nations also remains as a penumbral concern that merits sustained analysis. The principle of judicial restraint needs to be emphasized as a United States contribution to procedural international law precipitating a revision of judicial self-restraint in this field.

The precursor to the development of the principle of judicial restraint with respect to foreign sovereigns was developed by the United States Supreme Court in 1897. The issue became ripe for Supreme Court adjudication pursuant to an appeal from the Second Circuit. Significantly, the Second Circuit found that it lacked subject matter jurisdiction and that the “acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.”

A review of the factual contours of the case is illustrative. At the inception of the revolution that Eduardo Crespo spawned in Venezuela in 1892, General Hernández, who supported the political party that Crespo led in opposition to the administration of President Palacio, detained a United States citizen who at the time had been hired by the Venezuelan government to work as an engineer in *Ciudad Bolívar*. When General Hernández assumed military and political control of the region where Mr. Underhill (the U.S. citizen) worked, Mr. Underhill petitioned General Hernández for a passport for purposes of leaving the city. The petition was denied. In fact, it was not until October 18 that the revolutionary government actually provided Mr. Underhill with a passport. Upon receipt of the documentation Mr. Underhill fled the country.


31 Id.
Immediately on arriving to the United States Mr. Underhill filed an action in the United States District Court for the Eastern District of New York that was dismissed by the court and affirmed on appeal by the Second Circuit. The Supreme Court exercised its *certiorari* jurisdiction. The Court observed that with respect to judicial precedent concerning the (i) issue of military arrests effectuated in the absence of war, (ii) viability of contractual relationships among individuals who sought to foster or aid insurrection, and (iii) right of revolutionary entities to frustrate global commerce with impunity typically denounced on the ground of piracy, were all irrelevant to the issues before the Court.33

D. **The Act of State Doctrine.**

The judicial self restraint that the Supreme Court applied to affirm the Second Circuit’s holding gave rise to the embryonic precepts from which the doctrine commonly referred to as *The Act of State Doctrine* developed.34 Despite its modest conceptual origin, the development of the doctrine has been complex and exquisitely analytical.

The standard for the application of *the Act of State Doctrine* at first appears to be clear and unambiguous because of its ostensible simplicity. It is this very transparent test, however, that renders it extremely flexible and thus gives rise to considerable theoretical and practical uncertainty. An analysis of the doctrine’s development, and pragmatic contours are readily definable. All sovereigns have the legal right to engage in whatsoever acts or forbearances that may be deemed to be endemic to the exercise of sovereignty. Accordingly, to the extent that the acts or omissions at issue are such that they defy exercise by an individual in her private capacity or a private juridic entity, such as the exercise of police powers, that are not typically found within the ambit of commercial undertakings that individual actors exercise, the sovereign shall be protected against private causes of action.35

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32 *Id.*

33 On this point, the Court’s analysis requires citation in its entirety:

> The decisions cited on plaintiff’s behalf are not on point. Cases respecting arrests by military authority in the absence of the prevalence of war, or the validity of contracts between individuals entered into in aid of insurrection, or the right of revolutionary bodies to vex commerce of the world on its common highway without incurring the penalties denounced on piracy and the like, do not involve the questions presented here. *Id.*

34 *The Act of State Doctrine* finds its roots and foundation in the Supreme Court’s analysis in *Underhill v. Hernandez*, despite the stark succinctness of that opinion. As shall be detailed, this doctrine continues to develop and constitutes one of the most rudimentary doctrinal principles in the procedural defense of foreign sovereigns against civil actions.

35 It should be noted that a U.S. court shall be obliged to refrain from interfering in the affairs of foreign sovereigns based upon the doctrine even when the acts or omissions at issue on behalf of the foreign sovereign are undertaken by a government instrumentality.
The doctrine was developed and amplified by the Supreme Court over eighty years after issuance of the Court’s opinion in *Underhill v. Hernandez*, in the two seminal cases of *Banco Nacional de Cuba v. Sabbatino*[^36] and *Alfred Dunhill of London, Inc. v. Republic of Cuba*.[^37]

In the first of these cases, *Sabbatino*, the Court narrowed the issue before it as one that invited determining whether the doctrine would resist plaintiff’s allegations, which rested on a decree issued by the government of Cuba seeking the confiscation of certain property and the Cuban government’s unilateral appropriation of the rights to specific income generated by a transaction concerning the confiscated property at issue.[^38] The traditional formulation and iteration of the doctrine proscribes intervention on behalf of U.S. courts with respect to acts or omissions of a public character undertaken by a sovereign within its national territory. An analysis of the operative facts comprising the Court’s inquiry is necessary because of its valuable contribution in shedding light on the theoretical underpinnings of the doctrine as well as on its practical application.

In February and July of 1960, a U.S. corporation (Farr, Whitlock & Co.), executed a sale-purchase agreement for Cuban sugar with a subsidiary of Compañía Azucarera Vertientes-Camagüey de Cuba (“C.A.V.”).[^39] The brokers for the transaction, Farr, Whitlock, agreed to tender payment for the sugar in New York upon tender of a bill of lading[^40].

On July 6, 1960, the United States congress amended legislation commonly known as *The Sugar Act of 1948* so as to render viable the promulgation of a Presidential Decree (Executive Order) earmarked to reduce Cuba’s sugar quota.[^41] On that very date, President Eisenhower issued a decree for intervention that was made possible because of the referenced amendment. In fact, also on that same date, Cuba’s Council of Ministers approved and adopted the “Ley Número 851,” which legislation vehemently characterized the reduction in the sugar quota as an act of aggression motivated by the United States’ unilateral political agenda. Therefore, Ley Número 851 purported to implement countermeasures in response to this perceived act of economic aggression against the Republic of Cuba.[^42]


[^38]: 376 U.S. at 400-401.

[^39]: This corporation was organized under the laws of Cuba with venture capital invested by U.S. citizens.

[^40]: Id., at 401.

[^41]: Id. The very scant legislative history does not reflect any economic motive or rationale as a governing principle for this effort. Instead, it does create a factual basis from which to infer *that the motives were political and repressive in character and nature*.

[^42]: This legislation provided Cuba’s President and Prime Minister (Fidel Castro Ruz) with plenary powers to execute at his discretion, without more, confiscatory enactments without providing the owner of any property unilaterally
Sometime between August 6 and 9, 1960, the sugar that comprised the subject matter of the contract was loaded onto the *S.S. Hornfels*, which was scheduled to travel to Morocco and was anchored in the Cuban port of Júcaro (Santa María). The ship sailed for Morocco on August 12.44

Upon the transfer of consideration valued at the price of the sugar on board the *S.S. Hornfels* from Banco Exterior in favor of Banco Exterior, a Cuban government instrumentality, provided instructions to its agent in New York, Societe Generale, authorizing delivery of the merchandise on the ship in exchange for $175,250.69 to be paid to Farr, Whitlock, which in turn was to tender payment in cash.45 Societe Generale’s offer to produce the requisite documents in exchange for the cash payment was rejected by Farr, Whitlock, which that same day was notified of an action filed by C.A.V. alleging that it was the true legal owner of the sugar and, therefore, the beneficiary of the funds.46 Finally, Farr, Whitlock executed a contract with C.A.V. and disavowed any agreement with Societe Generale. Banco Exterior, was successful in persuading a federal district court in New York to issue injunctive relief in its favor and naming Sabbatino as trustee. This order caused Farr, Whitlock to deposit the funds with the court where they were *de facto* frozen within the jurisdiction of the State of New York.47

Banco Exterior filed an action in the U.S. Federal District Court for the Southern District of New York averring, *inter alia*, civil theft with respect to the funds that Farr, Whitlock had appropriated pursuant to the bill of lading. The court held that it had personal jurisdiction even though the expropriation of the sugar at issue took place within Cuban national territory. Also, the court ruled that “under merchant law, to civilized countries, Farr, Whitlock could not have asserted ownership of the sugar against C.A.V. *before* making payment.” It concluded that

expropriated with remuneration or compensation of whatsoever kind. It is worth noting that even though a rubric purporting to provide systematic compensation for any confiscation or expropriation had been established, the likelihood of payment pursuant to this scheme was unlikely at best. *Id.* at 402. The United States State Department classified the subject Cuban legislation (Ley Numero 851) as “manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory.” *Id.* at 402-403.

43 On the same date on which the *S.S. Hornfels* was loaded with the subject sugar cargo, the President and Prime Minister of Cuba, ostensibly acting pursuant to the normative mandate of Ley Numero 851, issued Resolucion Ejecutiva Numero 1. This resolution provided for the expropriation of a number of properties, entities and rights that included C.A.V., the entity owned by U.S. investors. As a direct and explicit consequence of this resolution, as a predicate for the *S.S. Hornfels’s* departure from the Cuban port, it became necessary to secure official authority from the Cuban government. In an effort to obtain this authorization, on August 11, Farr, Whitlock signed a contract identical to the one here at issue with C.A.V., but now with a new seller: Banco Para el Comercio Exterior de Cuba, an instrumentality of the Cuban government. *Id.* at 404-405.

44 *Id.* at 405.

45 *Id.* at 406.

46 *Id.*

47 *Id.*
C.A.V. had a property interest in the sugar “subject to the territorial jurisdiction of Cuba.”\(^{48}\) 
(Emphasis added.)

Despite reiterating the juridic viability of the Act of State Doctrine, the federal district court observed that the doctrine was inapplicable where, as in this case, it was alleged that that acts of a foreign sovereign violated international law under the theory that the expropriation underlying the litigation was in stark violation of recognized principles of international law. The court also noted that under the facts of the case it was impossible for valid and binding ownership title to have been conveyed. Hence, the court ruled that Cuba’s expropriation decree violated fundamental precepts of international law in three distinct and discrete ways: First, the expropriation was motivated by retribution and thus lacked a public character or purpose; second, the expropriation was intrinsically discriminatory, as it explicitly and directly discriminated against U.S. citizens; and, third, the expropriation lacked a functional methodology for indemnifying owners of confiscated property that had a commercially cognizable universal standard.\(^{49}\)

The Second Circuit Court of Appeals affirmed the district court’s ruling.\(^{50}\) The Supreme Court elected to exercise its \textit{certiorari} jurisdiction on the ground that the issues that the Second Circuit addressed were of great importance and significance because they concerned the foreign relations of a country and, in particular, the role of the judicial branch in such a sensitive arena. The Supreme Court reversed the Second Circuit and held that the Act of State Doctrine proscribed judicial intervention by United States courts in a case where an expropriation exercised by a sovereign occurred within the national territory of that sovereign. The Court added that such a precept applied even where the expropriation at issue \textit{per se} violated international law.\(^{51}\)

It is critical to note that the Supreme Court found ample analytic support in the ancient gem and precursor to the \textit{Underhill v. Hernandez} case, \textit{Bland v. Bamfield},\(^{52}\) which was decided in England in 1674. The Supreme Court deemed it necessary to articulate the longstanding principle on which the Court had rested its opinion approximately seventy years earlier:

\begin{quote}
Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts
\end{quote}

\(\textit{Id.}\)

\(\textit{Id.}\) at 406-407.

\(\textit{Id.}\) at 407.

Despite affirming the district court’s pronouncement, the Second Circuit emphasized that none of the three factors enunciated by the district court were sufficient to render the expropriation invalid pursuant to international jurisprudence. \(\textit{Id.}\) at 407.

As later detailed, Justice Byron White disagreed with the majority and issued a twenty-page dissenting opinion that merits consideration.

\(\textit{3 Swans, 604, 36 Eng. Rep. 922.}\) As referenced, the \textit{Underhill} opinion issued in 1895.
of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.53

Based upon this analytical framework, the Supreme Court noted that notwithstanding the antiquity of the Underhill decision, its holding had been stated and restated on multiple occasions in the Court’s opinions.54 Curiously, in amplifying the Act of State Doctrine, the Court made clear that the doctrine does not apply by compulsion based upon “the inherent nature of sovereign authority, as some of the earlier decisions seem to imply or by some principle of international law. If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it.”55

The opinion also establishes that it is self-evident that private international law does not apply to those cases where the actions or omissions at issue represent the practice followed by the majority of the members of the community of nations. The greater part of foreign sovereigns who have issued judicial opinions on the question of the Act of State Doctrine have chosen not to foist inflexible rules or judicial rubrics.56 In stating that neither the inherent nature of sovereignty, nor principles of international law, constitute a basis for the use of the Act of State Doctrine, the Supreme Court held that the doctrine does find normative support in constitutional principles that arise from the fundamental relationship among the different branches of government comprising a political system.57 Irrespective of this fundamental analysis, it appears established that the use and development of the Act of State Doctrine constitutes the exclusive subject matter of federal jurisprudence because both the judicial and the executive branches of

53 Underhill, supra, at 521.


55 Id. at 421-422.

56 Id. at 422. The Court stated: “No international arbitral or judicial decision discovered suggests that international law proscribes recognition of sovereign acts of foreign governments [citing Oppenheim’s International Law, Section 115aa (Lauterpacht, 8th ed. 1955)] and apparently no claim has ever been raised before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation. If international law does not proscribe the use of the doctrine, neither does it forbid application of the rule even if it claimed that the act of state in question violated international law. The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another.” Id. at 422.

57 Id. at 423. This proposition is premised on the reasoning that in applying the doctrine, the judicial branch is opining on the legitimacy and validity of acts and omissions undertaken by foreign sovereigns. Consequently, pursuant to one school of thought, such activity undertaken by the judicial branch may hamper rather than galvanize the foreign policy objectives that the executive branch may have fashioned for the United States, as well as the political goals of the community of nations. Id.
government may apply the doctrine depending upon the factual specificity of a particular case and the foreign policy concern at issue.\textsuperscript{58}

After distancing itself from the five propositions\textsuperscript{59} that defendants raised, the Court explained that “[h]owever offensive to the public policy of this country and its constituent states an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.”\textsuperscript{60}

Put simply, because the Act of State Doctrine proscribed any challenge to the legitimacy and validity of the Cuban expropriation decree under the facts of the case presented, the Supreme Court reversed the Second Circuit’s holding and remanded with instructions for the district court to take whatsoever steps may be necessary to implement the Court’s mandate.

E. The Separation of Powers

In \textit{Sabbatino} the Supreme Court predicated its analysis and holding on a principle of conceptual unity extracted from the elements of U.S. civil procedure jurisprudence. Curiously, notwithstanding the proliferation of pages where the Court enunciated in painstaking detail its reasoning, conclusion, and dissenting opinion, the word “\textit{comity}” only appears once in the entirety of the opinion. Nonetheless, the Court expressly emphasized that neither the inherent nature of the principle of sovereignty, nor any precedent before a judicial or arbitral tribunal, justified application of the Act of State Doctrine.

This very penumbra between judicially established precedents and settled principles of law, as with the time honored doctrine of sovereignty, is conceptually indistinguishable from the space that the Supreme Court fashioned seventy years earlier in \textit{Hilton v. Guyot}. In this latter case, the Court found it necessary to create a new juridic category that found absolutely no support in traditional concepts of legally binding obligations, international courtesies, or

\textsuperscript{58} This policy may be enacted by executive decree (State Department) or legislatively (congress).

\textsuperscript{59} First, that by virtue of Banco Exterior Nacional de Cuba, as a government instrumentality, the government of Cuba lacks standing to file an action in the United States based upon the principle of comity because of Cuba’s status as a foreign sovereign hostile to the United States. \textit{Id.} at 410. Second, defendants averred that Cuba had only expropriated contractual rights from the venue where those rights theoretically were reposed: New York. Hence, it is New York law that would govern and apply to any judicial proceeding. \textit{Id.} at 411. Third, defendants also alleged that because the subject matter of the expropriation was sugar, the complaint was one that sought the implementation of a foreign sovereign’s political policy. Such actions are not deemed justiciable by U.S. courts. \textit{Id.} at 412. Fourth, it was asserted that even in the absence of a generally accepted standard for gauging the legitimacy of an expropriation, such as the one \textit{sub judice}, the cumulative effect of (i) retaliation, (ii) discrimination, and (iii) lack of a viable formula for compensating the owners of the expropriated property, all overwhelmingly suggest a violation of private international law. Fifth and final, defendants alleged that the economic pressure that would necessarily follow from the proposed exception [the “Bernstein doctrine”] to the Act of State defense would materially impair the protection of U.S. investments overseas. \textit{Id.} at 419.

\textsuperscript{60} \textit{Id.} at 420.
deferences concerning the recognition and enforcement of foreign interlocutory or final judgments. The same rubric of comity cloaked with the mantle of constitutional principles underlying governments constituted by the separation of powers has served as an analytical fulcrum for the construction of a framework that would allow for the application of this doctrine without that application being deemed an obligation or a courtesy endemic to the doctrine of sovereignty and with origins traceable to international law precedent.

Comity assumes and emphasizes that neither normative principles having compulsory configurations nor courtesies of a diplomatic ilk suffice for purposes of governing and jurisprudentially organizing the legal relationships among nations and the attendant disparate legal systems. Therefore, it becomes necessary to obviate the very first principles and premises of private international law (i.e., obligation and courtesy) so that a new theoretical and practical paradigm of analysis may be developed to its final conclusions and consequences in the theoretical arena towards a principle of unification that shall lend itself to fostering uniformity, reasonableness, predictability, party autonomy, and judicial restraint. The negation of traditional precepts so that new principles may be developed to their extreme and final consequences bestows upon the principle of comity an appearance akin to the fundamental premise of contemporary modern geometry, which despite the inevitable consequences of disavowing the symmetry of Euclidean aesthetics, takes as an organizing principle the proposition that parallel lines in fact do meet and intersect, contrary to the Fifth Postulate contained in the Elements.61

The nature of its formal and non-substantive use ascribed by courts to the concept of comity is yet to be explored in depth and detail. To date, the use of the concept of comity has lacked substantive normative foundation as in the compulsory concept of an “obligation.” By definition the courts also have rendered the concept of comity bereft of any substantive content comparable in any way to the concept of “courtesy” as a diplomatic norm. In addition, comity also fails to comport with the principle of “equity”.

Equity finds its origins in the “justice” that royal courts would administer in extraordinary and exceptional cases of last resort. Comity is simply not rooted in precepts of solomonic “justice.” Comity is far afield from this plain standard. Its formal expression, like a formulistic syllogism without content, provides a new prospect and opening for the analysis and

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61 The First Book of Euclid’s Elements sets forth the renowned Fifth Postulate:

Kai’ e`an e’i`s duo e’vtheias emipptoussa yas’ e`ntos ka`i ep`i ta’ a’vta me`inti gonyias
dwo’ o`rtho’n e’lassasvnaas poi’hi, e`kballeomenvas tas’ dwo’ e’vtheias ep’ ame`ilov
sumpitpeiv, ‘ef’ ’a’ me`ra ei’stiv a’i tov dwo’ o`rtho’n e’lassasvnev.

That, if a straight line falling on two straight lines causes the interior angles, of the straight line falling on the two straight lines, to be less than two 90° angles each on the same side of the line, the two straight lines, if indefinitely extended would intersect on that same side where the angles measure less than 180°, or two right angles [translation by the author].
practical application of issues in the arena of conflicts of international law as ancient as the nature of men and of legal conflicts themselves.

Here we attempt to begin the process of providing the unique concept of *comity* with a normative foundation and a substantive analytical framework that may contribute to the unification of private procedural international law. As a predicate, however, tracing the contours of the use of the principle as a *quasi* formal precept is necessary.

The use of *comity* cloaked in an analytical rubric is found rather clearly in the Supreme Court’s analysis in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.\(^{62}\) Notably, it is in Justices Marshall, Brennan, Stewart, and Blackmun’s descending opinion that we may first glean an application of *comity* as a unifying principle in a pragmatic setting. The majority opinion instead appears to lose itself in a less than lucid analysis discussing the Act of State Doctrine in a purported commercial scenario pursuant to which the Court details the sovereign as an entity that acted in the same manner as would a private individual and not in conformance with acts and omissions attendant to the task of administering a sovereignty.

In *Alfred Dunhill*, the Supreme Court reversed the Second Circuit’s ruling and held that the Republic of Cuba could not find immunity for its acts or forbearances in the Act of State Doctrine when it refused to reimburse three creditors who asserted claims over funds that were purportedly owed to them based on the Cuban government’s expropriation of five (5) cigar manufacturing plants owned and operated by Cuban citizens. While the Court’s analysis at first glance appears to be ostensibly clear, it is opaque in its recurring use of different doctrines despite a very narrow analysis that was supposedly focused on the solitary issue of determining the circumstances pursuant to which the Act of State Doctrine would be applicable where a sovereign refuses to recognize a debt arising from the expropriation or confiscation of property.\(^{63}\)

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\(^{63}\) As already referenced, here the government of Fidel Castro took control of five cigar manufacturing plants belonging to Cuban nationals. When the government assumed control of the manufacturing plants, it appointed “interventores” (the equivalent of receivers) charged with operating the plants in a commercially viable protocol. *Id* at 605. The subject plants had kept accounts with U.S. purchasers open. One of these accounts pertained to Alfred Dunhill of London, Inc. During the 18 month window period between the “nationalization” of the plants and the imposition of the U.S. embargo on all trade with Cuba, the U.S. importers of tobacco received product from the plants. These importers also transferred payment in consideration for the purchase of the product to Cuba in the normal course of business. The plants’ former owners fled Cuba to the United States and filed an action against the U.S. importers alleging: (i) trademark infringement, (ii) restitution for payments tendered for shipments sent prior to the government’s intervention in the plants, and (iii) payment of funds due and owing for product shipments post-intervention. The District court allowed the government of Cuba to intervene in these disputes. *Id* at 685-686. The former plant owners alleged that their property had been confiscated without *any* just compensation let alone, and that the United States should not condone such confiscations. Finally the former owners added that even if they were unable to recover their manufacturing plants, inventories, and other properties pursuant to a final judgment issued by a Federal Court of competent jurisdiction, at least they would be entitled to recoup a liquidated sum owed to them. *Id* at 687.
It is critical to underscore that the Court’s point of departure in reversing the Second Circuit’s ruling rested on two fundamental premises. First, it observed that “[n]o statute, decree, order or resolution of the Cuban government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had, as a sovereign matter, determined to confiscate the amounts due to three of the foreign importers.”

Second, the Court found analytic support in the old chestnut authored by Justice Marshall where a distinction was drawn between (i) public and governmental acts undertaken by a sovereign, and (ii) private and routine commercial activity transacted by private individuals.

In an effort to develop this line of reasoning and apply it to the issue before the Court, the majority noted that the line dividing the limit and parameters of the Act of State Doctrine from a foreign sovereign’s refusal to honor a commercial debt, must to be emphasized. Accordingly, such debts, the majority reasoned, should not be deemed beyond the purview of U.S. Courts.

Here the Supreme Court highlighted its opinion concerning the State Department’s pronouncement and the potential inconsistencies that may arise were there to be a doctrinal conflict arising from the application of the Act of State Doctrine and U.S. Foreign Policy. Without abandoning the premise that commercial activities susceptible to execution by private actors are private and, therefore, beyond the Act of State Doctrine’s ambit, the Court concluded that in order to avoid “embarrassing conflicts with the executive branch,” and inconsistencies

64 Id at 695.


It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Id at 695-696.

66 Id at 698. Citing a letter dated November 26, 1975, from the United States Department of State stating through its Legal Advisor that “we [the Department of State] do not believe that the Dunhill case raises an act of state question because the case involves an act which is commercial, and not public, in nature.” (emphasis supplied)

67 Id at 698.
between the judicial and the executive branches of government, it would not amplify the doctrine so as to encompass a foreign sovereign’s commercial debt. The Court cited the now famous “Tate Letter” as an example of the Department of State’s Policy favoring a restrictive rather than an absolute immunity with respect to the amenability of foreign sovereign to be haled into U.S. Courts.

Regrettably, the Court engaged in a less than rigorous analysis that indiscriminately borrowed from at least three different doctrines (act of state, foreign sovereign immunity, and comity) without formally distinguishing among them or otherwise identifying their substantive character.

F. **The conceptual distinction between the doctrines of Foreign Sovereign Immunities and Act of State**

The categorical dilemma that the Supreme Court’s reasoning in *Alfred Dunhill* presents is clear enough. The doctrine of foreign sovereign immunities is materially distinct in its underlying tenets and juridic purpose from the Act of State Doctrine. Quite remarkably, none of the parties to the *Dunhill of London* case raised at all foreign sovereign immunity as a legal theory in the proceeding. In fact, the Court *sua sponte* introduced the doctrine and its analysis as part of the effort to broaden the Act of State Doctrine so as to bring within the scope of this doctrine acts and omissions on the part of a foreign sovereign within its national territory that are beyond the classic doctrinal immunity paradigm. The conceptional mistake is serious and sufficiently significant that it did not pass without mention in the dissenting opinion.

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68 During the first part of the Twentieth century some foreign sovereigns abandoned the classical theory of absolute foreign sovereign immunity in favor of a more liberal restrictive theory. This “new” more flexible theory does not accord immunity to foreign sovereigns with respect to commercial activities but still preserves immunity protection as to public acts. In 1952 the State Department adopted the restrictive theory of foreign sovereign immunity in a letter authored by its Legal Advisor, Mr. Jack Tate. See Gary B. Born, *International Civil Litigation In United States Courts 2001-2002* (3rd ed. 1996).

69 The Court stated:

“[T]he United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our Courts should be granted only with respect to causes of action arising out of a foreign state’s public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our Government since that time as the attached letter of November 26, 1975, confirms:

Moreover, since 1952, the Department of State has adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations, and that such adjudications are consistent with international law on sovereign immunity.” *Id.*

70 This doctrine is analyzed in considerable detail in Section ___.

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Analysis of the dissent demonstrates the anomalies inherent in the reasoning of the Court’s majority opinion. The dissenting Justices underscored that “[u]nder any realistic view of the facts of this case, the intervenor’s retention of and refusal to return funds paid to them by Dunhill constitutes an “act of state,” and no affirmative recovery by Dunhill can rest on the invalidity of that conduct. The Court of Appeals so concluded, and I would affirm its judgment.”\textsuperscript{71}

Put plainly, the dissent beyond cavil asserted that the Act of State Doctrine can be triggered only by a “statute, decree, order, or resolution” of a foreign government, or that the presence of an act of state can only be demonstrated by some affirmative action by the sovereign.\textsuperscript{72} This observation comports with the logical necessity of having substance prevail over form. It is common for sovereigns to exercise their sovereignty pursuant to formal means, such as executive or legislative enactments or other measures reduced to a formal decree.\textsuperscript{73} It would be a material mistake, however, to equivocate non-formulistic acts or forbearances with the doctrine’s inapplicability, particularly because sovereigns commonly also exercise acts and omissions endemic to the administration of their sovereignty pursuant to less formulistic methodologies.

It is the actual content of the act and not its form that is determinative in the applicability of the Act of State Doctrine. Here the dissent is conceptually clear and demonstrates greater internal consistency in its analysis than the majority issuing the opinion for the Court.

Equally disconcerting is the majority opinion’s premise that the restrictive theory of sovereign immunity does not extend immunity to foreign sovereigns acting as private entities or in commercial matters.\textsuperscript{74} The dissent rightfully observed that the Court never adopted the restrictive theory and, therefore, within the confines of the opinion there is no judicial basis from which to infer that such a theory can be imposed on the Act of State Doctrine.

It remains settled, based upon the dissent’s analysis, that the doctrine of sovereign immunity and the act of state doctrine, although related in some fundamental ways, differ in their respective objectives and methodologies of application.\textsuperscript{75} Foreign sovereign immunity provides

\textsuperscript{71} \textit{Id} at 716.
\textsuperscript{72} \textit{Id}.
\textsuperscript{73} \textit{Id} at 719.
\textsuperscript{74} \textit{Id}
\textsuperscript{75} It is important to note that the corollary to the Act of State Doctrine, at least within the ambit of free enterprise in foreign commerce, is the precept providing that an individual or corporate entity forced to act in a specific manner as a result of a particular governmental decree would be protected as if the acts of this private individual or entity were those of a sovereign acting within the confines of its national territory and exercising acts or omissions inherent in governance within its geopolitical territory. The compulsory character of a sovereign mandate itself gives rise to the protection of private individuals or entities that
a foreign sovereign named as a defendant with immunity simply by virtue of the sovereign’s status as a sovereign *per se*, without any further analysis or consideration. This standard is worth emphasizing when submitted to analysis within the conceptual framework of the act of state doctrine. Notably, the act of state doctrine does not confer immunity upon a foreign sovereign simply because of a defendant’s status. Instead, the act of state doctrine is but a tenet that advises the Court as to the applicable substantive law of the jurisdiction at issue.

This precept had been eloquently articulated by the very Court in *Sabbatino* when observing that the act of state doctrine “although it shares with the immunity doctrine a respect for sovereign states, concerns the limits for determining the validity of an otherwise applicable rule of law.”\(^76\) The act of state doctrine is rooted in the ancient axiom asserting that the acts of sovereigns, pursuant to specific scenarios, shall be deemed political issues that are not cognizable by U.S. courts.\(^77\) In *First National City Bank*,\(^78\) Justice Brennan succinctly identified

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\(^76\) *Id.* at 438. When examined through the prism of an “applicable law” concept rather than an immunity arising from the character or title of a sovereign, the analysis with respect to act of state doctrine significantly distances itself from the test used in applying the foreign sovereign immunity rubric. If two nations do not have a treaty addressing venue or choice of law, it still remains clear that even the most rudimentary principles of international law accord the act of state doctrine a presumption of validity extending to the acts or omissions of a sovereign undertaken within its national territory. The doctrine of foreign sovereign immunity, however, without ever considering the merits of a cause, simply presupposes that a sovereign is not susceptible to being sued in a civil proceeding filed in a federal district court. This difference between the doctrines is material and substantial.

\(^77\) *Id.*
five propositions to consider in determining if a foreign sovereign’s acts undertaken within its own national territory constitute a political issue or question. The five prong standard is practical and succinct: (i) the absence of consensus with respect to applicable international rules, (ii) a paucity or lack of standards by dint of treaty or other agreements, (iii) the existence and recognition of a foreign sovereign, (iv) deference accorded to issues of national importance, and (v) the executive branch’s ability to secure a just and adequate remedy for all U.S. citizens who may have been prejudiced.

When carefully considered significant and substantive differences are brought into sharp relief with respect to the reasoning and methodology applied in Sabbatino, and Alfred Dunhill of London, Inc. As a point of departure, it is necessary to observe that neither case finds analytic support in the concept of comity. Sabbatino, despite its fleeting reference to the doctrine, holds that acts undertaken by a foreign sovereign within its national territory that affect both foreigners and U.S. citizens perfectly comport with the act of state doctrine and, therefore, the doctrine was applied as a defense to the expropriation there at issue. The Court in that case held that the doctrine is viable and binding even in the presence of averments asserting that the expropriation at issue was (i) precipitated by political retribution, (ii) established without a methodology for just compensation, (iii) motivated only by the objective to sanction, and (iv) lacking in foundation in international law. Indeed, the owners of the property vehemently asserted that because the expropriation was in stark violation of international law, the act of state doctrine was wholly inapplicable. This proposition notwithstanding, the doctrine was held to constitute an absolute defense in favor of the expropriation.

Scarcely twelve years later, a reconfigured Court, but well aware of the holding in Sabbatino, completely distanced itself from the governing standard applied to the act of state doctrine, and elects not to analyze the material differences between the objectives and the application of this doctrine, and instead engages in judicial restraint refraining from application of the doctrine pursuant to the novel principle that no “statute, decree, order, or resolution” was issued by a foreign sovereign (in this case Cuba). The analysis in Sabbatino is completely irreconcilable with the majority’s reasoning in Alfred Dunhill of London, Inc. The only link between the two analyses is found in the dissenting opinion in Alfred Dunhill of London, Inc.

There is no juridic foundation justifying the imposition and formulistic transfer, without more, of the exceptions that proscribe application of the doctrine of foreign sovereign immunities to the governing standard for application of the act of state doctrine. This conceptual error

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78 See, First National City Bank, supra at 788.
79 Id.
80 See First National City Bank, supra, at 788.
82 Id. at 696.
pervades the holding in *Alfred Dunhill of London, Inc.* and thus ignores the underlying policy purposes and particularities of *both* doctrines. The doctrine of foreign sovereign immunities, with its seven exceptions, is only concerned with the status of a party to the proceeding as either a sovereign or a non-sovereign entity. This analysis is simple enough. Is the entity at issue recognized by the community of nations as a sovereign? If the answer is in the affirmative, then the step to follow is determining whether the activity is covered by one or more of the seven (7) cognizable exceptions to the doctrine of foreign sovereign immunities.

The act of state doctrine limits itself to determining whether the foundation of a judicial proceeding is constituted by a *political question or issue*. This analysis has spawned an elaborate rubric that rests on five elements. That standard does not foreclose consideration of the particular facts at issue to determine whether an act is capable of being performed by a private party instead of being exclusively endemic to a sovereign’s exercise of sovereignty. In the context of the *Alfred Dunhill of London, Inc.* case, not even this latter observation was enough to justify application of the doctrine even though the act of “expropriating” can only be executed by a sovereign. It cannot be sufficiently underscored that the act of state doctrine does not consist in prescribing a procedural immunity to sovereigns but rather concerns the determination of the law applicable to the facts underlying the proceeding.

Curiously, the majority opinion in *Alfred Dunhill of London, Inc.* also omitted reference to the distinction between jurisdiction (foreign sovereign immunity) and the issue of applicable law (act of state doctrine). The Court did emphasize the need to mention, quite in passing, this distinction but only accords to it the dignity of a footnote. Therefore the two principles that

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83 As shall be noted, the most notable and significant of these exceptions is the *commercial activity exception*.  
84 It is impossible to define with mathematical precision the *community of nations*. Nonetheless, a persuasive, if not governing, polestar would be those nations officially recognized by the United Nations.  
85 *Citibank, supra*, at 788; *Sabbatino, supra*, at 472-76.  
86 The Court limits its observation on this most important issue as follows:

The dissent states that the doctrines of sovereign immunity and act of state are distinct the former conferring on a sovereign ‘exemption from suit by virtue of its status’ and the latter ‘merely (telling) a Court what law to apply to a case.’ It may be true that the one doctrine has been described in jurisdictional terms and the other in choice-of-law terms; and it may be that the doctrines point to different results in certain cases. It cannot be said, however, that the proper application of each involves a balancing of the injury to our foreign policy, the conduct of which is committed primarily to the Executive Branch, through judicial affronts to sovereign powers, compare: *Mexico v. Hoffman*, 324 U.S. at 35-36, 65 S.Ct. at 532-533, 89 L.Ed. at 735 (sovereign immunity), with *Banco Nacional de Cuba v. Sabbatino*, [citation omitted] (act of state) against the injury to the private party, who is denied justice through judicial deference to a raw assertion of sovereignty, and a consequent injury to international trade. The state department has concluded that in the commercial arena the need for merchants ‘to have their rights determined in Courts’ outweighs any injury
would be dispositive for purposes of a comprehensive analysis concerning the viability of the application of the act of state doctrine were ignored, or in the jurisdictional context of foreign sovereign immunity, arbitrarily applied in defining a doctrine that has a different methodology of application and an equally distinguishable goal from that of the act of state doctrine. The Court also rejected application of the act of state doctrine where international law had been transgressed. The analysis in *Alfred Dunhill of London, Inc.* signals a lack of deference conferred to the acts of a sovereign (the Republic of Cuba)\(^\text{87}\) that is rooted in the very principle of comity.

Significantly, the Court cannot arrive at its holding based upon a normative principle of jurisprudence constituting an obligation. Neither did the Court ignore the participation of a sovereign in the proceeding, and at least at a very superficial level, it did make reference to the respect typically accorded to sovereigns. Notwithstanding this observation, the Court did not premise its holding on concepts of *courtesy*. Instead, the true decisive factor can be found in the very penumbra occupying the realm between *obligation* and *courtesy*, in the new juridic space that renders viable legal analysis and the need to dispense with recourse to static doctrines that by definition are incapable of embracing different juridic and meta-juridic precepts arising from the very particularity of facts that define the limits of each case.\(^\text{88}\)

\(^\text{87}\) It should be observed that in contrast with *Sabbatino*, where the Republic of Cuba was an implicit party to the case by virtue of its instrumentality (Banco Exterior de la República de Cuba), here the Republic of Cuba itself is an actual party to the litigation as a defendant/receiver. This formulistic posture, without more, underscores the need to study in greater depth and detail the facts at issue, particularly when one of the parties to the proceeding is an actual sovereign and not a sovereign’s representative having the status of agent or instrumentality.

\(^\text{88}\) In 1990 the Supreme Court decided *Kirkpatrick & Co. v. Environmental Tectonics Corp., Int’l*, 493 U.S. 400, its most recent pronouncement on the act of state doctrine. In *W.S. Kirkpatrick*, defendant (Kirkpatrick) pursuant to a bribe secured a contract for the construction and furnishing of an aerial/medical center in an Air Force base in Nigeria. The plaintiff (Environmental Tectonics Corp.), another bidder, upon learning of the bribe reported Kirkpatrick to the United States Embassy in Lagos, pursuant to the *Foreign Corrupt Practices Act*. A criminal prosecution ensued as a result of investigations conducted by the Federal Bureau of Investigations. Parallel to the criminal proceeding, plaintiff filed an action in federal district court against Kirkpatrick. 493 U.S. at 402-403. The Federal District Court required and received an opinion from the Department of State of the United States concerning the application of the act of state doctrine and proceeded to decide the case on summary judgment. The Court dismissed the action upon holding that the act of state doctrine applies where the motive of a foreign sovereign may give rise to embarrassment to the foreign sovereign or constitute an obstacle in the foreign relations policy of the United States. *Id.* at 403. The Third Circuit Court of Appeals expressed a different opinion and based on the State Department’s opinion held that judicial intervention in the purpose of a foreign sovereign’s acts would not interfere with U.S. foreign policy because in the case at issue no party had petitioned to nullify the act at issue, and thus reversed the District Court’s ruling. *Id.* at 403-404.

The Supreme Court, in an opinion authored by Justice Antonin Scalia reversed the Third Circuit. The Court first framed the issue before it as “whether the act of state doctrine bars a Court in the United States from entertaining the cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the
G. The Taking of Evidence and The Hague

The space between obligation and judicial courtesy rarely has been more pervasively invaded than in addressing evidence gathering in the context of international litigation. The case Societe Nationale Industrielle Aerospatiale v. US District Court for the Southern District of Iowa, is eloquent on this point and by any measure must be deemed a seminal development. Here, the Supreme Court identified the exquisite issue before it as “the extent to which a federal district court must employ the procedures set forth in the Convention when litigants seek answers to interrogatories, the production of documents, and admissions from a French adversary over whom the Court has personal jurisdiction.” After filing an answer to the performance of such official act.” Id. at 401. In answering this inquiry in the negative, the Court first engaged in a rather detailed analysis of its own precedent and acknowledged that the jurisprudence addressing the act of state doctrine has evolved and developed from a doctrine first bottomed on the concept of “international comity” (Oetjen) to one predicated on the separation of powers (Sabbatino). Id. at 404-405. Moreover, the Court distinguished the case before it from its other opinions on the doctrine by stating that in the action sub judice the adjudication of the claims or defenses did not require a finding that the official act at issue was valid or invalid. Id. at 406. The Court rejected the proposition that considerations of comity extended to the acts of foreign sovereigns are of no moment when at issue is only the motivation of an act and not its validity or legality. Id. at 408. In its conclusion, the Court explained that “[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.” Id. at 409-410.

Even though this case, to some extent clarifies the doctrine’s contours in situations where it is invoked as a defense based upon the underlying motive of a foreign sovereign’s public acts, it also represents an affirmation of the tendency to sever the act of state doctrine from its original roots in comity and reconciliation, and to subject the doctrine to an analysis premised on the separation of powers. As Professor Koh has stated, “the basic legal analysis. . . should be respectful, but not blind deference directed at the opinion of the Executive Branch.” Koh, supra at 231 (adding that foreign sovereign immunity, the act of state doctrine, and the interpretation of treaties, are legal and not political questions that should be addressed by the Courts.)
complaint, defendants applied for a protective order seeking issuance of an order precluding plaintiffs from conducting discovery. The motion was based on the proposition that defendants “French corporations, and the discovery sought can only be found in a foreign state, namely France, the Hague Convention dictated the exclusive procedures that must be followed for pretrial discovery.” *Id.* Plaintiffs did acknowledge that pursuant to French criminal law, defendants were proscribed from responding to the discovery demands to the extent that such demands were not within the Hague Convention’s purview.

The motion for protective order was denied by the federal magistrate judge who noted:

> that [t]o permit the Hague evidence convention to override the federal rules of civil procedure would frustrate the Courts’ interests, which particularly arise in product’s liability cases, in protecting United States citizens from harmful products and in compensating them for injuries arising from use of such products.\(^{95}\)

The Eighth Circuit Court of Appeals on a writ of mandamus filed by petitioners held that, “when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant’s possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the convention.”\(^{96}\)

Significantly, the Eighth Circuit rejected the proposition that international considerations of comity require plaintiffs first to exhaust those procedures that the Hague Convention functionally outlines and only as a last resort, upon proffering futility based upon Hague Convention evidence taking efforts, made plaintiffs resort to the Federal Rules of Civil Procedure. The Eighth Circuit enunciated that the possibility of reversing orders issued by foreign tribunals denying the production of documents would be more prejudicial than whatsoever benefits would redound in promoting considerations of international comity.\(^{97}\) In this context, the Eighth Circuit concluded that the objections bottomed on the French penal safest and most economical STOL plane.” *Id.* at 525. As one may surmise upon hearing so ambitious and bold a statement, on August 19, 1980, a Rallye crashed in Iowa injuring the pilot and a passenger. Three individuals independently filed actions in the United States Federal District Court for the Southern District of Iowa based upon the accident. These plaintiffs alleged the defendant had manufactured and introduced planes in the stream of commerce that were defective and thus defendants were responsible based on theories of negligence and breach of warranty. The three cases were consolidated before one judge and referred to a federal magistrate pursuant to 28 U.S.C. §636(c)(1) *id.*

\(^{95}\) *Id.*

\(^{96}\) *Id.* The Eighth Circuit disagreed with defendants’ proposition that this interpretation of the treaty would be akin to wresting all substantive meaning from the Hague Convention. Here the Eighth Circuit noted that the Convention still served the very useful purpose of being a functional mechanism for the taking of evidence from non-parties to the proceeding.

\(^{97}\) *Id.*
statute should be part of a two-prong analysis. First, consideration must be accorded to the issue of whether the order proscribing production of documents was appropriate even though compliance with the order would violate French law. Second, it is equally necessary to determine what sanctions are to be imposed in the event that defendants are unable to comply with the order. The appellate court held that the magistrate judge had satisfactorily addressed the first inquiry and that it was not yet ripe to respond to the second.98

After canvassing the contours of the historical negotiations that led to the drafting and signing of the Hague Convention, and meticulously studying the material terms that govern its implementation, the Supreme Court affirmed the Eight Circuit’s holding. Notwithstanding its affirmance, the Court held that it was necessary to analyze the interaction between the Hague Convention and the Federal Rules of Civil Procedure (Rules 26, 33, 34, and 36) concerning the production of documents and information. The Court advanced this proposition, in part, because there exists at least four (4) interpretations that are universally recognized and used with respect to the relationship between the Hague Convention and the Federal Rules of Civil Procedure concerning the production of documents and the disclosure of information.99

In elucidating the nature and character of these four (4) possible constructions of the Convention, the Supreme Court held that it could not “accept petitioners’ invitation to announce a new rule of law that would require first resort to Convention procedures whenever discovery is sought from a foreign litigant.”100 The Court stated that “[a]ssuming, without deciding, that we have the lawmaking power to do so [fashion Federal Rules of Civil Procedure], we are convinced that such a general rule would be unwise. In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the federal rules.”101

98 Id.

99 The four (4) interpretations are readily summarized. First, there is a school of thought holding that the Hague Convention completely replaces and preempts the Federal Rules of Civil Procedure in cases where the evidence is located within the jurisdiction of a foreign signatory and such evidence is earmarked for use in U.S. courts. Second, the Hague Convention is susceptible to being interpreted as first applying, but not exclusively, its methodology. Third, there is an interpretation of the Convention pursuant to which it supplements the Federal Rules of Civil Procedure and the convention’s functional methodologies remain as merely an option that may be exercised at the parties’ discretion. Fourth and finally, the Convention can be viewed as an instrumentality adopted by sovereigns for purposes of facilitating the production of documents and disclosure of information such that U.S. courts should resort to it upon concluding that the Convention’s use is appropriate after having studied the specificity of the factual predicates comprising a particular case and the sui generis character of the parties, together with the interests of the foreign sovereign at issue. See the court’s analysis at 482 U.S. at 533.

100 Id. at 542.

101 Id. Adoption of a rule that in all cases would command first resort to the Convention’s procedures, the Court reasoned, is inimical to the Federal Rules of Civil Procedure and would thus militate against “the overriding interest in the ‘just, speedy, and inexpensive determination’ of litigation in our courts. See Fed. Rule Civ. Proc. 1.”
In summary, the Supreme Court concluded that having long “recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. [citing Hilton v. Guyot],” the Court added, “American courts should therefore 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. We do not articulate specific rules to guide this delicate task of adjudication.”

III. COMITY AS A UNIFYING PRINCIPLE

The Supreme Court’s holding in Societe Nationale Industrielle Aerospatiale is disconcerting. Notwithstanding its reference to the standard to be followed in a discovery comity analysis, the Court shied from fashioning any organizing principle that would govern the relationship between the Hague Convention and the Federal Rules of Civil Procedure in the context of international discovery. Quite the contrary, the Court’s analysis rests on concepts that are totally foreign to the principle of comity and fundamentally premised on a very pragmatic commercial contract interpretation analysis. This reasoning and holding inevitably leave district and appellate courts without any guidance and encourages them to the extent that a comity analysis is at all applied, to do so without consideration of settled principles and considerations to be applied to the particularity of each individual case.

102 Id. at 545. Even though there is no consensus on a standard for the application of comity, the restatement of foreign relations law of the United States (revised) §437(1)(c) articulates a helpful test for any comity analysis:

“(1) The importance to the . . . litigation of the documents or other information requested;
(2) The degree of specificity of the request;
(3) Whether the information originated in the United States;
(4) The availability of alternative means of securing the information; and
(5) The extent to which non-compliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.”

Significantly, while this rubric is helpful and laudable for purposes of facilitating a district court’s adjudication of a comity oriented discovery or gathering of evidence analysis, it does not bestow upon comity, nor in fairness does it purport to do so, any substantive meaning.

103 Id.

104 Significantly, the Court undertakes great pains to construe the Convention as merely a contract, and, thus, focuses its analysis on what is a rather surface contract interpretation exercise focusing on history and the text’s plain meaning. This methodology finds ample precedent, but is hardly adequate in the international arena. See e.g. Transworld Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984) (applying standard contractual interpretation norms in international context); Ware v. Hylton, 3 D All. 199, 240-241, 1 L.Ed. 568 (1796); Air France v. Sachs, 470 U.S. 392, 397 (1985) (holding that the history of a treaty, the negotiations, and the practical construction adopted by the parties may be of relevance) (citing Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-432 (1943).
Of greater assistance to the practicing bar and bench would have been a reasoned opinion that not only underscored the importance of comity in private international law, but also one that sought to develop the jurisprudence of comity in this arena. Between an obligation and courtesy there is more than just a void wanting in rules of procedure and substance to be applied to particular cases based on the specific facts configuring each contention. If the principle of comity is to play a significant and material role in private international law, it must be elevated to the status of a precept of reconciliation that harmoniously converges the norms and idiosyncrasies of different legal traditions and cultures as well as the foreign relations interests among members of the international community of nations. Only by providing the doctrine of comity with a substantive rubric that attempts to reconcile these different premises and advance the principles of predictability, uniformity, party-autonomy, reasonableness, and judicial restraint in adjudicating civil international disputes. Comity should be the unifying principle that organizes and reconciles diverse doctrinal and procedural principles that constitute the fundamental framework of U.S. private international procedural law and unites them under a common umbrella for purposes of reconciling different interests, diverse legal cultures, and shifting geopolitical exigencies.

The dissent in Societe Nationale Industrielle Aerospatiale deftly bridges the majority opinion’s conceptual gaps. These Justices sought to provide comity with substantive content:

Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value

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105 In a very well reasoned article a commentator has observed that international comity is often “misconstrued” and “poorly applied” as courts avail themselves of the doctrine for purposes of commenting on political issues. The author suggests that international comity be used as “a legal doctrine that requires consideration of the practical needs of the forum state and the international system in creating a smoothly functioning mechanism for dispute resolution.” Steven R. Swanson, The Vexatiousness of a Vexation Rule: International Comity and Anti-suit Injunctions, 30 Geo. Wash. J. Int’l. L. & Econ. 1, 14 (1996). This “comity inclusive” approach stands in sharp relief with commentators who advocate for the complete abrogation of the doctrine. See e.g. Daniel Tan, Anti-Suit Injunctions and the Vexing Problem of Comity, 45 Va. J. Int’l L. 283, 301 205. This author underscores the “protean” nature of comity and asserts that comity is (i) inherently uncertain, (ii) wanting in predictive value, (iii) under specific scenarios a distraction from a warranted equitable analysis, and (iv) difficult “to apply as a major substantive factor because the courts are not used to considering comity in determining whether to grant or deny equitable orders.

Although such analyses are helpful in identifying the doctrinal incongruities arising from the application of a concept of comity that is devoid of any substantive elements beyond the general definition accorded to it when first referenced by the U.S. Supreme Court, they fail to assess the consequences stemming from the application of the doctrine as an organizing principle of reconciliation that may only be applied by considering such factors as (i) the interests of the parties, (ii) the interests of the United States, and (iii) the interests of the community of nations in preserving and developing an international legal rubric bottomed on uniformity, predictability, reasonableness, and judicial restraint.

106 Justices Blackmun, Brennan, Marshall, and O’Connor, authored the dissent.
of reciprocal tolerance and goodwill. As in the choice-of-law analysis, which from the very beginning has been linked to international comity, the threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law. When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.

Significantly, the dissent commented on how the venerable Justice Story applied the phrase “comity of nations” for purposes of expressing “the true foundation and extent of the obligation of the laws of one nation within the territories of another.”

Justice Story explained how “[t]he true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interests and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.”

The dissent placed particular deference on the conflicts that arise from the different methodologies used in the common law system and the civil law (continental system) tradition in the effort to gather evidence.

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108 Id. at 555. The dissent also critically analyzed that aspect of the majority opinion that leaves courts, practitioners, and commentators without any rubric or standard in a comity analysis. The dissent was eloquent on this point:

The principle of comity leads to more definite rules than the ad hoc approach endorsed by the majority. The Court asserts that the concept of comity requires an individualized analysis of the interests present in each particular case before a court decides whether to apply the Convention. [citation omitted] There is, however, nothing inherent in the comity principle that requires case-by-case analysis. The Court frequently has relied upon a comity analysis when it has adopted general rules to cover recurring situations in areas such as choice of forum, [citation omitted] maritime law [citation omitted] and sovereign immunity, [citation omitted] and the Court offers no reasons for abandoning that approach here. Id. at 554.

109 Story, supra, at §38.

110 Id.
Accordingly, the relationship between the Federal Rules of Civil Procedure concerning the production of documents and disclosure of information and its relationship with the Hague Convention in this field necessitates as a governing principle certainly a flexible framework but one having substantive content so as to render possible the reconciliation of disparate interests among sovereigns and different legal traditions and cultures that, at times, may appear to be in conflict with respect to the methodologies used to gather evidence from parties and non-parties. In the civil law or continental law tradition an officer of the Court is typically charged with the task of gathering evidence in the form of documents and testimony from parties and non-parties. This methodology stands in stark contrast when compared to the common law tradition where the parties, and not the Courts, are responsible for the production of documents and the gathering of information pursuant to procedural rules that may be perceived as unduly flexible and aggressive.\footnote{111}

The application of the Federal Rules of Civil Procedure concerning discovery, when viewed through the lens of international litigation, constitute an assault on the classic and traditional doctrine of territorial sovereignty, pursuant to which every sovereign enjoys a monopoly over the exercise of governmental powers within its national territory without the expectation that another sovereign shall engage in any judicial activity within a foreign sovereign’s national territory without first having received binding consent.\footnote{112} The dissent explicitly referenced that the United States’ delegations to the 12th Session of the Hague Conference on private international law acknowledged that the taking of evidence in a country with laws based upon a civil law system may be construed as public judicial actions being undertaken by a foreign person or entity lacking authority to engage in such activity.\footnote{113} The inevitable consequence of this common problem is not readily discernible. By way of example,\footnote{111} According to Federal Rule of Civil Procedure 26(a), each party to a litigation has an obligation of providing the other party with (a) the name and contact information of every individual who may have relevant information pertaining to the facts of the case as framed by the pleadings, (b) a copy or description of all documents in the custody or control of a party that are relevant to the facts at issue in the dispute, (c) a computation of damages and prejudice averred by the party in question, and (d) any insurance contract that may provide coverage with respect to allegations asserted in the case. Subsection 26(b)(1) is even more important. That subsection establishes that the parties may secure discovery concerning any subject matter that is not privileged, but that is relevant to the issues in the litigation, again, as framed by the pleadings.

\footnote{112} In the paradigmatic case where this formulation is first enunciated, The Schooner Exchange v. McFaddon, 7 Cranch 116, 136, 3 L.Ed. 287 (1812), Justice Marshall defined the concept as follows:

> The jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. \textit{Id.}\footnote{113}
a U.S. Court’s issuance of an interlocutory order concerning property located in a foreign jurisdiction may likely constitute a violation of the classical traditional paradigm defining sovereignty.114

This issue was very much at the forefront during the consultative drafting sessions of the Convention. The process left the drafters with no alternative but to attempt to reconcile the very salient differences between an adversarial system and an inquisitorial regime. This task clearly highlights the paradoxes to be reconciled. What unifying principle can be fashioned for purposes of converging the Federal Rules of Civil Procedure concerning discovery and the Convention on this point?

The dissent directly and explicitly addressed this issue and identified three (3) rudimentary interests on the part of the United States that are integrated in the Convention’s functional structure for the taking of evidence. First, the dissent stated that it is “[t]he primary interest of the United States in this context is in providing effective procedures to enable litigants to obtain evidence abroad.”115

Second, it was expressed that the United States demonstrated a meaningful interest in the equitable treatment of parties to a litigation. In this connection, the dissent questioned the underpinnings of the majority’s assertion that use of the Convention would inevitably result in asymmetrical treatment favoring foreigners who would be able to avail themselves of the liberal discovery standards embodied in the Federal Rules of Civil Procedure while U.S. citizens would be limited to more restrictive discovery and disclosure requirements promulgated in most civil law jurisdictions. Here the dissent explained that Courts are privileged to “‘make any order which justice requires’ to limit discovery, including an order permitting discovery only on specified terms and conditions, by particular discovery method or with limitation in scope to certain matters. Fed. Rule Civ. Proc. 26(c)).”116 Likewise, the dissent made clear how the majority opinion erroneously focused “on the nationality of the parties, while it is actually the locus of the evidence that is relevant to use of the Convention: a foreign litigant trying to secure

114 The dissent rightfully commented that “[u]nlike the common-law practice, which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers the obtaining of evidence a matter primarily for the Courts, with the parties in the subordinate position of assisting the judicial authorities.” Id. at 557.

The dissent went on to observe that “[m]any of the nations that participated in drafting the Convention regard non-judicial evidence taking from even a willing witness as a violation of sovereignty.” Id. at 558. Moreover, it went on to explain that “[s]ome countries also believe that the need to protect certain underlying substantive rights requires judicial control of the taking of evidence [citing the Federal Republic of Germany as an example].”

115 Id. at 561.

116 Id. at 566.
evidence from a foreign branch of an American litigant might also be required to resort to the Convention.117

Third, the final prong of a comity analysis concerns the determination of whether there exists a methodology that advances, and not hamper the development of an orderly international legal system.118 These interests are common to all nations.

Consonant with the dissent’s analysis, the Convention routinely promotes the development of multiple methodologies that contribute to the advancement of transnational litigation. One such feature is that parties to the Convention do not need to rely upon diplomatic officials in order to communicate directly with each other concerning the typical discovery disputes that are endemic to the process of document production and disclosure of information. The ability to communicate directly between the parties has proven meaningful in the resolution of the more common discovery disputes. In this same vein, Courts that avail themselves of the Convention shall be able to obviate the prejudices and injustices that arise when U.S. Courts demonstrate a lack of experience or insensitivity towards the judicial methodologies used in foreign jurisdictions, particularly in the arena of evidence gathering. This problem is compounded and multiplied when foreign sovereigns understandably feel intimidated by U.S. economic, political, and military influence and, therefore, elect not to challenge U.S. interlocutory orders in this field.119

117 Id.

118 An international legal system is one that must be capable of adjudicating transnational disputes and promoting specific principles without which such system would be unworkable, such as uniformity, predictability, party-autonomy, judicial restraint, reasonableness, an incentive to promote transnational commerce, and the promotion of stability pursuant to clearly defined expectations and reciprocity. Id. at 522 (citing Laker Airways, Ltd. v. Sabena, Belgium World Airlines, 731 F.2d 909 (1st Cir. 1984).

119 It would be an act of naiveté to assume that countries designated as part of the “second” and “third” world, to the extent that this nomenclature is even appropriate after the dissolution of the Soviet Union, are not profoundly “influenced” in their domestic policy, foreign policy, economic structure, and social stratification, by five international institutions whose autonomy certainly is not without U.S. influence: (i) the “World Bank” (“International Bank of Reconstruction and Development”), (ii) the “I.L.O.” (“International Labor Organization”), (iii) the “W.H.O.” (“World Health Organization”), (iv) the “I.M.F.” (“International Monetary Fund”), and (iv) the “W.T.O.” (“World Trade Organization”). Even though it is ostensibly represented that the structural goal in theory, practice, and execution of these organizations is to be “apolitical” and “neutral” with respect to their internal workings, in serving the communities of the “second” and “third” world, the practical reality is different. The United States is a protagonist with greater influence than any other member of the United Nations. By way of example, with respect to the World Bank and the I.M.F., multiple incidents have been meticulously documented concerning “the problem of conditionality.” The I.M.F.’s Rules of Governance emphasize that the I.M.F. is proscribed from interfering in the internal domestic affairs of its sovereign clients. In practice, however, the rule is observed in the breach. Likewise, the “democratization” of these organizations is not only desired, but necessary. Significantly, the presidents and senior managers of these bodies, practically without exception, are citizens of the industrialized nations of the West and not representatives of the countries that they purportedly serve. This issue is addressed in considerable detail in Globalization and its Discontents, by the Economics Nobel Prize winner Joseph Stiglitz of Columbia University. For completeness’ sake, it should be noted that Professor Stiglitz’s views in this
The cumulative effect of this conduct typically fosters hostility, resentment, and long-term want of cooperation on key issues on the part of foreign states. All of these issues, nonetheless, definitively can be obviated by the United States simply by complying with the terms of the Convention. This task is neither challenging nor laborious because of one simple reason. The United States in the first instance committed itself to complying with the terms of the Convention by virtue of being a signatory to the treaty.120 Here it is only urged that federal courts exercise the judicial and academic integrity of complying with those obligations that their very sovereign, the United States, committed to honor.121 The proposition is simple: at least as to form.

A. Comity and Three Elements of Reconciliation

Is there a unifying principle that can organize the precepts here reviewed under one comprehensive rubric? Perhaps of greater importance is a second question that sharpens and best defines the first. Is a unifying doctrine capable of fostering uniformity, certainty, predictive value, party-autonomy, reasonableness, and judicial restraint on the fundamental concepts that have been here recognized as U.S. procedural contributions to private international law? The answer to the first question is “yes” and “no.” The response to the second is no different than that to the first.


120 Volkswagenwerk Aktiengesellshaft v. Schlunk, 486 U.S. 694 (1988), is another dramatic example of the Supreme Court’s complete disregard for the legal obligations that the United States undertook concerning an international treaty, in this case the Hague Convention of November 15, 1965 addressing the notification and transfer of judicial and extrajudicial documents in civil and commercial matters. In that case the defendant filed an action in Illinois against a German corporation Volkswagen AG. Instead of serving process on the German defendant pursuant to the Convention, plaintiff served its subsidiary in the United States. The Illinois Court opined that the subsidiary’s actions were binding on the parent German entity pursuant to an alter ego theory. The U.S. Supreme Court affirmed the ruling of the Illinois Courts. The Court in its decision, despite acknowledging that the Hague Convention uses obligatory and not permissive language, held that the appropriate service methodology was governed by the law of the venue and that the Convention simply served to facilitate service of judicial documents. Id. at 703-705. Justice Brennan in the dissenting opinion emphasized that the Convention’s drafters had sought to address and thus obviate the very conclusion that the Court now had adopted. Id. at 710-711. In Schlunk, rather than according undue deference to the autonomy of U.S. parties in the methodology pursuant to which they would sue a foreigner in the United States, the Court should have developed an analysis based on reconciliation pursuant to which the interests of the United States as well as those of a foreign sovereign with respect to service upon the citizens of such sovereign, together with the burdens attendant to a defendant as to compliance with the Convention’s procedures. See Koh, supra, at 187.

121 Kennedy, supra.
Five case studies have been examined in considerable detail: all Supreme Court opinions. Aside from the specific facts of each case, they collectively address (i) an international dispute giving rise to an interlocutory order issued in a foreign jurisdiction, (ii) a foreign sovereign’s refusal to issue a passport to a U.S. citizen working within that sovereign’s national territory, (iii) the extent to which an executive decree and legislative enactment precipitated confiscations in a foreign jurisdiction and changes in the material terms of a contract may be susceptible to challenge in U.S. courts when the confiscations/expropriations occurs within a foreign sovereign’s national territory without issuance of a decree, resolution, legislation, or other judicial indicia on the part of the foreign sovereign that would trigger application of the act of state doctrine, and (v) the rules and precepts governing the relationship between the Hague Convention concerning the “taking of evidence” and the Federal Rules of Civil Procedure concerning this same issue. Underlying these issues there appears to be a common effort to incorporate doctrines that at times appear to be meta-juridic in order to strike a balance among doctrines that frequently appear to be irreconcilable.

In *Hilton v. Guyot* and *Underhill v. Hernandez* the Supreme Court appears to exert extraordinary effort in attempting to fashion a test that would facilitate the convergence and reconciliation of different legal systems, while at the same time executing this undertaking in a way that would give rise to predictability, consistency, and certainty, such that the opinions would not only comport, but actually promote, U.S. foreign policy. Obviously, these two opinions are contemporaneous with the writings of Justice Story and are meaningfully influenced by his thinking. This effort transcends the classical paradigm that draws a significant distinction between *right* and *positive law*. The five case studies suggest a need to use the principle of

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


127 In France the difference between *droit* and *loi* remains an important part of French civil law jurisprudence. Similarly, in Germany the same concept is applied under the terms *recht* and *gesetz*. Positive law is here defined as legislation having its final expression in the form of a statutory enactment. The normative foundation of all positive law is the actual legislative process, i.e. the procedure pursuant to which a proposal is enacted into a final expression of law in the form of legislation. The legislation is thus binding because of its procedural history and not its intrinsic content. Therefore, under a positive law theory a law that is contrary to basic principles generally shared by a community, that is to say a “bad” or “immoral” law still must be followed and obey. Legitimacy is a product of procedure under a positive law rubric or analysis. In a sociopolitical context, most notably in India under British colonization, positive law was directly challenged by the assertion that “bad” or “immoral” legislation, despite being procedurally irreproachable as to the actual legislative process pursued, need not be obeyed if such legislation
comity as a unifying concept that does not rest either in positive law or natural law. The first principle of this doctrine of comity must be the imperative of developing a framework of civil procedure for private international law rooted in a concept of reconciliation as a determinative precept. A common law analysis in this arena demonstrates a penchant favoring the integration of foreign doctrines and the global dissemination of classical principles of U.S. civil procedure, particularly in the area of document production and disclosure of information.


The concept of party autonomy is as prominent in U.S. private procedural international law as the doctrines of comity and judicial restraint. Party autonomy as a procedural concept constitutes an affront to human dignity or deprives citizens of “inalienable rights, such as the rights to self-determination, self-defense, and to private property.” See M.K. GANDHI, NON-VIOLENT RESISTANCE (SATYAGRABA) (Dovic Publications, Inc, 2001).

By way of contrast, the concepts of recht and droit do not acquire juridic legitimacy or a normative foundation by dint of a codification or legislative process irrespective of content. Here process is irrelevant to legitimacy and the normative nature of such precepts. The literature on this issue is vast, profound, and lapidary. In general terms, scholars and commentators have sought to bestow conceptual content to these norms based on theories of natural law. See as classical examples Plato’s The Republic; Perpetual Peace by Immanual Kant; Principles for a Philosophy of Right by G.W.F. Hegel; Natural Law by G.W.F. Hegel; The Concept of Law by H.L.A. Hart c.f. Introduction to the Problems of Legal Theory by Hans Kelsen; Principles of International Law by Hans Kelsen.

Significantly, the concept of comity cannot be classified or explained pursuant to either of these doctrinal currents to the extent that comity does not rise to the level of an obligation, the concept is devoid of any vestige relating to the normative mandate of positive law. Similarly, to the extent that comity is less than a mere courtesy implying little more than “respect” accorded to foreign and final judgments, decrees, or interlocutory orders, comity lacks normative elements that are fundamental to natural law and that require universal application without consideration to such “collateral issues” as tactical methodologies in its application or formation. Even the most cursory analysis of those Supreme Court opinions that purportedly were premised on the concept of comity, establishes that a comity analysis must include consideration of four rudimentary tenets: (i) U.S. foreign policy objectives and interests, (ii) the interests, domestic and international, of the foreign sovereign(s) at issue, (iii) the mutual interests of the community of nations in promoting a rational international legal order, and (iv) the convergence of dual (without limitation) legal systems both substantively and procedurally. Consideration of these imminently pragmatic factors are not encompassed by the classical traditional theories of natural or positive law.

128 In the course delivered at the Hague Academy of International Law, Professor Lowenfeld proposes the adoption of a principle of “reasonableness” for private international procedural law. LOWENFELD, supra at 292. Under this rubric of “reasonableness”, Courts or states must consider the values and interests of other states, private interest, but not abstract interests of sovereignty. Id. at 293. This principle does not greatly differ from the concept of comity or reconciliation here proposed. Professor Lowenfeld cites as an example of the proper application of the principle of “reasonableness” §442 of the Restatement of Foreign Relations Law concerning the disclosure of information by foreign parties. According to §442, a judge, in deciding if she or he shall order a foreign party subject to the Court’s jurisdiction to produce documents must first consider such factors as (i) the importance of the documents relative to the merits of the case, (ii) the specificity advanced in the request for production, (iii) the genesis of the information, (iv) the availability of alternative methods of obtaining the same information, and (v) the interest of the foreign venue and sovereign where the information is located. Id. at 249-250.
was first addressed by the Supreme Court in 1972,\textsuperscript{129} despite its rather long history and trajectory of conflicting opinions among the circuit courts.\textsuperscript{130} The \textit{M/S The Bremen v. Zapata Off-Shore Co.} stands as a seminal case that decisively is premised on a new economic horizon having an international nature. Indeed, there the Supreme Court finds that the global character of commercial transactions in which the United States is a protagonist necessitates the development of a corresponding jurisprudence. Thirty years before the reality of globalization the mandate to fashion rules that would accommodate a world economy was articulated in \textit{The Bremen}.

There the issue before the Court was whether a forum selection clause in a contract stating that “[a]ny dispute arising must be treated before the London Court of Justice,” is controlling when the U.S. parties to the contract files an action against another party to the agreement (a German corporation) in a federal district court in the United States.\textsuperscript{131} In November 1977 plaintiff, Zapata Off-Shore Company (“Zapata”) a corporation headquartered in Houston, Texas, signed a contract with defendant Unterweser, a German corporation, with the business purpose of transporting an oceanic oil drill belonging to Zapata christened \textit{Chaparral} from Louisiana to a port in the outskirts of Ravenna, Italy, in the Adriatic sea. Zapata had contracted to drill specific oil reserves. The transportation contract that the parties executed contained two very relevant clauses. First, both parties had agreed that any dispute arising from the contract had to be adjudicated before the London Court of Justice. Second, two additional interactive clauses having the effect of indemnifying Unterweser concerning any contractual liability or tort regarding the execution of the terms of the agreement by the parties was also agreed to as part of the contract.\textsuperscript{132} Relying on precedent from the Fifth Circuit Court of Appeals,\textsuperscript{133} the District Court held that defendant Unterweser had to comply with equitable principles and abstain from prosecuting the parallel litigation that had been filed before the

\textsuperscript{129} 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed. 2d 513 (1972).

\textsuperscript{130} Compare: \textit{Carbon Black Export, Inc. v. The Montrosa}, 254 F.2d 297 (5th Cir. 1958); \textit{The Ciano}, 58 F.Supp. 65 (E.D. Pa. 1944) (disavowing forum selection clauses) with \textit{Wm. H. Muller & Co. v. Swedish American Line Ltd.} 224 F.2d 806 (2nd Cir. 1955); \textit{Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.}, 187 F.2d 990 (2d. Cir. 1951) (holding that a forum selection clause must be enforced, and not applying a “significant relationship” test).

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} On January 5, 1968 Unterweser’s deep water tug called \textit{The Bremen} left Venice, Louisiana with the \textit{Chaparral} being towed towards Italy. When \textit{The Bremen} and the \textit{Chaparral} reached international waters in the Gulf of Mexico and were affected by a severe storm. During the storm the \textit{Chaparral} lost one of its elevator legs that had been raised for the journey. Moreover, the drilling platform also was seriously damaged. The crisis led Zapata to instruct \textit{The Bremen} to tug the \textit{Chaparral} to Tampa, Florida, which was the nearest port of possible refuge. \textit{Id.} at 1910. In stark defiance of the forum selection clause providing that “any dispute arising must be treated before the London Court of Justice,” Zapata filed a claim before the Federal District Court in Tampa alleging US$3.5 million in damages against Unterweser and against \textit{The Bremen, in rem}, according to allegations of negligence and breach of contract. \textit{Id.}

\textsuperscript{133} \textit{See Carbon Black Export, Inc. v. The Monrosa}, 254 F.2d 297, 300-301 (5th Cir. 1958), cert. dismissed, 359 U.S. 180 (1959) (holding that forum selection clauses are not binding as being against public policy because their objective is to wrest jurisdiction from Courts that otherwise would have exercised it).
London Court of Justice. The District Court also found that it had subject matter and in personam jurisdiction.

The Fifth Circuit Court of Appeals affirmed the District Court’s decision based upon the Carbon Black precedent, observing that the case “‘at the very least’. . . stood for the proposition that a forum selection clause ‘will not be enforced unless the selected state would provide a more convenient forum than the state in which the suit is brought.’”134 Based on this premise the Fifth Circuit also held that irrespective of the forum selection clause, the District Court limited the exercise of its jurisdiction by dismissing the case on the ground of forum non conveniens.135 The majority of the Panel of the Fifth Circuit136 approved the District Court’s ruling, which was premised on five dispositive observations:

(i) The flotilla never left the Fifth Circuit’s mare nostrum and the accident took place in the District Court’s vicinity,

(ii) A considerable number of prospective witnesses, including the entire crew of the Zapata, resided in the area close to the Gulf of Mexico [the “Gulf”];

(iii) All pre-voyage preparation work, including inspection and repairs, were undertaken in the vicinity of the Gulf;

(iv) the testimony of the Bremen’s crew was readily available by deposition; and

(v) other than the forum selection clause, England had no interest in any of the issues configuring the case or contacts with the parties.137

134 Id. at 1912.

135 The doctrine of forum non conveniens, in part, provides a Court with discretion to dismiss the case in favor of a more convenient alternative forum so long as such ruling advances the equitable principles of justice by minimizing costs and maximizing access to evidence. The doctrine was first articulated by the venerable case Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947) in a brilliant opinion authored by Justice Jackson. The doctrine was later developed within the context of international litigation in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). In Piper Aircraft Co., the Supreme Court reversed the Third Circuit, which had denied a petition to dismiss on the ground of forum non conveniens merely because the Court found Scottish law to be less favorable to plaintiff than the law of the forum. The Supreme Court applied an analysis similar to the one advanced in this essay with respect to the concept of “reconciliation” pursuant to which a Court must first consider certain private and public interests so as to determine whether plaintiff’s choice of forum imposes an undue burden on the defendant or the Court. In accordance with this analysis the public interest component includes both the interests of the forum as well as those of the alternative forum. See Born, supra at 341-366, for the development and actual status of the doctrine of forum non conveniens.

136 The Fifth Circuit’s original opinion issued from a Panel divided two to one. In fact, defendant filed a motion for reconsideration and hearing en banc before all fourteen judges of the Fifth Circuit. Six of the fourteen judges dissented with a “majority” opinion of eight judges affirming the district court.

137 Id.
In *Bremen* the Fifth Circuit also observed that *Zapata* was a U.S. corporation and therefore the trial court’s discretion to dismiss the case in favor of a foreign forum, particularly where it was likely that English courts would recognize as binding the contract’s exculpatory clauses. The majority of the Fifth Circuit judges opined that such clauses were against public policy and therefore unenforceable based on long-settled Supreme Court precedent.\(^\text{138}\)

The Supreme Court exercised certiorari jurisdiction arising from a direct and explicit conflict among the circuits on the specific question concerning the extent to which parties to a contract have autonomy to select a foreign forum, independently of the situs where the alleged breach of contract or negligence occurred. The Supreme Court reversed the Fifth Circuit and bottomed its analysis on eight fundamental tenets.

First, the Court underscored that for at least two decades there has been a significant and material expansion in global commerce and transnational commercial activities by firms based in the United States.\(^\text{139}\) In this context the Court emphasized that the barriers of distance that once limited commercial transactions now comprised but a “modest territory” and have practically disappeared.

Second, there are numerous United States companies specialized in transporting heavy equipment and machinery across thousands of nautical miles and oceans that constitute a fundamental part of every day international commerce.\(^\text{140}\)

Third, as a general policy U.S. industries shall be disadvantaged and stifled in their expansion and development if, “notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our Courts.”\(^\text{141}\)

\(^{138}\) *Id.*. The Fifth Circuit explicitly found analytic support for this proposition in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955), and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed. 2d 78 (1963).

The Court’s public records contained affidavits by British lawyers opining that exculpatory clauses in contracts under English law were deemed “prima facie valid and binding” against *Zapata* because of an illegal action filed in England in which *Zapata* alleged that Unterweser’s breach of contract or negligence caused damages to the *Chaparral*.

\(^{139}\) *Id.* at 8. Here the Court referenced the two decades between 1953 and 1973. This argument is of greater significance and relevance today in light of a socioeconomic policy of globalization, the fragmentation and dissolution of the former Soviet Union, the economic integration of China with one-third of the global population and a growing economy that from 1985 to 2005 has expanded at an unprecedented rate of eight percent per annum (the highest sustained growth of any economic model in modern history), and the renaissance of a Europe without borders that finds itself negotiating merely logistics towards the implementation of a European constitution that will recognize multiple membership categories. See e.g. *The End of Poverty: Economic Possibilities for Our Time*, by Jeffrey D. Sachs, Professor at Columbia University.

\(^{140}\) *Id.* at 9.
Fourth, the analysis enunciated by the Fifth Circuit in *Carbon Black* is inapplicable in the context of international commerce; “[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our Courts.”\(^\text{142}\)

Fifth, eight years earlier, the Supreme Court in *National Equipment Rental, Ltd. v. Szukhent*\(^\text{143}\) held that a party to a federal district court proceeding may be susceptible to service of process in a district where the party otherwise could not be served pursuant to the parties’ voluntary designation of an agent for purposes of accepting service of process in that jurisdiction. The Court noted that:

> [It] is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether [citation of authority omitted].\(^\text{144}\)

The Supreme Court stated that the case *sub judice* merely constituted the other side of the very same proverbial coin. Put simply, forum selection clauses pursuant to which any contractual dispute or civil obligation in the context of an international transaction is to be adjudicated in a foreign venue must be absolutely binding upon the parties. Indeed, the only exception to this ironclad pronouncement is when adherence to the particular clause at issue inevitably leads to an “irrational” result under the facts and circumstances of a specific case.\(^\text{145}\)

Sixth, in the case before the Court the subject forum selection clause was negotiated at arm’s length in a commercially reasonable manner by sophisticated and experienced persons. Accordingly, but for a finding of fraud, other similarly compelling circumstances or valid grounds establishing that the negotiation process was materially asymmetrical and, therefore, inherently unfair, the clauses negotiated by the parties shall be binding.\(^\text{146}\)

\(^{141}\) *Id.* at 9.

\(^{142}\) *Id.*

\(^{143}\) 375 U.S. 311 (1964).

\(^{144}\) 375 U.S. at 315-316.

\(^{145}\) *Id.* at 10.

\(^{146}\) *Id.* at 12. Significantly, the Court rejected the proposition asserting that forum selection clauses are but illegal methodologies used to wrest from and divest Courts of jurisdiction to administer justice equitably. The Supreme Court enunciated that such propositions are rooted on a historical legacy pursuant to which Courts resist “any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets.” The Court further asserted that “[n]o one seriously contends in this case that the forum selection clause ‘ousted’ the District Court of jurisdiction over Zapata’s action. The threshold question is whether that court should have exercised its jurisdiction
Seventh, the record overwhelmingly demonstrated beyond cavil that the forum selection clause had been “a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.”

Finally, notwithstanding the inconveniences inherent in filing and prosecuting a cause in a remote and ostensibly inconvenient forum (one that maximizes the expenditure of resources and minimizes access to proof and other evidence), the Court underscored that the party opposing the forum selection clause must meet a high and difficult burden of proof. Adherence to a forum selection clause is particularly unnecessary in cases concerning international commerce and that do not entail merely domestic parties seeking the adjudication of a local (national) controversy.

The appropriate construction to be placed on the clause, according to the Court, is one where full force and effect is to be accorded to the clause unless the party challenging the forum is capable of demonstrating with clarity and specificity that enforcement of the clause would be irrational and unjust, or that the clause is null and void on grounds of fraud or material disparity in the parties’ ability to negotiate the subject matter in question.

Significantly, the Supreme Court nowhere mentions four rudimentary tenets that remain latent, but pervade, its own analysis and holding: (i) comity, (ii) judicial self-restraint, (iii) party autonomy, and (iv) judicial predictability. In fact the Bremen was decided consonant with the very principle of reconciliation that has been identified as fulcrum and first premise of the penumbra resting between a legal obligation (juridic normative mandate) and a courtesy that may be accorded to a foreign sovereign or judicial tribunal.

The holding in Bremen, like Socrates’ legendary cloak that is said to have been riddled with holes that vastly diminished the visible presence of any fabric, reveals more than it conceals. Despite a quite elaborate emphasis concerning the “the sanctity of contractual

to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum selection clause.” Id.

147 Id. at 14.

148 Id. at 17-19. “We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. . . .”

“This case, however, involves a freely negotiated international commercial transaction between a German and an American corporation for towage of a vessel from the Gulf of Mexico to the Adriatic Sea. As noted, selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation.”

149 Id. at 18-19.
obligations," the analysis is framed by emphasis on the presence of international commerce and
the proliferation of United States multinationals that principally conduct transnational business.
It is patently with keen regard for these two factors that the Court accorded weight to the parties’
autonomy and to the legitimacy of the foreign selection clause. The principle of party autonomy
could have been articulated more comprehensively and coherently within the context of a
procedural test that rested on the unifying precept of reconciliation that here has been ascribed to
the tenet of comity. This proposition commands sustained analysis.

In identifying the elements of comity, judicial self-restraint, party autonomy, and
predictability as first principles that govern international civil procedure in United States courts,
it follows that it is imperative for these precepts to be organized within a conceptual rubric
characterized by its ability to generate legal analysis and holdings that distinguish themselves for
their uniformity, reasonableness, and predictive value. These precepts become progressively
critical to the development and application of fundamental principles of comity, party autonomy,
and judicial restraint. Analytical support and application based on this rubric rests on the
principle of reconciliation endemic to the concept of comity, such as reconciliation and comity
have been here defined. The Bremen provides for a fruitful and prodigious case study that
allows the careful reader to examine the manner in which the concept of reconciliation inherent
in comity serves to further the precepts of uniformity, reasonableness, and predictability.

In the comity analysis that Justice Brennan detailed\textsuperscript{150} a five part standard is set forth for
purposes of determining whether comity rendered viable and binding the act of state doctrine as a
defense. Furthermore, the Supreme Court also elucidated a juridic criteria significantly more
abbreviated, but still bottomed on comity, as an organizing principle to be used in determining
the viability of the act of state doctrine. This standard focuses analysis on three basic elements:
(i) the extent to which U.S. interests would be affected, (ii) analysis of the interests germane to
the foreign sovereign at issue, and (iii) the extent to which a specific holding would harmonize
with the interests of the community of nations in developing, promoting, and preserving a
reliable and efficacious system of international law. The distinct presence of party autonomy
found in the court’s opinion in The Bremen is very much susceptible to a comity analysis as here
identified, without the need to consider basic principles of contract interpretation. Application of
standard and commonplace methodologies of contractual construction to international disputes
that may entail depriving a court of competent jurisdiction by dint of an agreement between the
parties is of little moment to most foreign jurisdictions. This “solution” or “resolution” is
parochial in nature and one that the very norms of contractual interpretation never even could
have contemplated.

In underscoring the “new” international commercial environment, as well as the (albeit
embryonic by contemporary standards) proliferation of multinational corporations, the Supreme
Court without articulating it is using the very concept of reconciliation that vests the principle of
comity with content. The use of this principle is brought into sharp focus when observing that
the Court deemed it necessary to accord it greater content and materiality rather than merely

\textsuperscript{150} See the dissenting opinion in First National City Bank, supra at 788.
engaging in a contractual interpretative analysis based on simplistic commercial doctrines of contract interpretation, and instead incorporating global commercial considerations, the international juridic character and function of emerging multinational corporations, and the palpable reduction of logistical obstacles in the trafficking of transnational commerce. Here the Court seeks to reconcile party autonomy, the conflicts between the substantive law of the U.K. and that of the U.S. with respect to the dispute at issue, and the “new” protagonism of multinational corporations, but without ever relying upon a doctrinal standard capable of setting an analytical precedent that would preserve and contain the elements of comity, judicial self restraint, predictability, reasonableness, and party autonomy such that the use of these precepts within a framework resting on reconciliation would lead to a result characterized by the desired tenets of reasonableness, uniformity, reasonableness, and predictability.

C. Comity and International Arbitration

The principle of party autonomy in the context of an international dispute rises to the level of an acknowledged precept in cross-border litigation only one year after issuance of The Bremen opinion. In Scherk v. Alberto-Culver Co the Supreme Court exercised certiorari jurisdiction in this cause on the ground that it was faced with an issue of great public importance. The specific question that the Court addressed was whether its holding in Wilko v. Swan that “an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Security Act of 1933, in view of the language of Section 14 of that Act, barring ‘(a)ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter.’”

The issue reached the Court after the Seventh Circuit disavowed an arbitration clause contained in a contract between a U.S. plaintiff and a German defendant residing in Switzerland, where the contract at issue was executed in Austria with respect to three corporations organized under the laws of Germany and Liechtenstein. Contrary to considerable scholarly opinion purporting to trace the origins of interstate arbitration to U.K. jurisprudence, arbitration as a methodology for the equitable administration of justice in an international context finds its genesis in Greece, primarily in the Hellenistic and not the Classical period. There are numerous examples of sophisticated and quite detailed and comprehensive interstate arbitral agreements during this period that only recently have surfaced, see e.g. Interstate Arbitration in Greece by Sheila Ager, despite more accessible sources that have been amply documented by even the very early iterations translated from Attic Greek. By way of example, Thucydides recounts that the Peloponnesian war could have been averted had Sparta adhered to an interstate arbitration clause that it had entered into with Athens. The First Book of Thucydides’ History of the Peloponnesian War, Chapter XXVIII, lines 2 to 3 states:

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151 It should be noted that the Supreme Court interprets as synonymous the terms “international contract” and “dispute or international controversy.”


155 Contrary to considerable scholarly opinion purporting to trace the origins of interstate arbitration to U.K. jurisprudence, arbitration as a methodology for the equitable administration of justice in an international context finds its genesis in Greece, primarily in the Hellenistic and not the Classical period. There are numerous examples of sophisticated and quite detailed and comprehensive interstate arbitral agreements during this period that only recently have surfaced, see e.g. Interstate Arbitration in Greece by Sheila Ager, despite more accessible sources that have been amply documented by even the very early iterations translated from Attic Greek. By way of example, Thucydides recounts that the Peloponnesian war could have been averted had Sparta adhered to an interstate arbitration clause that it had entered into with Athens. The First Book of Thucydides’ History of the Peloponnesian War, Chapter XXVIII, lines 2 to 3 states:
In reversing the Seventh Circuit’s pronouncement, the Court observed that the arbitration agreement at issue was binding, dispositive, and controlling with respect to any dispute relating to the subject international commercial transaction, irrespective of the mandate of Section 14 of the Securities Act, proscribing all stipulations such as those concerning arbitration that would conflict with this provision. The Supreme Court meticulously enunciated that the (i) plaintiff was a U.S. corporation conducting most of its business activities in the United States, (ii) defendant was a German national whose companies were organized under the laws of Germany and Liechtenstein, (iii) negotiations led to the execution of the contract at issue in Austria and the closing of the transaction in Switzerland, the United States, England, and Germany, and (iv) subject matter of the contract principally concerns the sale-purchase of companies organized under the laws of European countries and that conducted business mostly, if not exclusively,

“Should they advance a claim with respect to Epidamnus [“Επιδάμνου”] they would be willing, or so they allege, to submit the matter to arbitration to any of the Pelopenisian states selected by each of the parties, and also to the party to whom the colony (Epidamnus), to which the colony pertains. They were also willing to dispute to the oracle in Delphi.”

Regrettably, Sparta elected to disavow the arbitration agreement as well as any prospective pronouncement by the Delphic oracle, and pursued war as the appropriate methodology for international dispute resolution. The text contains multiple references to a resolution of this “international” dispute by having it submitted to a non-judicial process in a neutral forum, elected by the parties, so long as the parties were of a single mind in adhering to a neutral methodology for the unanimous selection of arbitrators and in agreement in respecting whatsoever award would issue from such arbitration. Put simply, despite the aura of “modernity” that attaches to arbitration as a “new” methodology for international dispute resolution, its roots are deep and ancient particularly when understood as preceding the industrial revolution by approximately 2,300 years.

Historically, English tribunals disfavored and undermined arbitration agreements under the theory that they illicitly “divested” judicial tribunals of subject matter and personal jurisdiction that they otherwise may have competently exercised. This juridic tradition with respect to arbitration influenced U.S. courts until 1924 when the United States Arbitration Act, see H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924), was passed. See e.g. Sturges and Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 Law and Contemp. Prob. (1952).

156 417 U.S. at 513.
directed at European markets.\textsuperscript{157} Clearly the international character of the facts framing the issue before the Court materially distinguished the case from the Court’s prior ruling in \textit{Wilko}, where \textit{all} of the parties were U.S. entities.

As in \textit{The Bremen}, the Court emphasized that \textit{certainty} is a necessary and indispensable element in the context of international transactions. Additionally, the Court highlighted that “[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”\textsuperscript{158} The Court added that “such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.”\textsuperscript{159}

In \textit{Scherk} the Supreme Court found a conceptual link between party autonomy and (i) risks endemic to international commerce, (ii) the need for uniformity in adjudicating international disputes of this ilk, and (iii) the will and ability to finance and bring to fruition international agreements.\textsuperscript{160} Despite the analytical support that the Court was able to extrapolate

\begin{footnotes}
\footnote{Id.}{\textsuperscript{157}}
\footnote{Id. at 516.}{\textsuperscript{158}}
\footnote{Id. See also f.n 10 stating that:}{\textsuperscript{159}}

\textit{Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1051 (1961). For example, while the arbitration agreement involved here provided that the controversies arising out of the agreement be resolved under ‘(t)he laws of the State of Illinois,’ [citation omitted], a determination of the existence and extent of fraud concerning the trademark would necessarily involve an understanding of foreign law on that subject.}

\footnote{In footnote 15 of the opinion the Court detailed post \textit{Wilko} changes that analytically corroborated its decision. This footnote commands citation in its totality.}{\textsuperscript{160}}

\footnote{FN15. Our conclusion today is confirmed by international developers and domestic legislation in the area of commercial arbitration subsequent to the Wilko decision. On June 10, 1958, a special conference of the United Nations Economic and Social Council adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1970 the United States acceded to the treaty, (1970) 3 U.S.T. 2517, T.I.A.S. No. 6997, and congress passed Chapter 2 of the United States Arbitration Act, 9 U.S.C. s201 et seq., in order to implement the Convention. Section 1 of the new chapter, 9 U.S.C. s 201, provides unequivocally that the Convention ‘shall be enforced in the United States courts in accordance with this chapter.’ The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. Exec. Doc. E, 90\textsuperscript{th} Cong., 2d Sess. (1968); Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049 (1961), Article II (1) of the Convention provides:}{FN15}
from its decision in *The Bremen*, the fulcrum of the Court’s opinion is the somewhat extraordinary juridic weight that it placed on the concept of an “international contract”, and the extent to which the precept of *party autonomy* is deemphasized and subordinated to the new guidepost (“international contract”).

*The Bremen* and *Alberto-Culver Co.* decisions reach a similar, if not identical, conclusion with respect to the clauses there at issue and the global economic considerations to be weighed in rendering a coherent opinion suitable for developing transnational commerce, as well as the need to promote the principles of *reasonableness*, *uniformity*, and *predictability*, particularly in the context of private international law. Despite having these premises in common, the analytical methodology applied was significantly distinguishable. In both analyses, underscored by its very absence, is the concept of *reconciliation*, which promotes *uniformity*, *predictability*, and *reasonableness*. It is the very concept of reasonableness that bestows substantive judicial import on the precept of *comity*. The application of these precepts likely would not alter the holdings here at issue, but unequivocally enunciate the appropriate standard to be followed in analyzing international disputes without having to resort to ascribing undue juridic weight to the mere presence of an “international contract.” The use of the significance of an international contract as an organizing principle in transnational dispute resolution is a disconcerting analytical tenet susceptible to numerous permutations and iterations depending on the particularity of the facts framing the case at issue.¹⁶¹

¹⁶¹ ‘Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.’

In their discussion of this Article, the delegates to the Convention voiced frequent concerns that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements. See G. Hague, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, pp. 24-28 (1958).

Without reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country’s adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today.

It is worth noting that the most successful international law treaty in recorded history with the greatest number of signatories, even when one considers the success of the multiple Hague Conventions, is the treaty commonly referred to as the “*New York Convention*”.

¹⁶¹ Independent of its character and nature as an “international contract,” international agreements raise distinct issues, possible points of contention, and challenges concerning the equitable administration of justice. An international construction contract, for example, is materially different from an international distribution agreement, and both stand in radical contrast with respect to an international asset based sale-purchase contract. The varying economic considerations in the manner in which the “internationalism” of each of these agreements projects itself as
The Supreme Court finds itself facing a daunting challenge rife with conceptual paradoxes. It must reconcile a new “international economic order” (now globalization) with party autonomy and the archaic prejudice against having private parties divesting judicial tribunals of jurisdiction by dint of forum selection clauses and even arbitration clauses resulting from legitimate arms-length negotiations between sophisticated and industry savvy parties. It is precisely at this delicate crossroads that the principle of reconciliation as here used together with comity that the precepts of uniformity, predictability, and reasonableness not only with respect to the methodology to be applied in the analysis of legal issues, but also in giving rise to consistent and coherent opinions that inevitably shall serve as dispositive standards to be followed by tribunals and multinational corporations and private individuals serving as protagonists in the theater of multinational commerce.

It is necessary to explore the extent to which the principles of comity, judicial restraint, party autonomy, and reasonableness have spawned different doctrinal rubrics commonly used in international private procedural law. By briefly tracing the contours of these developments it is possible to detail a methodology that may lead to a unified doctrinal theory pursuant to which the consistent and methodical application of these tenets, based upon the principle of comity as a concept of reconciliation typically in three distinct arenas (the common law system, the Roman-Germanic civil code system, and material transformations in global economics at macro and micro levels), shall promote (i) the interests of foreign states, (ii) the interests of the United States, and (iii) the interest of the community of nations in preserving, developing, and enhancing a reliable, predictable, and uniform corpus of international conventional and customary law.

IV. JURISDICTION TO PRESCRIBE: THE EXTRATERRITORIAL APPLICATION OF U.S. STATUTORY LAW.

As archaic as the very concept of sovereignty itself is the classical issue delineating the extent to which the laws of one sovereignty may be applied to acts or omissions undertaking by foreigners within the national territory of a foreign state. The gamut of points of departures pursuant to which scholars and courts have attempted to approach this issue is as manifold and sui generis as the nature of the concept of sovereignty and the normative basis of laws well as the extent to which the different underlying policy considerations affect public policy, certainly would materially alter a decision and leave courts and practitioners without an analytical Polestar. Put simply, the almost infinite permutation of international commercial agreements renders flawed and resounding in folly the use of “an international contract” as an organizing principle.

Courts have treated arbitration clauses as no different from forum selection clauses such that they may be deemed one and the same. See e.g.

This analysis shall not address the issues and intricacies inherent in concerns that parties to an international treaty, such as the 1968 Nuclear Nonproliferation Accord, routinely must address.
themselves. The fundamental nature of this issue reflects its complexity rather than the simplicity that typically characterizes the configuration of first principles.

Identifying the rudimentary difficulty inherent in the issue is simple enough. What right or normative basis does a sovereign have for purposes of engrafting its laws so as to administer equitably justice arising from the acts or forbearances undertaken by foreigners within the national territory of a foreign sovereignty? If such a right or normative foundation in facts exists, is it based on natural law, the processes that give rise to legislative enactments that ultimately rest on a constitutional premise, the stare decisis of the common law, custom, or on a combination of some or all of these factors? Does the extraterritorial application of U.S. law based upon acts and omissions occurring within the national territory of a foreign sovereign require a treaty or convention between the respective countries imposing a condition of reciprocity as a predicate? Without purporting to resolve in any conclusive manner these questions, or even submit them to sustained and exhaustive analysis, here the more modest task of analyzing the various standards developed in the United States concerning the issue of extraterritorial application, which is developing exponentially in the framework of international commerce at a pace that finds no historical precedent in a global context defined by porous economic boundaries and pervasive globalization, is relevant and necessary.

Significantly, U.S. jurisprudence dictates that courts in the United States may exercise jurisdiction over activities undertaken within the national territory of a foreign sovereign. To be sure the extraterritorial application of U.S. law has been the subject matter of spirited debate, controversy, and in many cases consternation on the part of other countries. Opinions issued by federal courts requiring the execution of judgments based upon the extraterritorial application of U.S. law has been interpreted as a direct and explicit violation of the sovereignty of foreign nations. The judicial intervention of U.S. Courts in the realm of sovereignty pertaining to foreign nations has given rise to significant, and in some cases, strident protests and objections, particularly during the last forty-five (45) years.

The extraterritorial application of U.S. law commands a unique place within the analysis of jurisdiction. Standing in sharp relief with respect to personal jurisdiction and subject-
matter jurisdiction, jurisdiction to prescribe refers to the authority of a state to have its laws applied to persons or activities in a foreign state. Jurisdiction to prescribe explicitly refers to the authority of the legislative branch to legislate laws having extraterritorial application. Article I, Sec. 8, Cl. 3 of the U.S. Constitution provides congress with considerable latitude to regulate commerce with foreign nations. The Supreme Court consistently has ratified the constitutionality of congressional authority to legislate laws having extraterritorial application within the national territory of a foreign nation so long as the United States is affected by the acts or omissions at issue. Legislation of this ilk applies equally to U.S. citizens and foreign nationals alike.

A federal district court may not exercise subject-matter jurisdiction absent a federal statute valid pursuant to Article III of the U.S. Constitution. Subject-matter jurisdiction may only be exercised under two narrow conditions (i) where the controversy concerns “a federal question” pursuant to the U.S. Constitution, federal legislation or regulations, see 28 U.S.C. §1331; or (ii) pursuant to diversity jurisdiction created by U.S. citizens residing in different states (28 U.S.C. §1332 (a)(1)); or between U.S. citizens and foreign citizens (28 U.S.C. §1332(a)(2) & (3)). For a comprehensive analysis of personal jurisdiction in the context of domestic and international disputes see BORN, supra at 7-13.

Also known as legislative jurisdiction: see E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 253, 111 S.Ct. 1227, 1233; RESTATEMENT (FIRST) CONFLICTS OF LAWS §60 (1934).

The greater part of the jurisprudence that has developed concerning jurisdiction to prescribe, not surprisingly, concerns antitrust legislation. See e.g. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582 N.6, 106 S.Ct. 1348, 1354, N.6, 89 L.Ed. 2d 538 (1986); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 682 S.Ct. 1404, 8 L.Ed. 2d 777 (1962); United States v. Sisal Sales Corp., 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1927); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

Despite arguable constitutional foundation, jurisdiction to prescribe does not necessarily follow from the language of Article I, Sec. 8, Cl. 3 of the Constitution. It is widely acknowledged that commerce among nations can be regulated by virtue of methodologies based upon party consent (i.e. a treaty), or as is typically implemented in the international arena, with the adoption of commercial barriers imposing tariffs. These two methodologies, however, are materially different from the regulation of activities taking place within the national territory of a foreign sovereign without the consent of the foreign nation affected by the judicial decree at issue.


See United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
Because of the exceptional nature of the legislative authority bestowed on congress concerning extraterritoriality, it is necessary and illustrative to examine the interpretative methodology used in studying legislation that purports to be susceptible to extraterritorial application, together with the different standards or rubrics that U.S. federal courts have enunciated. In connection with this second point, it becomes indispensable to analyze the extent to which the doctrine of *comity* such as we have here developed it, may serve as an organizing principle for purposes of systematizing and unifying an analytical discipline that engenders so much international attention and touches upon the deepest concerns of states because it (extraterritoriality) is inextricably tied to the very concept of foreign sovereignty, the wisdom of the international community of nations and, therefore, the actual dignity of the members of this international and interactive community.

### A. Legislative Interpretative Methodology

In contrast to the generalized boiler-plate assertions by commentators, jurists, and lawyers steeped in the Roman-Germanic civil code system, in broad strokes Anglo-American common law has developed multiple principles of interpretation and construction so as to render clear what may be otherwise opaque or ambiguous specific mandates contained in complex legislative rubrics. As a point of departure it is necessary to observe that “[t]he canon of construction which teaches that legislation of congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, [citation omitted] is a valid approach whereby unexpressed congressional intent may be ascertained.”

A second principle of statutory construction is triggered once the presumption against extraterritorial application has been met or otherwise rendered inapplicable. This principle states

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173 In some legal disciplines, such as constitutional law, the study of jurisdiction, criminal procedure, and Title VII, even more specialized interpretative precepts have been developed consonant with the particularity and specificity of the subject matter in question.

174 *Foley Bros., Inc., et al. v. Filardo*, 336 U.S. 281, 285, 69 S. Ct. 575 (1949). In fact, in *EEOC v. Arabian American Oil Company, et al.*, 499 U.S. 244, 111 S.Ct. 1227 (1991), the Supreme Court held that the statutory precursor to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e-2000e17 (1988ed) did not extend beyond the national territory of the United States despite the statute’s broad provisions covering any activity, business, or industry affecting commerce. 499 U.S. at 249, 111 S.Ct. at 1231 (relying on 42 U.S.C. §2000e(h)). Likewise, the Supreme Court also underscored that “the intent of congress as to the extraterritorial application (of the statute at issue) must be deduced by inference from boiler-plate language which can be found in any number of congressional acts, none of which have ever been held to apply overseas [citing authority].” *Id. at 251.*

The Sherman Act also contains boiler-plate language very similar to those embodied in Title VII, but the Supreme Court in this context, however, observed that the presumption against the extraterritorial application of U.S. law is overcome with respect to antitrust legislation. It is well recognized that the Sherman Act, by way of example, enjoys extraterritorial application. *See e.g. Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 N.6, 106 S.Ct. 1348, 1354, N.6, 89 L.Ed. 2d 538 (1986); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 682 S.Ct. 1404, 8 L.Ed. 2d 777 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1927); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).
that “[a]n act of congress ought never to be construed to violate the laws of nations if any other possible construction remains.” It is important to note that this precept is “wholly independent” of the presumption against extraterritorial application. This tenet is necessary for purposes of mapping the substantive ambit of domestic legislation, particularly as the “law of nations” or international law, acknowledges limitations on the normative bases that nations have with respect to jurisdiction to prescribe. Generally, there is no presumption suggesting that the U.S. congress is vested with authority exceeding the traditional limits of private international law. Yet, it is also assumed that in legislating statutory authority susceptible to extraterritorial application congress is acting well within the purview of its powers. Additionally, congress is endowed with constitutional authority to fashion legislation intended to transcend customary limits of international private law by dint of congressional fiat to legislate jurisdiction to prescribe. In the context of the well-recognized presumption against congress exceeding the limits of private international law pursuant to its authority to legislate jurisdiction to prescribe, the Supreme Court has stated that “even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation will conflict with principles of international law.”

As the Supreme Court highlighted in Hartford, its analysis of applicable law, was bottomed on the standard enunciated in Lauritzen v. Larsen. This cause also concerned a Jones Act claim on behalf of a non-U.S. sailor against a non-U.S. foreign manager. Notably, the Court seized the opportunity that this action presented to identify the fundamental difficulty attendant to the extraterritorial application of this statute; if (the Jones Act) is to be interpreted

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175 See Murray v. Schooner Charming Betsy, 2 C. Ranch 64, 118. 2 L.Ed. 208 (Chief Justice Marshall).

176 See Aranco, 499 U.S. at 264, 111 S.Ct., at 1239.

177 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§401-416.


179 Id. In articulating this principle the Supreme Court cited as illustrative precedent issued thirty-two years earlier, Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959). In Romero the plaintiff was a seaman from a Spanish city who lost consciousness while working on a vessel that sailed under the Spanish flag and belonging to Spanish citizens. The plaintiff filed an action pursuant to the Jones Act against his superiors. Because that claim was predicated on a statutorily imposed obligation and not a breach of contract, the presumption against the extraterritorial application of a U.S. federal statute was deemed inapplicable where, as in that case, all material acts took place within the confines of U.S. territorial waters. See Id. at 383, 79 S.Ct. at 486. The Supreme Court held that “in the absence of a contrary congressional direction, it would apply principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community.” Id. at 383, 79 S.Ct. at 486.

180 Supra at 816.

literally, it then must follow that congress had conferred a cause of action on U.S. citizens that


the mere predicate of being “any seaman who shall suffer personal injury in the course of his


employment.”182 It is rather transparent that this premise is juridically unacceptable. Put simply,


it would constitute an aberration that frontally militates against even the most rudimentary


principles of sovereignty that private international law recognizes.


The Supreme Court limited its jurisdiction to prescribe and identified a construction


placed on the statute pursuant to which it would “apply only to areas and transactions in which


American law would be considered operative under prevalent doctrines of international law.”183


The methodology used to fashion a standard for jurisdiction to prescribe that would be


compatible with a system of international law capable of uniting the community of nations is


subject to a simple exegesis consisting of two rudimentary rules of interpretation, together with


two doctrinal premises that comport with these rules and that are central to the extent to which


the extraterritorial application of U.S. law may be viable in a particular case.184 First, when a


statute is bereft of any clear intent to the contrary, all congressional enactments should be


exclusively applied within the national territory subject to the jurisdiction of U.S. courts. Second,


congressional enactments can never be interpreted so as to violate the laws of nations so long as


an alternative construction is possible within the confines of reasonableness. Despite the want


of analytical depth with which the Supreme Court addressed these two principles, one may glean


that they rest on the tenets of judicial restraint, reasonableness, and comity as a principle of


reconciliation.


The first precept invites a jurist to discern and articulate an intent contrary to the


territorial application of a statute that would be limited by a U.S. court’s ability to exercise


personal jurisdiction. This challenge is conceptually indistinguishable from that which the


second precept identifies; i.e., ensuring that international law will not be violated by the


extraterritorial application of a congressional enactment so long as a reasonable alternative


interpretation is at all possible. It is critical to underscore that only when limiting a


congressional enactment to U.S. national territory within the jurisdiction of federal courts is


irrational or incapable of being sustained under any reasonable hypothesis of logic, law, fact, or


equity, shall extraterritoriality ensue.


The principle that necessarily serves as a standard for these two precepts is the concept of


reasonableness. This concept, however, is in dire need of a substantive rubric if it is to have any


content or meaning beyond that of the formal and formulistic paradigm of mere syllogistic
discourse. The doctrine of comity as a principle of reconciliation can supply this much needed


182  Id. at 576, 73 S.Ct., at 925.


183  Id. at 577, 73 S.Ct., at 926.


184  See Hartford Fire Insurance Co., 509 U.S. at 813-816, for a Supreme Court analysis detailing the two


presumptions together with the two tenets of statutory construction.
substantive juridic content as an analytical instrument to be applied in the interpretation and construction of legislation that may have extraterritorial consequences.

If these two rules of statutory construction are to serve as limiting factors in the extraterritorial application of U.S. law, it is necessary in establishing limits framed by national territory where U.S. courts may exercise jurisdiction, to analyze three fundamental principles of reconciliation that provide the doctrine of *comity* with predictability and uniformity: (i) the judicial and economic interests of the United States, (ii) the judicial and economic interests of foreign sovereignties, and (iii) the interest of the community of nations in nurturing a system of international private law that would not only protect and preserve but also promote and enhance commerce and the well-being of all members of a global economic community. Absent consideration of these premises, neither of the two precepts could even purport to justify with any uniformity or predictive value the necessary restraint on behalf of the three branches of government that typically comprise a representative democracy.

Hence, it is through the prism of *comity*, viewed as a principle of reconciliation, that the judicial branch is capable of harmonizing the policies and efforts of congress with the foreign policy of the executive branch such that the resulting consequence would lead to the recognition and respect of the independence of foreign sovereignties. Without *comity’s* analytical rubric it would be quite difficult, if not altogether impossible, to accomplish this goal with respect to the international community of nations while advancing the desirable principles of *reasonableness, uniformity, predictability, judicial restraint, and party autonomy*.

The twin presumption that are attendant to the two precepts of statutory construction and interpretation here referenced are also lucidly defined. First, it is assumed that in the very activity of legislating (i.e. the creation of positive law in the classical jurisprudential tradition) congress deliberately engages in an exercise of self-restraint so as to avert piercing the limits of international law. Second, even when the presumption against the extraterritorial application of U.S. law is of no moment, legislative enactments should never be interpreted as having as its objective the mission of regulating the conduct of foreigners within their national territory where such regulation may interfere with international law. The twin presumption comports with and are susceptible to analyses predicated on (i) *reasonableness*, (ii) *comity*, (iii) *judicial self-restraint*, and (iv) *party autonomy*.185

Without purporting to engage in an oversimplified schematic of the methodology necessary for the equitable consideration and implementation of the extraterritorial application of U.S. law, the configuration detailed below presents a clear summary of the various normative foundations that lead to an understanding of this issue:

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185 Here *party autonomy* refers to the acts and omissions of foreigners within their national territory.
The precept of *reason*
Formal reasoning that comports with Hegelian logic and Aristotelian categories

The Precept of *comity* as a principle of *reconciliation*

The Precept of judicial self-restraint

(a), (b), + (c) = cause the harmonization of the three branches of government with respect to extraterritoriality and jurisdiction to prescribe

Substantive justification of reason
renders possible and viable

Harmonize

The Legislative Branch

The Judicial Branch
Two interpretative principles of statutory construction that render possible:

- *predictability*
- *uniformity*
- *judicial self-restraint*
- *reasonableness*
- *party autonomy*

The Executive Branch

(Department of State policies and interests)
(Policies and interests of the Pentagon)

First Presumption
Respect for the limits of the extraterritorial application of U.S. law absent clear congressional intent to the contrary

Second Presumption
Congressional enactments are only to be applied within U.S. national territory except where this interpretation would lead to an irrational conclusion

Conclusion

Judicial Compatibility with the Community of Nations

(a) Consideration of national interests,
(b) Consideration of foreign interests, and
c) Consideration of the interest of the community of nations in maintaining and enhancing a system of private international law.
d) Consideration of legal systems and convergence.

(briefly described in the text, not visible in the diagram)
B. The Many Faces of the Standards Governing the Adjudication of Jurisdiction to Prescribe and the Concept of Comity to Prescribe

The exigent need to limit the extraterritorial application of congressional enactments has required the development of complex doctrines than the two principles of statutory construction and attendant presumptions here analyzed. This orthodox analysis has been amended by adding the doctrine of comity but now under the new name of comity to prescribe.186

Despite the proliferation of jurisprudence addressing jurisdiction to prescribe, particularly in the realm of antitrust law,187 the standard governing the extraterritorial application of U.S. law, even when viewed in its most favorable light, remains in a state of complete conceptual chaos. The magnitude of this disarray is extraordinary.

In Timberlane188 the lack of conceptual unity and consensus is regrettably all too eloquent. In that case the Ninth Circuit Court of Appeals reversed a trial court ruling that dismissed the claims of four consolidated plaintiffs on two grounds: lack of personal jurisdiction and forum non conveniens. The Ninth Circuit held that the Sherman Act189 is

186 The concept of comity to prescribe or to legislate (“prescriptive comity”) was first enunciated by the Supreme Court in Hartford Fire Insurance Co., 509 U.S. 764, 817, in an effort to underscore the differences between the use of comity in contexts where judges refrain from exercising jurisdiction over cases that theoretically would be best judicially processed in another foreign venue and the use of comity in the arena where reciprocity and the mutual respect of nations constitutes the basis for limiting extraterritoriality; “[C]omity is exercised by legislatures when they enact laws, and Courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory.” Id. at 817.


188 Timberlane Co. v. Bank of America, N.T. and S.A., 549 F.2d 597 (9th Cir. 1976).

189 Sherman Anti-Trust Act, §§1 et seq.; as amended, 15 U.S.C. §§1 et seq. Section 6(a) of the Act provides that it shall not be applied to commerce among nations unless the conduct in question has a direct,
not circumscribed to restrictions on commerce that have an effect (i) direct and (ii) substantial on U.S. foreign commerce. The Ninth Circuit issued this ruling despite a record rife with allegations asserting violations committed by non-U.S. citizens taking place in Honduras, and having the most direct and significant effect on Honduras. Indeed, the Ninth Circuit narrowed the issue before the Court as raising “important questions concerning the application of American anti-trust laws to activities in another country, including actions of foreign government officials.”

C. Seven Standards and One Problem: From Bad to Worse

Remarkably, the Ninth Circuit identified no less than eight standards for purposes of addressing the issue identified before the Court prior to engaging in the laudable effort of crafting a tripartite test. The various standards command meticulous analysis.

As a point of departure the Court reiterated the “direct and substantial effect” test concerning U.S. foreign commerce that the District Court had applied, and observed that this very formula had generally been followed by a number of federal courts.

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substantial, and reasonable effect on (a) domestic commerce in the United States, or (b) foreign commerce undertaken by an entity that conducts business in the United States.

190 549 at 600-601.

191 Id. at 610, citing Swiss Watch case, 1963 Trade Cases P. 70,600; United States v. R.T. Oldham Co., 152 F.Supp. 818, 822 (N.D. Cal. 1957); General Electric, 82 F. Supp. at 891. The Ninth Circuit also noted that the “direct and substantial effect” test had been lauded by several commentators.: See e.g. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, 30, 174 (2d Ed. 1973); J.VAN CISE, UNDERSTANDING THE ANTITRUST LAWS, 204 (1973 Ed.); and also cited to the REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 76 (1955) (applying the standard of “substantial anticompetitive affects”); and the RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE UNITED STATES §18. This section reads:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory, and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems. (emphasis added)

The requirements of “direct” and “substantial” effect derive from Commentaries (b) (ii) and (iii) to this section, which specifically state, notwithstanding that the test only applies to foreigners and that U.S. citizens may be deemed bound by their nationality, that the standard exclusively applies when there is no significant conduct taking place within the United States, otherwise personal jurisdiction easily could be exercised pursuant to contemporary standards of general personal jurisdiction or specific personal jurisdiction. Id. at n.18.
In its effort to continue to trace the historical and contemporary contours of extraterritorial jurisprudence, the Ninth Circuit asserted that “[o]ther courts have used different expressions, however.” After careful analysis, it can be established that the Ninth Circuit makes special reference to no less than seven additional formulations.

Second, extraterritoriality is appropriate when the combined effect of the acts and omissions taking place in a foreign jurisdiction has an effect on U.S. foreign commerce.

Third, extraterritorial application of U.S. law is justified when the acts or omissions at issue within the territory of a foreign jurisdiction have an effect on U.S. imports and exports.

Fourth, where facts demonstrate that a conspiracy undertaken within the national territory of a foreign jurisdiction has an effect on U.S. commerce, jurisdiction to prescribe is warranted.

Fifth, extraterritoriality is appropriate where the acts or omissions at issue within the national territory of a foreign jurisdiction caused a direct effect and influenced U.S. commerce with other nations.

Sixth, when the activity at issue in a foreign country causes a direct or substantial effect, or when the activity at issue within the national territory of a foreign country causes any effect that is not insubstantial and indirect, extraterritoriality is legitimate.

Seventh, the extraterritorial application of U.S. law is juridically viable if (i) the effect takes place during the course of foreign commerce, or (ii) the extraterritorial acts or

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192 Citing to Thomsen v. Cayser, 243 U.S. 66, 88, 37 S.Ct. 353, 360, 61 L.Ed. 597 (1917) (“the combination affected the foreign commerce of this country”); Alcoa, 148 F.2d at 444 (“intended to affect imports and experts (and) . . . is shown actually to have had some effect on them”); [FN19] *611 United States v. Imperial Chemical Industries, Ltd., 100 F.Supp. 504, 592 (S.D.N.Y. 1951) (“a conspiracy. . . which affects American commerce”; United States v. Timken Roller Bearing Co., 83 F.Supp. 284, 309 (N.D. Ohio 1949), modified and affirmed, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) (“a direct and influencing effect on trade”). See also citations in 1 J. von Kalinowski, Antitrust Law and Trade Regulation s. 5.02(2), at 5-120.


194 Alcoa, 148 F.2d at 444.


196 See Koh, supra, at 56 (proposing that Timberlane suggests that the effect on U.S. commerce should not be trivial, but rather reasonably direct and substantial, and thus the Court held in an effective manner that a party may not invoke jurisdiction to prescribe unless it has alleged a valid claim pursuant to jurisprudence protecting free trade and competition.”

forbearances in question substantially affect commerce between the United States and the foreign nation at issue, or (iii) domestic U.S. commerce. 198

The last standard enunciated in favor of the extraterritorial application of U.S. law is when the activity at issue takes place within a foreign national territory substantially and adversely has an effect on commerce among the various states of the United States. 199

Notably, despite the court’s exhaustive analysis of the jurisprudence governing extraterritoriality, particularly in the context of antitrust legislation, the term “reconciliation” fleetingly appears despite the overwhelming, and practically exclusive, emphasis on such nomenclature as “effects,” “direct,” and “significant,” all articulated in different standards that often seem to be inconsistent in furthering different economic policies and legal issues. “Reconciliation” is referenced rather vaguely and without pretense of bestowing upon the term any juridic content, or otherwise treating it with jurisprudential rigor. The Court limits itself to the observation that while “courts have spoken in terms of the Restatement and of congressional policy, findings that an American effect was direct, substantial, and foreseeable, or within the scope of congressional intent, have little independent analytic significance, instead, cases appear to turn on a reconciliation of American and foreign interests in regulating their respective economies and business affairs.” 200 In Timberlane, however, we do see the seed of the concept of comity as some form or permutation, yet to be defined, of reconciliation. Regrettably, the analysis is frustrated at its very inception.

The standards or formulas premised on the “effects” principle is fundamentally flawed inasmuch as it altogether fails to consider the wider and more global concerns of the community of nations or rudimentary precepts of international conventional and customary private international law. Likewise, this standard ignores the nature of the very parties to a dispute. By way of example, the extraterritorial application of U.S. law based upon acts or omissions undertaken by U.S. citizens within the national territory of a foreign nation clearly has material implications that are different and substantially less problematic with respect to international law and U.S. foreign policy, than would the identical set of facts but arising from the acts or omissions of non-U.S. citizens. 201

198 See Rahl, Foreign Commerce Jurisdiction of the American Antitrust Laws, 43 Antitrust L.J., 521, 523 (1974). Here the Court observed, borrowing from Dean Rahl that “(t)here is no agreed black-letter rule articulating the Sherman Act’s commerce coverage in the international context. Id. at 611.


200 549 F.2d at 611, citing Note, American Adjudication of Transnational Securities Fraud, 89 Harv. L. Rev. 553, 563 (1976) (emphasis supplied).

201 See Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 815 (D.C. Cir. 1969) (holding that the standard or formula governing extraterritoriality must focus on the nexus between the parties, their activities, and the United States, and not on the formulistic circumstantial mechanics of “effects” that a particular set of facts may have on U.S. imports and exports).
Curiously, after first having raised the “notion” of “reconciliation,” at least in the context of using this word, the Ninth Circuit explicitly mentions comity. Based upon its own exegesis of the Alcoa opinion, the Court stated that a standard based upon “substantial effects” could be susceptible to the incorporation of additional concepts such as “substantial” and thus give rise to a more flexible standard that may vary when considered together with other factors.\textsuperscript{202}

The analysis of the multiple standards and tests set forth in Timberlane is loquacious in establishing the lack of conceptual consistency that pervades the arena of jurisdiction to prescribe. Critical terms such as “effects” and “direct” are wholly bereft of content and consistent meaning. Also, the opinion reveals inexplicable arbitrariness in its lack of commitment to endowing such terms as “other factors to consider,” with any degree of specificity that may serve as meaningful precedent. The want of reference or sustained analysis to such critical issues such as political and geopolitical concerns that may be at stake, the nationality of the parties, the effect of extraterritoriality on international customary and conventional private international law, and the interests of the community of nations as a whole, all compound and multiply the problem and lead to confusion for those commentators, courts, and practitioners seeking consistency, uniformity, party-autonomy, reasonableness, judicial restraint, and reconciliation among the multiple interests that inevitably are touched upon whenever extraterritoriality takes place.

The opinion does not answer a very simple question. Under what circumstances is the extraterritorial application of U.S. law appropriate based upon the acts or forbearances occurring within the national territory of a foreign jurisdiction? The question is valid, warranted, and necessary. So too should be its answer.

D. The Tripartite Standard: Some Light in the Midst of Chaos

Faced with conceptual inconsistencies and disarray, the Ninth Circuit’s visceral analytical penchant in Timberlane was to fashion a tripartite standard that would theoretically embody sufficient flexibility so as to reconcile the multiple interests and variables that must be considered in determining jurisdiction to prescribe. The effort doubtless represents a step in the right direction and thus merits consideration in its entirety:

*613 [13] A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in the first instance that there be some effect actual or intended on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is

\textsuperscript{202} 549 F.2d at 612. Here the Court observed that “[t]he intent requirement suggested by Alcoa, 148 F.2d at 443-44, is one example of an attempt to broaden the Court’s perspective, as is drawing a distinction between American citizens and non-citizens.”
sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws. [authority omitted] Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States including the magnitude of the effect on American foreign commerce are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.  

The Ninth Circuit’s virtuosity in crafting this test is laudable and impressive, notwithstanding the mechanical incorporation of the very debilities that the very court observed in other analyses. Regrettably, the tripartite test is conceptually inapplicable and theoretically unacceptable. No less than five fundamental premises contribute to the new standard’s shortcomings as a viable and binding precedent that may be followed by courts, practitioners, states, multinationals, entrepreneurs, and the community of nations.

First, the terms “some effect actual” or “intended” enunciated in the first premise of the tripartite test lack significance at even a philological level, let alone juridically. The mere presence of some intent on the part of private entities engaging in acts or omissions within the national territory of a foreign sovereignty concerning U.S. foreign commerce, without more, constitutes an impoverished foundation on which to repose subject matter jurisdiction. In fact, the caselaw is bereft of any precedent supporting so extraordinary a proposition. Similarly, “some effect actual” is hardly a guidepost to be followed.

Second, the term “sufficiently large” that the tribunal so acutely criticized as inappropriately and “blindly” raised by other courts in the context of international transactions is here incorporated without being meaningfully articulated.  

Third, the tripartite standard is devoid of any reference to the status or nationality of the actors at issue. Already it has been noted that the relationship between U.S. citizens and the acts or forbearance in question as well as the connection between the activity at issue and non-U.S. citizens, is simply indispensable to an extraterritoriality analysis. It is remarkable that comity forms no part at all of the standard. Despite having underscored the importance of this doctrine in the context of substantiation, the Court elected to ignore in its entirety the issue of comity and thus avert facing the challenge of bestowing upon it a material and substantive foundation that would facilitate the adjudication of extraterritoriality issues.

Fourth, the tripartite formula’s third premise does not contemplate the need to reconcile the competing and conflicting interests that are inevitably generated by issues concerning the extraterritorial application of U.S. law. The Court merely limited itself to

203 Id. at 613 (emphasis supplied).

204 Id. at 613.
referencing the “magnitude of the effect on American foreign commerce . . . vis-à-vis those of other nations,” for purposes of determining the propriety and legality of jurisdiction to prescribe.205 A deeper analysis is necessary. It is analytically impossible to premise a test concerning jurisdiction to prescribe that must necessarily harmonize economic interests among and between nations on so subjective and elusive a term as “magnitude.” The gravity of this problem is compounded and made worse when understood as taking place in a completely unilateral context. A test purporting to be bottomed on more “objective criteria” is not only warranted but indispensable. The suggestion of “magnitude” leads to such an inference. Moreover, the need to modify materially this third prong of the tripartite standard grows in importance when considering such factors as the elements of a global economy purporting to have porous economic borders consonant with a universal policy of “equitable globalization.”

If the elements of reciprocity and reconciliation, as basic points of departure are to play a material role in redefining and applying comity, the doctrinal rubric governing the extraterritorial application of U.S. law must be severely modified to incorporate these concepts. Reliance on the theoretical and pedagogical construct holding that the common law gradually modifies and purifies itself pursuant to the mere passage of time so as to adapt to changing social, political, and economic historical tenets, thus purifying itself continuously through the evolution and development of stare decisis is here unavailing. Instead of creating theoretical and practical schemes that may address this complex issue that compels consideration of factors beyond the mere allocation of wealth, the common law has given rise to a proliferation of standards and tests that, certainly in some instances, show themselves to be internally contradictory and inimical to the very goals that it purports to further. Other examples of the standards and tests that the “perfect workings” of the common law demonstrate are tests and standards that are of little or dubious utility in the promotion of judicial restraint, party autonomy, predictability, reciprocity, and reconciliation, or of addressing the growing exigencies that pervade a global economy that defines itself in terms of globalization and such multilateral treaties as NAFTA, Mercosur, and The Andean Pact, to mention only some of the agreements that define the economic and judicial scenario confronting Latin America.206

205 Id. at 613.

206 In Hartford Fire Insurance, the Supreme Court lost an invaluable opportunity to legitimize and adopt the Timberlane analysis, which although flawed, constitutes the most comprehensive effort on the subject. Plainly, the Supreme Court failed in clarifying the circumstances in which comity would serve as a factor in limiting jurisdiction to prescribe. In fact, after its decision in Hartford Fire Insurance, a foreign party seeking to dismiss a complaint on the ground of comity appears only to have to aver that the acts or forbearance that the United States has declared as being illegal are actually legal within the jurisdiction of the foreign country at issue. In addition, the Hartford Fire Insurance precedent also may suggest that a movant seeking dismissal in addition to establishing that the alleged illegal act is legal in the foreign jurisdiction in question, but also that the legislation of the foreign country caused the movant to act in the manner deemed illegal by the United States.
V. FOREIGN SOVEREIGN IMMUNITIES AND ATTENDANT EXCEPTIONS

A. The Absolute Theory of Foreign Sovereign Immunity

Practically from its very foundation as a constitutional democracy the United States provided virtually absolute immunity to foreign sovereignties from the exercise of jurisdiction by U.S. courts. This theory of absolute immunity was first articulated by the U.S. Supreme Court in 1812, scarcely sixty-seven years after securing independence from the United Kingdom.207

In The Schooner Exchange, the Court’s first Chief Justice premised his analysis on a classical territorial doctrine of analytical jurisprudence. Justice Marshall observed that so long as a foreign state acted within the confines of its national territory “[i]t is susceptible of no limitation not imposed by itself,”208 and that the United States implicitly had waived jurisdiction over the activities of a foreign nation undertaken under these circumstances. The analysis of the case arose from the very specific facts pertaining to the determination of whether U.S. Courts could exercise jurisdiction over a navy vessel belonging to a foreign sovereign that was not hostile to the United States and did not demonstrate any badges of belligerency. It was in this context that the absolute theory of foreign sovereign immunity was first pronounced.209

Significantly, in The Schooner Exchange there is no reference at all to the doctrine of comity. Even a surface reading of the opinion, however, reflects that Justice Marshall predicated his opinion (without so articulating it) on the very reasoning that underlied the Court’s holding in Hilton v. Guyot, that caused the creation of a new normative space in jurisprudence: “less than an obligation but more than a courtesy.” In fact, in 1983, 160 years after the ruling in The Schooner Exchange, the Supreme Court underscored Justice Marshall’s analysis as one in which “foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities [citations omitted].”210

207 See The Schooner Exchange v. McFadden, 7 Cranch 116, 3 L.Ed. 287 (1812).

208 Id.

209 See e.g. Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088 (1926).


The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decision in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by

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It is significant that Justice Marshall did not cite to any judicial precedent in crafting *The Schooner Exchange* opinion, but did premise his analysis on precepts founded on concepts of natural law and “principles” adopted by “civilized nations.” The first articulated statement concerning the absolute theory of sovereign immunity expressed in a U.S. Supreme Court opinion was eloquently and succinctly pronounced by Justice Marshall in *The Schooner Exchange*:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.211

The absolute theory of sovereign immunity typifies the paradigmatic “child of his times.” The “absolute” component of the theory is as rigid as the doctrinal inflexibility that accompanies, and may be inferred from, the concept of “territoriality.” The analytical formation and transformation evinced by the conceptual movement from

211 *Id.* at 136 (emphasis added). It is worth noting that in *The Schooner Exchange* the concept of absolute sovereign immunity was applied to a French navy vessel docked in a U.S. port. Pursuant to Justice Marshall’s analysis, the Court decreed that “the Exchange, being a public armed ship, in the service of a foreign sovereign [Emperor Napoleon], with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the port of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.” *Id.* at 147. Curiously, in the very first challenge to the absolute theory of sovereign immunity concerning a foreign sovereign, the immunity actually was amplified to cover property of a foreign nation located within the national territory of the United States. The standard now had been clearly established.
“territoriality” to “material contacts and significant relations” in the arena of jurisdiction and conflicts of law also highlighted the frailties inherent in doctrines that are not sufficiently maleable to adopt political policies and economic changes that render policies of international isolationism archaic and unworkable. The advent of “economic transnationalism,” the growth of information technology, and the failure of an international legal system that revealed its embryonic state of development and want of practical application with respect to serving as a rational guiding principle in the relationship among nations based upon its inability to derail two world wars, together created a need for a radical and substantial change concerning the rudimentary precepts surrounding the underlying jurisprudence governing the absolute theory of sovereign immunity.

This theory lost its relevance and functional ability together with the carriage powered by marvelous equines and the flickering light of the last gas-powered lamps. We learn that the process of self-elimination arising from new technologies and competition leading to the “purification” of the marketplace, provide a sufficient factual basis from which to infer that both the last carriage and lamp must have been of the most excellent quality, but their time has passed. Likewise, the static concept of territoriality in the context of foreign sovereign immunity had to yield to the precept of relativity best characterized by the elements of “effects,” “significant relations,” and universal norms that find their reason for being in the protection of human dignity and humanitarian rights. The permutation that governed jurisdictional doctrines simply could not sever itself from the “other side of the coin:” the immunity accorded to nations.

The absolute theory of sovereign immunity remained as a dispositive rubric until 1952. In fact, during this period, the Supreme Court meticulously emphasized the distinction between judicial questions that appropriately fell within the ambit of the judiciary and so deemed the issue of immunity accorded to foreign sovereignties and concerns that are more appropriately framed as political questions to be addressed by the executive branch of government.212

B. The Restrictive Theory of Sovereign Immunity: The Separation of Powers

It was not until 1952 that the United States Department of State typically would issue petitions invoking immunity as to all legal proceedings filed against any foreign state with whom diplomatic relations were “friendly” or “positive.” This policy presented a harmonized and consistent rubric between the executive branch and the absolute theory of sovereign immunity that the Supreme Court had first adopted in The Schooner Exchange. On May 19, 1952, however, acting legal adviser for the U.S. State Department, Jack B. Tate, who at the time was charged with providing legal counsel to Attorney General Phillip B. Perlman, drafted a letter that contained the state department’s new and official policy with respect to foreign sovereign immunity. This novel position...
materially altered the absolute theory of sovereign immunity and introduced the new restrictive theory. Jack Tate’s missive is commonly referred to as the “Tate letter.”

Significantly, it was not until 1976 that congress enacted legislation, 28 U.S.C. §§1602-1611, and 28 U.S.C. §1330, known as the Foreign Sovereign Immunities Act (the “FSIA”). The FSIA provides federal district courts with the solitary and exclusive ground for exercise of jurisdiction over a foreign sovereignty.

It was not until 1989, three years after having enacted the legislation, that the Supreme Court clarified the FSIA’s monopoly on jurisdiction over a foreign nation. The transformation from an absolute theory of sovereign immunity to a restrictive rubric, despite the primacy of the absolute theory from 1812 until 1952, signified that “a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (jure imperii), but not as to those that are private or commercial in character (jure gestionis).” The Supreme Court established that a foreign sovereignty as a matter of law participates in a “commercial activity” pursuant to the restrictive theory “a foreign state engaging in

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214 §1330, entitled “Actions against foreign states” was enacted by congress on October 21, 1976 (see eight of Pub.L. 94-583), for purposes of being applied to §1602. §1330 vests federal district courts with subject matter:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) which service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

It is impossible to comment exhaustively and in detail on the FSIA in a single article. Accordingly, here only the contours of the legislation are traced in order to explore the measure in which application of a substantive concept of comity, as a doctrine of reconciliation in the arena of procedural international law may serve as a fundamental premise and first principle towards a unified theory that purports to foster predictability, uniformity, reasonableness, judicial restraint, and party autonomy to private international law.


‘commercial’ activities does not exercise powers peculiar to sovereigns; rather, it exercises only those powers that can also be exercised by private citizens.”

Accordingly, a foreign nation pursuant to the restrictive theory shall be deemed to be engaging in a “commercial activity” only when it acts “in the manner of a private citizen or a corporation” in the marketplace.

The statutory rubric creates a presumption of immunity in favor of foreign nations unless a showing is proffered demonstrating that the nature of the activity in question falls within the ambit of a specific exception under this legislative paradigm. In applying an exception within the confines of the restrictive theory, in applying an exception enunciated by the restrictive theory, a district court would lack subject matter jurisdiction, as set forth in the very anatomy of the statute pursuant to §1330, to affirm the original jurisdiction of federal courts bottomed on the FSIA.

The point of departure for any analysis concerning the immunity from jurisdiction in U.S. courts to be accorded to a foreign nation is configured by a presumption of immunity absent a showing that the acts or forbearances at issue fall within the realm of any of the seven very narrowly limited exceptions that the FSIA prescribes. Despite,


218 Id. In Weltover, the Supreme Court underscored that the dispositive standard in a foreign sovereign immunities analysis is the nature of the foreign nation's activity and not the underlying motive that may be identified at issue. This distinction between nature and motive (or purpose) is explicitly articulated in the very legislation, which defines “commercial activity” as “a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” 28 U.S.C. §1603(d) (emphasis supplied).

Federal district courts are of a single voice in holding that when a foreign nation exercises its “police powers” it shall not be deemed to be engaging in a “commercial activity” within the meaning of the FSIA. See e.g. Nelson, 113 S.Ct. at 1480; John Doe I v. UNICAL Corp., 963 F.Supp. 880 (C.D. Cal. 1997) (abuse of a sovereignty’s police powers constitutes activity particularly pertaining to the acts of a sovereign by its very nature and, therefore, does not fall within the purview of the FSIA's commercial activity exception”; Granville Gold Trust-Switzerland v. Comisiones del Fullimento/Interchange Bank, 924 F.Supp. 397 (E.D.N.Y. 1996); Aguas Viva v. Iberia Lineas Aereas de España, 937 F.Supp. 141 (D.P.R. 1996) (holding that the use of police power by a foreign nation has long been established as endemic to the nature of a sovereign pursuant to the restrictive theory); Habtemicael v. Saudi a/k/a Saudian Arabian Airlines, 1995 WL 443940 (N.D. Ill. 1995) (holding that abuse of police power falls squarely within the domain of a sovereign’s nature); Intercontinental Dictionary Series v. DeGruyter, 882 F.Supp. 662, 674-676 (the research and development of an academic treatise covering the lives of many academicians in the field of linguistics over time is not a typical commercial activity and, therefore, the government instrumentality of the Australian government undertaking such a task merits FSIA immunity); Mol, Inc. v. The Peoples Republic of Bangledesh, 572 F.Supp. 79, 84 (D.Ore. 1983) (finding that the use of a state’s police powers constitutes an activity essential to the undertakings of a sovereign).


220 The seven exceptions may be summarized as follows:
(a) “a foreign state shall not be immune from the jurisdiction of the United States or of the states in any case –

(i) when the foreign sovereignty “has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver” [Section 1605(a)(1)];

(ii) “in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity in a foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that state causes a direct effect in the United States [Section 1605(a)(2)];

(iii) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by a foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in a commercial activity in the United States [Section 1605(a)(3)];

(iv) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue [Section 1605(a)(4)];

(v) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment, except this paragraph shall not apply to [Section 1605(a)(5)]:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be based,

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(vi) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitration, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (i) of this subsection is otherwise applicable [Section 1605(a)(6)]; and

(vii) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft, sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph. [Section 1605(a)(7)].

This seventh exception is qualified by two provisions providing that a court shall not have jurisdiction to prosecute a cause against a foreign nation where the foreign state (a) “was not designated as a state sponsor of terrorism under Section 6(j) of the Export Administration Act of 1979 (citation omitted)
however, the scope of the operative exceptions affording foreign states immunity, the
plethora of authority has been generated by the “commercial activity” exception of
Section 1605(2).

C. The “Direct Effect” Element of “Commercial Activity”

It is of little surprise that the “commercial activity” exception provides the most
illustrative paradigm of the FSIA’s immunity scheme.

The mere diminution of value or even an economic loss that a U.S. plaintiff may
aver, without more, does not suffice to overcome the FSIA’s presumption of immunity
despite clear circumstances where the “commercial activity” upon which the claim rests
is “direct” but does not constitute an “effect.” By way of example in *Kline v. Kaneko*,221
an action was based on the official conduct of Mexico’s Secretary of Government. There
plaintiff alleged that he had been expelled from Mexico by that nation’s Secretary of
Government, who in turn pursued an agenda of promoting economic interests contrary to
those of the plaintiff. In addition, plaintiff alleged that the expulsion took place without
engaging in any formal extradition proceeding and lacked all vestiges of due process
attendant to such proceedings. In dismissing the complaint, the district court observed
that “the expulsion of foreign nationals from sovereign nations is not an activity
customarily carried out for profit by private persons.”222 Furthermore the Court noted that
it was not appropriate for it to engage in an inquiry into and judgment of Mexico’s
immigration laws.223

Also illustrative is the holding in *Mol, Inc. v. The People’s Republic of
Bangledesh*224 where the Court examined “the issue [of] whether Bangladesh’s regulation
of the capture and export of game is a ‘commercial’ or ‘governmental’ activity.”225 Here
plaintiff challenged the revocation of a hunting and exportation license that the

or Section 620A of the Foreign Assistance Act of 1961 (citation omitted) at the time the act occurred,
unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110 (E.G.S.)
in the United States District Court for the District of Columbia; and

(b) even where the foreign state at issue is designated as a sponsor of terrorism, the act in
question occurred within the national territory of a foreign state and that state was not accorded an
opportunity to arbitrate pursuant to international law or “neither the claimant nor the victim was a national
of the United States [citation omitted] when the act upon which the claim is based occurred.”

Conditions under which an action in admiralty may be brought are also set forth in the subsections
to section (vii).


222 *Id.* at 391.

223 *Id.* at 389.


225 *Id.* at 83.
government of Bangladesh issued for purposes of capturing Rhesus monkeys and exporting them to the United States. The legally secured license allowed plaintiff to export the magnificent animals at bargained-for set prices and quantities regulated by government officials. In 1977, after the government of India proscribed the exportation of similar monkeys, Bangladesh became the solitary source for the exportation of Rhesus monkeys and the global prices of the animals significantly increased. Shortly after the appreciation of the value of the Rhesus, in 1978 Bangladesh cancelled its agreement to export the species.

The district court held that Bangladesh enjoyed immunity pursuant to the FSIA:

[The Court] conclude[s] that Bangladesh’s granting of the License to plaintiff in this case was not a “commercial activity,” but a sovereign act not subject to suit in United States courts. The granting of such a license as part of a comprehensive regulation of wildlife under the police power is an action in which the sovereign power is essential. Likewise the granting of an export license, like the power to exclude imports to regulate exports in general, is a power possessed only by sovereigns, not private parties. I find that the activity in suit here is by its “nature” sovereign activity.

Plaintiff’s analysis in this cause merits consideration. It is significant to note that plaintiff averred that the license’s fundamental purpose was to generate income for the state of Bangladesh and, therefore, must be deemed commercial in nature. Yet the Court overwhelmingly rejected this proposition and criticized the analysis by emphasizing that “[t]he purpose of the activity is irrelevant under the statute.”

The precept that mere diminution in value or economic loss is insufficient to meet the “direct effect” element so as to overcome the presumption of immunity provided to a foreign state has been firmly established.

226 Id. at 81.

227 Id. at 84.

228 Id. (emphasis in original).

229 See United World Trade, Inc. v. Mangyshlakneft Oil Production Ass’n, 821 F.Supp. 1405, 1409 (D.Co. 1993), aff’d, 33 F.3d 1232 (10th Cir. 1994) (cert. denied, 513 U.S. 1112, 115 S.Ct. 904, 130 L.Ed. 2d 787 (1995) (holding that mere economic loss suffered by plaintiff in the United States as a result of the conduct of a foreign state does not constitute a “direct effect” and, therefore, cannot, without more, give rise to subject matter jurisdiction in conformance with Section 1605(a)(2) (FSIA)). See also H.Rep. Dr. No. 1487, 94th Cong., 2d Sess. 17, reprinted in 1976 U.S.S.C.A.N. 6604, 6616 (underscoring that the term “commercial” must include “substantial contact” with the United States so as to reflect a degree of contact between the conduct at issue on behalf of a U.S. citizen or U.S. resident and the plaintiff); Granville Gold Trust-Switzerland v. Commissione, 924 F.Supp. 397, 408 (E.D.N.Y. 1996) (holding that when the role of the “Commissione” is limited to securing assets and liquidating claims, and a contract was in place between
It is important to note that even when the commercial activity exception applies, the immunity protection only attaches so long as a direct effect is not present in the United States. The case of *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari*\(^{230}\) is useful in demonstrating the inapplicability of the commercial activity exception in the absence of any direct effect, notwithstanding economic loss. There, plaintiffs filed a complaint against the Emirate of Dubai alleging mismanagement of plaintiffs’ collateral during the liquidation of the insolvent Bank of Dubai. The receiver’s committee in *Drexel* was constituted by four (4) Dubai citizens. The government had formed this committee and also retained authority to liquidate the Bank’s assets as well as to file and to defend all legal actions on the Bank’s behalf.\(^{231}\)

The Second Circuit held that the FSIA proscribed the prosecution of all claims at issue because even though “these activities might be regarded as commercial, they are not activities that caused a direct effect in the United States.”\(^{232}\) As is the case with the doctrine of extraterritoriality, the immunity accorded to a foreign state pursuant to the restrictive theory raises more conceptual questions and paradoxes than it answers or otherwise satisfactorily addresses. This problemata is best exemplified highlighting ten (10) fundamental premises that characterize it.

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\(^{231}\) *Id.* at 319.

\(^{232}\) *Id.* at 330. The holding of the district court for the Northern District of Illinois in *Magnus Electronics, Inc. v. Royal Bank of Canada*, 620 F.Supp. 387, 390 (N.D. Ill. 1985) traces the parameters of the “direct effect” requirement:

As for “direct effect,” [Plaintiff] seeks to read that requirement as though mere economic impact on a United States party, caused by a foreign government’s actions on its own soil, were enough to subject the foreign sovereign to suit here. That construction of course would prove too much: It would eliminate sovereign immunity altogether, for all the United States plaintiff would have to show would be damages caused by the alleged wrongful conduct of the foreign government in its own territory. Due process constraints preclude such a broad sweep against private litigants (see e.g., *State Security Insurance Co. v. Frank B. Hall & Co.*, 530 F.Supp. 94, 98-100 (N.D. Ill. 1981)), and it would be anomalous indeed if a foreign nation could be haled into court here on so slender a connection where a non-sovereign could not.
D. More than an Achilles’ Heel in the Restrictive Theory of Foreign Sovereign Immunity

First, the transition from the absolute to the restrictive theory of foreign sovereign immunity gave rise to a need to create applicable standards that would necessarily yield predictability, uniformity, party autonomy, reasonableness, and judicial restraint on a consistent basis. The FSIA’s seven rudimentary and rather narrow exceptions indeed provide greater flexibility than could ever be aspired to under the absolute theory, but they are wanting in analytical consistency so as to meet the basic objectives pursued in the development of jurisprudence resting on stare decisis.

Second, the commercial activity has been the most prolific of the seven exceptions in generating caselaw.233

Third, the use of a standard based upon analysis of the character or nature of the particular facts at issue so as to determine whether they constitute acts that may be undertaken by a private entity, as opposed to those actions that are endemic to a sovereign’s exercise of sovereignty (such as the use of police power, enactment of immigration laws, and issuance of licenses), constitutes a basic premise on which the restrictive theory rests.

It is important to emphasize that conceptually this standard is materially distinguishable, but parallel to the concept of commercial activity. Here, curiously, the “commercial effect” of the facts at issue are irrelevant. Accordingly, pursuant to some paradigms, the very elements of the doctrine of foreign sovereign immunities appear to be internally inconsistent. Even a modest exercise of the imagination readily gives rise to scenarios where a foreign state undertakes acts capable of being ascribed to a private actor but lacking any economic consequence. Likewise, the corollary does not present the imagination with much of a challenge. There are multiple circumstances where a foreign state exercising acts and forbearances inherent to sovereignty itself, within its national territory, is rendered susceptible to the extraterritorial application of U.S. laws with respect to the activities of its very citizens or those of U.S. citizens (a distinction that the standard does not recognize) so long as economic consequences flow from such activities such that they materially, in some sense not defined with any mathematical or juridic rigor, touch or concern the United States’ national or international commerce.

Fourth, the restrictive theory is predicated on an analysis of the nature of the facts at issue and not their purpose or motive. This standard or element of the restrictive theory is also somewhat problematic and capable of leading to fundamental doctrinal inconsistencies. For example, despite the emphasis that the Supreme Court places on this

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233 There is a common denominator among the (i) Extraterritorial Application of U.S. Law, (ii) Act of State Doctrine, and (iii) Foreign Sovereign Immunities Act. Despite the conceptual integrity and independence of each of these doctrinal precepts they are somewhat related and overlapping in that all three, to some extent, are governed by economic factors and considerations. Indeed, their application is profoundly influenced, if not altogether governed, by the extent to which acts and forbearances taking place within the national territory of a foreign state affect either the national or international commerce of the United States.
standard in the context of analyzing “commercial effects” on the United States, the underlying intent giving rise to the acts at issue also has been highlighted as a relevant and material component of the analysis. It is analytically impossible simultaneously to sustain the propositions that the purpose of the acts in question should not be considered in the analytical jurisprudence of the application of foreign sovereign immunity, but that the intent must be deemed part of the dispositive legal criteria. The anomaly is evident. Here too it becomes clear that the rubric that follows from the restrictive theory establishes, in the best of scenarios, that it is wanting in significant doctrinal development, and in the worst of circumstances, it reveals itself to be internally inconsistent. Neither scheme is acceptable.

Fifth, the conexity or nexus between the facts at issue within the territory of a foreign state and the commercial consequences of those acts or forbearances are conceptualized under the restrictive theory as necessarily having to be “direct.” Regrettably, however, the jurisprudence has not developed, let alone defined, the nomenclature “direct.”

Therefore, the elements of predictability, uniformity, party autonomy, judicial restraint, and reasonableness, are reduced to the status of mere aspirational goals in the context of this jurisprudence as well as that concerning the analysis of extraterritoriality.

Sixth, the rubric of the restrictive theory mandates an economic effect as a predicate to the application of the commercial activity exception. The FSIA’s impoverished legislative history does not define “effect.” As with the paradigm of “direct effect” that forms part of the analytical construct addressing the extraterritorial application of U.S. law, the Supreme Court studiously has averted the challenge of providing this precept with a substantive content so as to articulate an objective precedent giving rise to meaningful predictive value and objectivity, while wresting from the analysis of extraterritoriality all vestiges of happenstance that tend to be intrinsic to analyses bottomed on the idiosyncrasies of each individual case.

Seventh, the facts at issue only fall within the purview of the commercial activity exception if these facts are “based upon” a commercial activity. The frailties of the “based upon” component became evident in the Supreme Court’s pronouncement in

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234 By way of example, in the jurisprudence concerning civil negligence the term “direct” is encompassed within a traditional legal definition of proximate cause, which is deemed to be one of the necessary elements to state a claim premised on negligence. See e.g. RESTATEMENT (SECOND) OF TORTS Section 430 (1965). The most recent draft of the Restatement (Third) concerning the law of personal injury observes that a defendant’s liability is limited by the harm arising from risks that the defendant undertook, which may have risen to the level of negligence. RESTATEMENT (THIRD) LIA. PHYSICAL HARM §29 (P.F.D. No. 1 2005). The jurisprudence concerning foreign sovereign immunity should develop a conceptual standard that integrates a “direct effect” component related to the precept of necessary proximate cause, much like the rubric present in the legal constructs governing the law of negligence. The integration of this concept would lead to a greater objective standard that inevitably would bestow considerable predictive value on analyses in this arena.

235 At least on school of thought in contemporary analytical jurisprudence tends to disfavor particular normative tenets arising from “particular norms” as opposed to “general norms” most commonly identified with legislative enactments. See e.g. Hans Kelsen, The General Theory of Law and State (put cite).
Despite its best efforts, the Supreme Court in *Nelson* hardly elucidated the meaning of the term “based upon” despite meticulously and painstakingly having reviewed the legislative intent suggestive of a distinction between a complaint “based upon commercial activities” and claims alleged to be “based upon acts performed in connection with such activity,” the distinction only serves to promote even greater

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236 See *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed. 2d 47 (1993). In *Nelson* plaintiff, a U.S. citizen employed by a hospital in Saudi Arabia (“Saudi Hospital”) filed an action against The Kingdom of Saudi Arabia, and U.S. investors who purchased the hospital. The action sought compensatory damages arising from personal injury and economic harm that plaintiff allegedly suffered as a direct consequence of having been incarcerated and tortured without cause by the Saudi government. The complaint was filed in the U.S. District Court for the Southern District of Florida and was presided by the late distinguished jurist, the Honorable Leonore Carrero Nesbitt. The district court dismissed the complaint for want of subject matter jurisdiction pursuant to the FSIA. The Eleventh Circuit, however, reversed holding that the acts undertaken by the Kingdom of Saudi Arabia, and Saudi Hospital were of such character and nature so as to fall within the FSIA’s commercial activity exception. On appeal the Supreme Court reversed the Eleventh Circuit and affirmed Judge Nesbitt’s district court ruling. Specifically, the district court had rejected plaintiff’s claim that subject matter jurisdiction rested on the first clause of §1605(a)2, because the complaint “was one ‘based upon a commercial activity’ that petitioners had ‘carried on in the United States.’ ” *Id.* at 354.

The specific facts in *Nelson* together with the Supreme Court’s analysis represent the most eloquent jurisprudence in demonstrating the multiple problems inherent in the element of “based upon” a commercial activity.

In *Nelson* plaintiff had responded to an employment advertisement published in the United States for a job in Saudi Hospital. After consulting the advertisement, plaintiff interviewed in Saudi Arabia for the position and later returned to the United States where he executed an employment contract with Saudi Hospital. All recruitment undertakings, together with employment training and orientation, were administered by The Hospital Corporation of America, Ltd. (“HCA”).

In December 1983, plaintiff traveled to Saudi Arabia and commenced working at Saudi Hospital in the capacity of supervisor charged with supervising “all facilities, equipment, utilities, and maintenance systems to ensure the safety of patients, hospital staff, and others.” *Id.* at 352.

During his employment, plaintiff communicated on numerous occasions to hospital officials multiple defects that placed at risk the security of the patients as well as hospital staff. Plaintiff also published this information to the Saudi government. *Id.* at 353.

Allegedly, Saudi government agents arrested plaintiff. The allegations also assert that plaintiff was deprived of food for four days, tortured, and beaten. The record reflects averments stating that plaintiff was forced to sign a declaration in Arabic, despite his lack of knowledge of the language. *Id.* It was not until two months had elapsed under these conditions that plaintiff was freed, largely because of the private efforts of a U.S. senator and finally allowed to leave Saudi Arabia.

Notwithstanding a record that compellingly demonstrated that plaintiff was recruited in the United States, executed a contract in the United States, and that his hiring and advertising on the part of Saudi Hospital constituted “commercial activities within the United States,” the Supreme Court emphasized that congress in enacting the commercial activity exception “manifestly understood there to be a difference between a suit ‘based upon’ commercial activity and one ‘based upon’ acts performed ‘in connection with’ such activity.” *Id.* at 358. The Court also noted that plaintiff only had averred a breach of an obligation and not a contractual breach. These factual predicates, the Court held, constituted the basis of the complaint and are not the “activities [that] led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons’ suit . . . , [t]hose torts, and not the arguably commercial activities that preceded their commission, formed the basis for the Nelsons’ suit.” *Id.* at 358.
uncertainties in what was already an ill-defined and vague standard. Moreover, as with the fifth proposition here enumerated, the jurisprudence is opaque on the “extent to which” the facts at issue may be found to be “in connection with” a commercial activity, rendering it conceptually impossible to draw a line distinguishing a claim “based upon” a commercial activity and another action “based upon acts performed in connection with a [cognizable] commercial activity.” The talisman simply does not exist with sufficient refinement so as to provide for the likely moving scale.

Eighth, the term “diminution” pervading the jurisprudence in this area concerning the restrictive theory is, even when viewed with extreme generosity, imprecise. The concept of “diminution” lacks a standard for objective quantification. While the Supreme Court commands that “mere diminution” and the effects on commerce in the United States is insufficient for purposes of triggering the commercial activity exception, a definition of “diminution” that has not been sufficiently developed or, to be more precise, developed at all. Substantial and material questions linger that must be answered if the aspirational goal of developing a standard that shall find its productive workings. By way of example, is the concept of diminution to be treated as insubstantial where at issue is a small percentage affecting an exceptionally high volume of commerce? Likewise, the corollary to this inquiry raises the same conceptual uncertainty. Is the “diminution” component limited only to a specific economic sector at issue in a particular case? It is also worth asking whether “diminution” is to be understood in the context of domestic commerce as concerns international commerce? In the same event, the issue of “diminution” certainly cannot be analytically severed from the “nationality” of the actors concerned.

Finally, the scirent or intent component is also devoid of meaning within the restrictive theory’s rubric as applied by the Supreme Court in the commercial activity context. It is not at all clear, for example, whether intent in this context is synonymous with “party consent” that is part of the formation of a binding contract. The degree of intent necessary even to allege, let alone prove, common law fraud, or the extent of the intent required to establish a criminal delict, considerably vary. The Supreme Court nowhere articulates the weight to be accorded to the element of intent in a case where there is present only a “mere diminution” in either foreign or domestic commerce, but not both simultaneously in connection with the same acts or forbearances.
A schematic of the doctrinal development of the precept of foreign sovereign immunity is simple and of considerable didactic value:

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<td><strong>1812</strong>: <em>The Schooner Exchange</em> establishes <em>The Absolute Theory of Foreign Sovereign Immunity</em>. The holding is premised on precepts of <em>comity</em> even though there is no mention of this term.</td>
<td><strong>1952</strong>: The <em>Tate</em> letter issues reflecting a change in State Department policy (Executive Branch) causing a transformation in the judicial branch’s analysis of sovereign immunity. The <em>Restrictive Theory of Sovereign Immunity</em> is introduced.</td>
<td><strong>1976</strong>: The <em>Tate</em> letter is “codified.” Put simply, the <em>Restrictive Theory of Sovereign Immunity</em> is enacted in 28 U.S.C. §§1602-1611, and 28 U.S.C. §1330.</td>
<td><strong>1989</strong>: <em>Argentina Republic v. Amerada Hess Shipping Corp.</em>: For the first time the Supreme Court issues an opinion holding that the only manner in which a federal district court may exercise subject matter jurisdiction and personal jurisdiction over a foreign state is pursuant to the strictures of the FSIA.</td>
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The **Restrictive Theory of Foreign Sovereign Immunity** creates an uncertain framework that, in many cases, proves to be internally inconsistent. The doctrine of *comity* is segregated from the *restrictive theory* despite *comity’s* potential in helping to create greater precision and reliability with respect to the very elements used to determine the applicability of the *commercial activity exception* within the meaning of the FSIA. Subjecting a foreign state to the jurisdiction of U.S. courts in a civil proceeding, as with the extraterritorial application of U.S. law based upon acts and omissions occurring within a foreign nation’s territory, is readily susceptible to an interpretation pursuant to which a direct and explicit challenge to a foreign state’s sovereignty is effectuated. This challenge would be susceptible to meaningful mitigation were the *restrictive theory* to incorporate *comity* in its analysis as a fulcrum of analytical *reconciliation*, which in turn would compel sustained consideration of the need to scrutinize the interests of foreign states as well as those of the community of nations in desiring to maintain and develop a system of private international law that would promote *predictability, uniformity, party autonomy, reasonableness, and judicial restraint*.

E. **Economic Diminution**

Curiously, the formation and transformation from the *absolute* to the *restrictive theory* did not occur in a demographical or economic vacuum. The last two centuries witnessed an unprecedented growth in global population, which increased by sixty percent (60%) in this time frame alone, reaching a figure of 6.1 billion world inhabitants at the commencement of the third millennium.\(^{237}\) Notably, parallel to this staggering growth, the average global income per capita grew even more aggressively by nine hundred percent (900%) during the identical period.

\(^{237}\) Source Maddison (2001).

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First Graph: World Population

between 1820 and the year 2000. Since 1820 the difference in income per capita between rich industrialized nations and the less fortunate countries is best measured by using the most industrialized country of that period (the United Kingdom) as a paradigm together with the poorest region of the world (Africa) as the source for a ratio that would yield a four (4) to one (1) relationship in wealth measured by per capita income. Put simply, the abysmal difference between “rich” and “poor” nations is a relatively new phenomenon that is a characteristic of very contemporary history. When measured as of 1998, the economic gap between the richest and
most industrialized nation “the United States” and the poorest region of the world (Africa) reflects an arresting twenty (20) to one (1) ratio.  

Viewing this analysis in the context of the metamorphosis from the restrictive theory first enunciated in 1812 until 1989, when the Supreme Court first ruled that only pursuant to the FSIA would a federal district court be capable of exercising subject matter jurisdiction and personal jurisdiction over a foreign state, it becomes evident that the industrial revolution also gave rise to transnational commercial activity. This new “economic order,” characterized by porous economic borders comports with an imperative to develop a new juridic methodology that would render foreign states responsible for their actions or forbearances once they elected to enter the stream of international commerce. The profound connection between economic development, industrialization, globalization, and private international law cannot be ignored behind the subtleties militating against an analysis based upon “causation” in favor of one fraught with greater rational uncertainties that aspires to seek clarity based upon mere “happenstance.”

Third Graph: Gross Domestic Product Per Capita in 1820 and 1998


Possibly the most novel U.S. contribution to private international law is found in 28 U.S.C. §1782. This statute authorizes the use of federal rules of civil procedure governing the discovery of documents and information in U.S. federal courts for purposes of assisting a foreign tribunal or investigation secure documents or deposition testimony from persons or entities located in the United States.241

A. Section 1782 and its Elements

The fundamental propositions governing Section 1782 can be summarized by citing edited sections of the very statute:

(a) 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. . . 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 (emphasis supplied).242

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241 Pursuant to the methodology set forth in the Hague Convention governing The Gathering of Evidence Abroad in Civil or Commercial Matters, the judicial authority of a signatory state may petition the competent authority of another signatory state, pursuant to issuance of letters rogatory, the gathering of evidence. See Art. I. Even though this system represents a remarkable development in the arena of international judicial assistance, it is less than satisfactory in terms of effectiveness and efficiency. Yet, the use of the Convention forces the petitioning party to surrender control of the discovery process pursuant to its domestic procedural rules, and shifts the burden to the authorities of the producing nation receiving the letter rogatory to comply with the request in conformance with its status as a signatory state. See Art. IX. Section 1782, however, allows a non-U.S. party to a non-U.S. proceeding or investigation to circumvent the cumbersome letters rogatory methodology and directly to apply to a United States federal district court and petition discovery consonant with the federal rules of civil procedure from a U.S. located entity within the jurisdiction of the particular federal district court where the petition was filed. It is today patent that the United States has undertaken a protagonistic role in providing global access to its federal court system for the limited purpose of providing foreign tribunals with assistance in the context of discovery and the gathering of evidence. For a list of obstacles raised by nations with judicial systems based upon the Roman-Germanic Civil Code, see Born, supra, at 847-849.

242 The current iteration of §1782 was modified in 1964. Courts have observed that §1782 was amended “to facilitate the conduct of litigation in foreign tribunals, improve international cooperation in litigation, and put the United States into the leadership position among world nations in this respect.” See In Re: Bayer A.G., 146 F.3d 188, 191-92 (3d Cir. 1998). According to the Senate Report that accompanied the final iteration of the draft that eventually became the current version of §1782 “congress hoped to encourage foreign countries to revise their judicial procedures similarly.” See In Re: Application of Asta Médica, S.A., 981 F.2d 1, 5 (First Cir. 1992) (citing to S. Rep. 1850, 88 Cong. 2d Sess., also published in 1964 U.S.C.C.A.N. 372, 3788 (1964)).
Analysis of the opinions that federal courts have issued construing §1782 establishes that they are of a single voice in holding that this provision aspires to the “twin goals” of: (i) providing an efficient means for the assistance of interested persons engaged in international disputes so as to provide them with direct access to federal district courts, and (ii) encouraging foreign courts to provide comparable means of foreign assistance to those litigants in U.S. courts seeking the production of documents and information in foreign jurisdictions.\textsuperscript{243} The Eleventh Circuit Court of Appeals has recognized that the “legislative history shows that the purpose behind the proposal [the 1964 amendments to §1782] was to encourage other nations to follow the lead of the United States and to adjust their procedures in order to improve practices of international cooperation in litigation.”\textsuperscript{244} In tracing the legislative intent underlying §1782, the Eleventh Circuit in \textit{Trinidad and Tobago} asserted that congress deliberately had amplified the statute’s scope to (i) include not only depositions and written interrogatories, but also the discretion to secure documents and other tangible evidence, (ii) permit federal district courts to assist proceedings in “foreign tribunals,” without limiting the meaning of “foreign tribunals” within the statute to courts or exclusively judicial fora, (iii) permit “interested persons” (and not just foreign tribunals as is the case in less efficient proceedings pursuant to Hague Convention strictures) directly to petition a federal district court for judicial assistance, and (iv) eliminate the requirement that the discovery process used be applicable only while there is a “pending proceeding,” and that the documents and information produced only be used by a foreign tribunal.\textsuperscript{245}

\textsuperscript{243} See \textit{Schmitz v. Bernstein, Liebhard & Lifshitz, LLP}, 376 F.3d 79, 84 (2d Cir. 2004). The Second Circuit Court of Appeals has emphatically underscored that the twin goals of Section 1782 can be succinctly synthesized and stated as “providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign courts to use examples to provide similar means of assistance to our courts.” See \textit{Lancaster Factory Co., Ltd. v. Mangone}, 90 F.3d 38, 41 (Second Cir. 1996) (citing F. Rep. No. 1580, 88\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. 2 (1964) reprinted in 1964 U.S.C.C.A.N. 3782, 3783); \textit{In Re: Gianoli Aldunte}, 3 F.3d 54, 58 (2\textsuperscript{nd} Cir. 1993) (same proposition); \textit{In Re: Ishihara Chemical Co.}, 251 F.3d 120, 124 (2d Cir. 2001) (citing the twin goals of §1782 as (i) providing efficient means of assistance to participants in international litigation pursuant to our federal courts and (ii) encouraging foreign countries by dint of this example to promote similar or analogous assistance to U.S. litigants); \textit{In Re Edelman}, 295 F.3d 171, 175 (2d. Cir. 2002) (“at bottom, this statute affords access to discovery of evidence in the United States for use in foreign proceedings.”); \textit{In Re Letter Rogatory from the Nedenes District Court, Norway}, 216 F.R.D. 277, 279 (S.D.N.Y. 2003) (“therefore, granting a motion to compel [party] to provide a blood sample would efficiently assist a request made by the Norwegian Court and would encourage Norway to provide similar assistance to our courts.”); \textit{In Re Application of Grupo Gamma, S.A. de C.V.}, 2005 W.L. 937486, *1 (S.D.N.Y. April 22, 2005); \textit{In Re Request of Oric}, 2004 W.L. 2980648 (N.D. Ill. 2004); \textit{In Re Application of Servicio Panamericano de Protecci{\textcommabelled}n, S.A.}, 354 F.Supp. 2d 269, 273-74 (S.D.N.Y. 2004); \textit{In the Matter of the Application of Procter & Gamble Co.}, 334 F.Supp. 2d 1112, 1113 (E.D. Wis. 2004); \textit{In Re Application of Guy}, 2004 W.L. 1857580 (S.D.N.Y. 2004).

\textsuperscript{244} In \textit{Re: Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago}, 848 F.2d 1151 (11\textsuperscript{th} Cir. 1988).

\textsuperscript{245} In \textit{Trinidad and Tobago}, the Court analyzed with extraordinary scholastic skill §1782’s legislative history. Here the Court in painstaking detail observed that “the Act of March 2, 1855 first authorized federal courts to assist foreign tribunals. This statute granted federal courts the power to compel the testimony of witnesses in order to assist foreign courts. “\textit{In Re Letter Rogatory from the Justice Court, District of Montreal, Canada}, 523 F.2d 562,
It is critical to note that 28 U.S.C. §1782 petitions are subject to the absolute discretion of federal district courts. 246

Even though it is less than clear from the jurisprudence, courts tended to limit grant of a 28 U.S.C. §1782 petition only to those cases where a showing that the information or documents sought would also be discoverable in the foreign jurisdiction initiating the petition. 247 This fundamental tenet categorically was rejected by the Second Circuit Court of Appeals. The court in In The Matter of the Application of Euromepa, S.A. v. Esmerian, Inc., 248 elucidates this premise as well as the concept of symmetrical reciprocity in the production of documents and information pursuant to a §1782 petition.

In that case the Second Circuit reversed a trial court ruling that denied a §1782 petition. The reversal was predicated on a finding of “abuse of discretion.” 249 The court observed that “to

564 (6th Cir. 1975). The passage of the Act of March 3, 1863, however, soon restricted this first statute. The 1863 Act allowed the United States courts to obtain testimony to assist foreign courts only if such testimony was for use in suits (1) which pertained to the recovery of money or property, (2) which were pending in a foreign country with which the United States was at peace, and (3) in which the government of the foreign country was a party or had an interest. This 1863 statute, with its limitations, remained relatively unchanged until 1948.

Beginning in 1948 congress enacted several amendments that broadened the scope of the statute. The 1948 amendment deleted the requirement that the foreign government be a party or have an interest in the suit. Congress also changed the limitation that the “suit [be] for the recovery of money or property” and eventually only required that the action be a “judicial proceeding.” See Act of May 24, 1949, ch. 139, §93, 63 Stat. 103. During this time, however, congress retained the requirement that the judicial proceeding be pending in a foreign country with which the United States was at peace.

In 1964, congress enacted the most recent amendments to section 1782. These modifications marked a significant departure from congress’ cautious approach to international judicial assistance. Letter Rogatory from Montreal, Canada, 523 F.2d at 565. Congress adopted, without objection, a set of proposals submitted by the Commission on International Rules of Judicial Procedure which revised section 1782. The legislative history shows that the purpose behind the proposals was to encourage other nations to follow the lead of the United States and to adjust their procedures in order to improve practices of international cooperation in litigation [citation omitted]. Id. at 1153-1154.

246 See United Kingdom v. United States, 238 F.3d 1312, 1318-19 (11th Cir. 2001); Lo Ka Chun v. Lo To, 858 F.2d 1564, 1565-66 (11th Cir. 1988) (holding that congress has granted federal district courts wide discretion under §1782). Hence, even where all of the statutory elements are met, only an affirmative showing that the trial court engaged in abuse of discretion shall a ruling be reversed.

247 See e.g. In Re Application of Asta Médica, S.A., 981 F.2d 1, 7 (1st Cir. 1992); Lo Ka Chun v. Lo To, 858 F.2d 1564, 1566 (11th Cir. 1988).

248 51 F.3d 1095 (2nd Cir. 1995).
say that a district court may or may not, in its discretion, order discovery, does not mean that it is free to do so on inappropriate grounds. In this case, we conclude that the district court misapplied our guiding precedents, and misperceived the extent to which it should construe foreign law in deciding whether to order discovery.”

In fashioning its holding the Second Circuit dispensed with four premises that purported to constitute the dispositive standard in adjudicating a §1782 petition. As an analytical point of departure the court highlighted that in enacting §1782 congress crafted “a one-way street.” Otherwise stated, the legislation “grants wide assistance to others but demands nothing in return.”

Appellate courts for a considerable time were in disarray as to the issue of whether the exhaustion of remedies in the petitioning foreign jurisdiction constituted a predicate to the filing of a §1782 petition. The Second Circuit underscored that it had already rejected “any implicit requirement that any evidence sought in the United States be discoverable under the laws of a foreign country.” Accordingly, the Second Circuit suggested that the discoverability of the documents or information sought in the “petitioning foreign jurisdiction” is but a factor to consider in adjudicating such a request.

Finally, the court sweepingly removed any doubt concerning the extent to which a district court must first research the procedural or substantive law of the petitioning foreign jurisdiction also as a predicate to the adjudication of a §1782 petition. Precedent from other circuits holds that discovery would be proscribed where such gathering of evidence would offend the laws of the relevant foreign jurisdiction. Here the court highlighted that it is neither necessary nor desirable to engage in an exhaustive analysis of foreign law for purposes of somehow divining the attitudes of foreign nations with respect to efforts seeking judicial assistance in the production of documents or information in the United States. This precept does not purport to

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249 Id. at 1097.

250 Id.

251 Id. at 1097.

252 Id. citing In Re: Malev Hungarian Airlines, 964 F.2d 97, 99 (2nd Cir.), cert. denied, 506 U.S. 861, 113 S.Ct. 179, 121 L.Ed. 2d 125 (1992). See also John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 135 (3rd Cir. 1985) (holding that §1782 “does not require reciprocity as a predicate to the grant of a discovery order.”)

253 Id. at 1098, citing In Re Application of Aldunate, 3 F.3d 54, 59 (2nd Cir.) (“if congress had intended to impose such a sweeping restriction on the District Court’s discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included the statutory language to that effect.”), cert. denied, 510 U.S. 965, 114 S.Ct. 443, 126 L.Ed. 2d 376 (1993).

254 The conclusion concerning this critical precept rested on the commentaries of one of the principal architects of the current version of §1782:

[The statute’s] drafters realized that making the extension of American assistance dependent on foreign law would open a veritable Pandora’s box. They definitely did not want to have a request for cooperation turn into an unduly expensive and time-consuming fight about foreign law. That would be
state that a district court should disregard in its totality consideration of foreign law and the attitudes of foreign countries with respect to the particular issues that may be raised in a §1782 petition. Engaging in explicit reference to the legislative history as to the “nature and attitudes of the government of the country from which the [discovery] request emanates,” the Third Circuit Court of Appeals interpreted the drafters’ language and intent with respect to this issue as “authoriz[ing] district courts to scrutinize the underlying fairness of the foreign proceedings to ensure that they comply with notions of due process.”

In *Euromepa*, the Second Circuit adopted the Third Circuit’s exegesis on this point and concluded that “it is unwise-as well as in tension with the aims of section 1782-for district judges to try to glean the accepted practices and attitudes of other nations from what are likely to be conflicting and, perhaps, biased interpretations of foreign law.”

*Euromepa* established four principles as a dispositive standard in adjudicating a Section 1782 petition, but remained in direct and express conflict with the First Circuit Court of Appeals’ pronouncement three years earlier in the matter of *In Re Application of Asta Médica, S.A., et al.* In that case the First Circuit reversed the trial court’s ruling in favor of a petition that sought from a person residing within the district court’s own jurisdiction documents and deposition testimony. The court premised its analysis on opinions entered by the (i) Tenth Circuit Court of Appeals, (ii) Third Circuit Court of Appeals, (iii) Second Circuit Court of Appeals, and (iv) the Federal District Court for the Eastern District of Pennsylvania, all of which interpreted the dispositive standard as requiring consideration of the issue of whether the discovery sought in the United States would be discoverable and permissible in the country of origin. The conflict between the holdings in *Asta Médica, S.A.* and *Euromepa*, was decisively quite contrary to what they sought to be achieved. They also realized that, although civil law countries do not have discovery rules similar to those of common law countries, they often do have quite different procedures for discovering information that could not properly be evaluated without a rather broad understanding of the subtleties of the applicable foreign system. It would, they judged, be wholly inappropriate for an American district court to try to obtain this understanding for the purpose of honoring a simple request for assistance.


255 *Id.* at 1099, citing to *John Deere, Ltd.*, 754 F.2d 136 N.3 (in turn citing to *Senate Report*, d. 3788).

256 *Id.* at 1099.


258 See *Id.* at 6 (citing *In Re: Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (“the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance”); *Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988) (reversing the trial court with instructions for the district court to determine whether the evidence sought in the United States is discoverable in the country of origin [Hong Kong 1988]); *John Deere, Ltd.*, 754 F.2d 132, 136 (3rd
and exhaustively addressed by the Supreme Court in *Intel Corporation v. Advanced Micro Devices, Inc.*

**B. Intel Corp. v. Advanced Micro Devices: Uniformity and Predictability**

The doctrinal quagmire that obscured the dispositive standard to be followed in the adjudication of Section 1782 petitions was considerably addressed in 2004 in the now seminal Supreme Court case of *Intel Corp. v. Advanced Micro Devices*. This ruling fashioned clear and flexible standards for the consideration of Section 1782 applications. In exercising its jurisdiction, the Supreme Court identified the issue before it as one that as “concern[ing] the authority of federal district courts to assist in the production of evidence for use in a foreign or international tribunal.”

After a detailed review of the action’s procedural history, the Court noted that pursuant to the Ninth Circuit Court of Appeals’ pronouncement, a claimant before the Director-General for Competition of the Commission of the European Communities (“European Commission” or “Commission”) qualified as an “interested person” for purposes of Section 1782. Additionally, the Supreme Court observed that the “Commission” “is a tribunal” when acting in the capacity of a “first-instance decision-maker.” Likewise, the Court held that the “discovery. . . sought under Section 1782(a) must be in reasonable contemplation, but need not be ‘pending’ or ‘imminent’” (emphasis in original). Finally, the Supreme Court reasoned that “Section 1782(a) contains no threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the foreign proceeding.”

This ruling simplifies and makes clear the applicable standard in adjudicating a Section 1782 petition. Only three requirements are necessary for purposes of meeting this test; (i) the

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260 The Court exercised *certiorari* jurisdiction “in view of the division among the circuits on the question of whether Section 1782(a) contains a foreign discoverability requirement.” The Court also granted review on two other questions. First, does Section 1782(a) make discovery available to complainants. . . , who do not have the status of private ‘litigants’ and are not sovereign agents? [citation omitted]. Second, must a ‘proceeding’ before a foreign ‘tribunal’ be ‘pending’ or at least ‘imminent’ for an applicant to invoke Section 1782(a) successfully?” 124 S.Ct. 2466, 2476.

261 *Id.* at 2472.

262 *Id.* at 2472-73.
person or entity from whom information is sought must be present within the jurisdiction of the federal district court where the petition is filed, (ii) the intent underlying the use of the information elicited pursuant to the petition must be limited to providing assistance to a foreign tribunal, and (iii) the juridic entity must be an “interested person,” within the meaning of Section 1782. This holding represents a succinct and readily applicable restatement of the legislative elements comprising the statute, and now constituting binding judicial precedent, or, in the terminology of analytical jurisprudence, a binding individual norm.

Beyond the three prong test that the Court enunciated as a predicate to grant of a Section 1782 application, a second precept bottomed on the very principles that congress sought to develop in enacting Section 1782 also was articulated. Upon a finding by a district court that the three prong standard has been met, a court must then exercise its discretion in adjudicating the merits of the petition. As briefly noted, a district court is not compelled to grant a petition “merely” because the dispositive standard has been met. The Supreme Court undertook great pains to emphasize the dispositive factors to be considered by federal district courts in the exercise of their discretion in adjudicating Section 1782 petitions. These elements include: (i) an evaluation of whether the “person” or “entity” who is the target of the petition for production of documents and disclosure of information is a party to the foreign proceeding. If the answer to this simple inquiry is in the affirmative, the need to provide judicial assistance generally will not be as apparent as when evidence is sought from a person or entity that is not a party to the proceeding at issue; (ii) “the nature of the foreign tribunal, the character of the proceedings under way abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance;” and (iii) whether the petition has been confected to circumvent extant foreign restrictions concerning the gathering of evidence or other public policies of the foreign state or the United States, or the information elicited is “unduly intrusive or burdensome [and] may be rejected or trimmed.”

The Supreme Court’s opinion not only elucidates the statute’s elements and the manner in which they have been interpreted by federal courts, such as the term “interested parties,” the

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263 This rubric comports with the Second Circuit’s holding in In Re Application of Aldunate, 3 F.3d 54 (2d Cir. 1993), cert. denied sub nom. Foden v. Aldunate, 114 S.Ct. 443 (1993).

264 See In Re Bayer AG, 146 F.3d at 193; In Re Application of Esses, 101 F.3d 873, 875 (2d Cir. 1996); In Re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela, 42 F.3d 308, 310 (5th Cir. 1995).

265 Id. at 2483.

266 The legislation commonly referred to as the “The Dictionary Act” contains definitions that govern the meaning of terms and words codified in congressional enactments (federal legislation). This statute provides that “unless the context indicates otherwise-” the word “person” includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” 1 U.S.C. §1.

267 124 S.Ct. at 2483.
nature and character of a “proceeding” before a “foreign tribunal,” but also amplifies the dispositive standard by observing that pursuant to §1782 federal district courts may adjudicate such petitions more liberally and with less restrictions in applying the Federal Rules of Civil Procedure. The very definition of the term “tribunal,” as used by the Court in the first prong of the standard that it promulgated demonstrates that it had interpreted congressional intent in crafting §1782 in conformance with a literal reading of the statute’s terms. Both a plain-meaning construction of the terms embodied in §1782 and that statute’s legislative intent suggest a liberal and not a restrictive application.

C. The Case Consejo de Defensa del Estado de la República de Chile v. Augusto Pinochet and the Doctrine of Comity

Despite the proliferation of literature analyzing §1782 none of the commentators or courts addressing this provision have purported to link §1782’s normative basis with the precepts that define jurisdiction to prescribe (the extraterritorial application of U.S. law). Simply stated, even though it has not been implicitly, let alone explicitly articulated, the very normative grounds providing for the extraterritorial application of U.S. law triggered by activities or forbearances undertaken either by U.S. citizens or foreign nationals within the national territory of a foreign state also render conceptually viable the nature and character of foreign assistance granted under 28 U.S.C. §1782, where federal district courts have no connection with the “foreign proceeding,” “foreign tribunal,” “interested person,” or any other aspect of the case or investigation being undertaken in the country of origin. Although never analyzed through this conceptual prism, §1782 is a paradigmatic example of the extraterritorial application of U.S. law,

268 See Ishihara Chemico Co. Ltd. v. Shipley Company, et al., 251 F.3d 120, 124 (2d Cir. 2001) (observing that Section 1782 provides sufficient means for assistance to parties involved in international litigation before federal courts); Lanchaster, 90 F.3d 38, 42 (holding that the agent of a trustee appointed by the court to protect the interests of a foreign debtor is an “interested person” within the meaning of Section 1782; “the legislative history to Section 1782 makes plain that ‘interested person’ includes ‘a party to the foreign... litigation. Senate Report at 8, 1964 U.S.C.C.A.N. at 3789’); In Re Application of Esses, 101 F.3d 873, 875-876 (2d Cir. 1996) (holding that the sibling of a person who died without a testament in a foreign state is “an interested person” for purposes of the statute: Section 1782); In Re Letter of Request from the Crown Prosecution Service of the United Kingdom, 870 F.2d 686 (D.C. Cir. 1989) (adjudicating that a foreign minister of legal affairs, a general prosecutor, or other prosecutor (have been recognized on numerous occasions as persons or entities within the ambit of §1782 as “interested persons”; federal courts unanimously have indicated that a party in interest to the foreign proceeding may serve as a petitioner or “interested person” within §1782’s purview without need of first securing an order from the foreign tribunal of origin authorizing the production of documents or disclosure of information.; In Re Malev Hungarian Airlines v. United Tech. Int’l, Inc., 964 F.2d 97, 101 (2d Cir. 1992) (“we believe it was improper for the district court to predicate its denial of an application for discovery under 28 U.S.C. §1782 on the absence of a request for assistance from the Hungarian court”).

only that at issue with that statute is U.S. *procedural* and not *substantive* jurisprudence. Hence, here two fundamental precepts intercept.

First, the separation of the political branches is highlighted as a critical protagonist by congress’ enactment of 28 U.S.C. §1782. In the process of crafting this legislation, a vast record reflecting the statute’s legislative history demonstrating the goals of §1782 within the context of the international arena remains. In developing this legislative history, congress articulated the archaic question that pervades jurisdiction to prescribe. Does 28 U.S.C. §1782 give rise to legal or political issues? Does it spawn questions that simultaneously overlap into the legal and political arenas? Is it at all clear that encouraging the transnational proliferation of U.S. federal discovery rules, without regard to diverse and sometimes divergent legal cultures, customs, traditions, and expectations harbored by foreign sovereign states, is merely a *legal* issue, without more? The answers to these questions, as the very questions themselves, linger in a penumbra. Does congress have the normative authority based on precepts of conventional or customary international law, or constitutional jurisprudence, to fashion legislation providing “interested persons” within foreign states plain access to U.S. district courts to apply the federal rules of discovery? This issue is conceptually indistinguishable from the concern underlying even the most surface analysis of jurisdiction to prescribe. Restructuring the inquiry; does congress have authority derived from constitutional or international tenets to legislate substantive or procedural norms to be applied extraterritorially to the activities or forbearances undertaken within the national territory of a foreign state?

To the extent that this extraordinary and unprecedented access comprises a *political* and not a *legal* issue, then the policies and objectives of the executive branch, typically through the Department of State, should govern any analysis so as to ensure a consistent foreign policy. Likewise, a constitutional crisis is inevitable when the parameters of the three branches of government are blurred. This model of obfuscation most frequently manifests itself when courts find themselves attempting to engage in the equitable administration of justice in the context of statutory issues that in turn do not provide the judiciary with any alternative but to address *political* rather than *legal* issues.\(^\text{270}\)

\(^{270}\) This concern was placed in high relief when observing the development and transformation from an *absolute theory* of sovereign immunity, as first articulated by Justice Marshall in *The Schooner Exchange* case, to a restrictive theory arising from the *Tate Letter* in 1952, and codified in the *FSIA*. Irrespective of its judicial opinion and jurisprudential considerations, the Supreme Court made clear in its opinion the need not only to preserve but to enhance respect for the independence of the different branches of government. Prior to being codified in 1976, for a period of twenty-four years (between 1952 and 1976), the Supreme Court acknowledged as dispositive a policy outlined by the Department of State that deemed the issue of immunity accorded to sovereign states a *political* and not a *legal* question and, therefore, within the ambit of the executive and not the judicial branch of government.

Here too is present the penumbra attendant to the methodology pursuant to which issues are classified as either *legal* or *political* in nature. The question that follows from this analysis is simple to articulate but virtually impossible to answer decisively under any sustained analysis. *What standard is used and by whom to determine the answer to this inquiry? How is the issue debated and in which forum?* Are representatives from the three branches of government present in the deliberative process that compels the Department of State to instruct the judiciary that an issue is either *political* or *legal*? The methodology and the standard used to arrive at a classification of issues as either *political* or *legal* by the different branches of government is less than clear. Was the judiciary privileged to
second, the doctrine of *comity* may be used as a normative basis from whence a reasoned analysis that would lead to certainty, uniformity, and predictability with respect to the political component underlying §1782 that congress underscored, as well as shed light on the uncertainty attendant to the absolute lack of standard and methodologies used by the branches of government in defining when an issue is to be deemed *political* or *legal* in nature. congress’s twin aspirational goals of (i) rendering accessible to the rest of the world federal procedural rules governing discovery in the context of offering foreign assistance and (ii) encouraging the community of nations to adopt procedural rules of discovery or evidence gathering similar to those of the federal rules of civil procedure and thus foster reciprocity and transparency in transnational litigation, are best explained within the framework of *comity* as a precept of *reconciliation*. despite whatsoever measure of good faith that may be ascribed to the “noble intent” to proliferate the federal rules of civil procedure as to discovery so that they may be universally embraced subject only to minor limitations and restrictions, such intent shall inexorably constitute a genesis of incongruencies and resentment among the community of nations. by way of example, the exclusion of the requirement that the subject matter of a §1782 petition need be susceptible to discovery in the country of origin by the “interested person” as a predicate to grant of such an application, is susceptible to being construed as a tenet seeking to circumvent the national laws and rules of the country of origin.

a scenario pursuant to which u.s. laws trump those of a foreign state where united states courts lack personal and subject matter jurisdiction over the underlying claim being processed in a foreign jurisdiction, and the u.s. has no interest in the merits of the investigation or proceeding at issue, cannot but give rise to a compelling inference that the very fundamental character of a foreign state’s sovereignty (i.e. its judiciary) is being undermined, if not altogether elided. this critique is endemic to any analysis of 28 u.s.c. §1782 and to the entire conceptual rubric upon which jurisdiction to prescribe rests. whether “procedural” or “substantive” the concern remains patent. on what jurisprudential basis arising from customary international law can the exportation of u.s. procedural or substantive laws rest? indeed, there is no absence of commentators who have asserted in a serious and consistent manner that the twin goals contained in the 1964 amendments to §1782 are misguided. these commentators never even address the issues concerning the normative basis of such legislation or the questions of constitutional consequences that they necessarily embody.271

disagree with the *tate letter*, let alone reject it? were the legislative and judicial branches consulted prior to issuance of the *tate letter*? there is less than a paucity of material addressing this issue.

271 in light of these u.s. cases and the disarray among the appellate courts, together with largely unaltered foreign discovery practices (particularly noticeable in civil law countries), it has been suggested that neither of the objectives of the 1964 amendments to section 1782 have been fully achieved. with regard to the first goal – that of facilitating the district court’s handling of foreign requests for discovery of evidence located in the united states – the federal courts clearly have not been able to agree fundamentally on the grounds for permissibility of applications. with regard to the second goal – that of encouraging other nations, by example, to facilitate u.s. style discovery abroad through adjusting their own procedures – no such adjustments have materialized. in retrospect, because the scope for evidence-gathering in the united states is well recognized to be far broader than in most other jurisdictions, it is not entirely surprising that other governments did not expedite similar legislation. the same
In defining the doctrine of *comity* as one that promotes the reconciliation of interests that appear to be ostensibly opposed by applying a tripartite analysis based upon the sustained study of the (i) juridic, social, political, and economic interests of the United States, (ii) analysis of these same factors but within the context and framework of the foreign state at issue, and (iii) the interests of the community of nations in crafting precepts of international law that are predictable, reliable, uniform, and conducive to party-autonomy and judicial restraint, the arbitrariness and randomness endemic to the “good faith” justification of the use of §1782 would be meaningfully mitigated if not altogether eviscerated. Likewise, sustained analysis of these factors as a guiding standard, rather than the application of vacuous policy statements concerning a purported desire to enhance the proliferation of U.S. discovery rules so as to promote reciprocity among nations, would lessen the well-founded critique that the use of §1782 is invasive and derogatory with respect to the concept of sovereignty. The purported good faith intent somehow “destined” to give rise to reciprocity among nations in a manner yet to be explained is less than adequate for purposes of constituting a normative foundation legitimizing the universal application of §1782 and rendering moot the principal criticisms asserted against this extraordinary discovery device and assistance to foreign tribunals on behalf of interested persons.

**D. Section 1782 and the Pinochet Affair: A Paradigm**

The 1996 legislative amendments to §1782 establish that the statute applies to criminal investigations before formal charges are asserted. Accordingly, §1782 petitions are routinely granted in the context of the mere existence of foreign criminal investigations. Governments have not been hesitant, however, to make use of Section 1782, and have increasingly done so in international civil litigation. Indeed, it was largely the absence of the desired spontaneous foreign response that gave rise to reciprocity requirements being given statutory force in the 1994 International Antitrust Enforcement Assistance Act, at least for the priority area of antitrust discovery. This law was enacted to “facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis.” See *e.g.* Extraterritorial Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?, International Lawyer, Winter 2003, 37 Int’l Law. 1055 at 1064.

272 See §1342(b), 110 Stat. 486.

273 See *e.g.* Intel, 124 S.Ct. at 2479, 2480 (observing that an investigation before an administrative tribunal, such as the European commission, concerning a *quasi* or judicial proceeding [such as a complaint asserting violations of antitrust laws] classifies as a “foreign tribunal” for purposes of §1782); *Trinidad and Tobago*, supra at 1151 (holding that a subpoena issued at the request of the National Prosecutor of the Ministry of Legal Affairs of Trinidad and Tobago concerning a criminal investigation falls squarely within §1782’s ambit); *U.S. v. Sealed One, Letter of Request for Legal Assistance from the Deputy Prosecutor General of the Russian Federation*, 235 F.3d 1200 (9th Cir. 2000) (holding that a federal district court, based upon statutory authority, is vested with discretion to issue formal petitions in furtherance of granting assistance to a foreign tribunal arising from a criminal investigation in the United States initiated by the Russian Federation based upon allegations of tax fraud); *In Re Letter of Request from a Crown Prosecution Service*, 870 F.2d 686 (D.C. Cir. 1989) (holding that evidence was the appropriate subject matter of discovery pursuant to §1782 concerning a criminal investigation pending in the U.K.).
One of the most eloquent and illustrative contemporary applications of §1782 within the framework of a criminal investigation and subsequent criminal prosecution is found in the case filed by Chile’s equivalent of the U.S. Department of Justice (the “CDE” or Consejo de Defensa del Estado de la República de Chile) against the former President and Chief of the Armed Forces, Augusto Pinochet.\textsuperscript{274}

The procedural history of this exceptional case is necessary. Indulgence is asked of the erudite reader who has studied Augusto Pinochet’s political and juridic trajectory.

The relationship between Augusto Pinochet and the rule of law constitutes a sad and tortuous history that, to some extent, has been globally publicized and painstakingly chronicled.\textsuperscript{275}

After a bloody military \textit{coup} Augusto Pinochet ascended to power in Chile and ruled as “President” of that State since 1973 until 1990. After stepping down as “President” in 1990, Augusto Pinochet remained in power and officially held the title of Commander-in-Chief of the Armed Forces of Chile until 1998. At that time he retired from the military but simultaneously was named “Senator for Life.”

During the middle part of the decade of the 1990s, Augusto Pinochet has found himself in the capacity of a defendant in cases filed in Spain, the U.K., Chile, and other countries. Most of these cases were bottomed on averments concerning human rights violations, the violation of humanitarian rights, crimes against humanity, and violations of fundamental precepts of international law, all of which took place during his tenure as President of Chile or Commander in Chief of the Armed Forces.

On July 15, 2004, the \textit{Committee on Governmental Affairs of the United States Senate} published an investigation entitled: “\textit{Case Study Involving Riggs Bank}” (“Senate Report”).\textsuperscript{276} The Senate Report expressly stated that from 1994 until 2002 Riggs Bank had opened several

\begin{itemize}
\item There is no intent to reconfigure, let alone restate, the contours of the relationship between Augusto Pinochet and the Rule of Law. To the contrary, the aspiration is considerably more modest. It is limited to narrating succinctly and in the most general terms only those indispensable factual predicates necessary to place the referenced petitions in context.
\item Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act – \textit{Case Study Involving Riggs Bank}, Minority Staff of the Permanent Subcommittee of Investigation, Committee of Governmental Affairs, United States Senate (July 15, 2004).
\end{itemize}
bank accounts and issued multiple certificates of deposit on behalf of Augusto Pinochet and identifying Augusto Pinochet as a beneficiary. Notably, the bank “turned a blind eye and a deaf ear” even to the most rudimentary issues pertaining to the source of the subject funds.\(^{277}\). The Senate Report identified deposits in the accounts of Augusto Pinochet in amounts that at times surpassed US$8 million.\(^{278}\) The Senate Report also underscored that Riggs Bank had assisted Augusto Pinochet in circumventing legal proceedings instituted against Augusto Pinochet seeking to freeze funds contained in that institution.\(^{279}\)

On March 6, 2004, The Committee On Governmental Affairs of the United States Senate issued a second report entitled: Supplemental Staff Report on U.S. Accounts Used By Augusto Pinochet (“The Supplementary Report”).\(^{280}\) The Supplemental Report beyond cavil demonstrates that the relationship between Riggs Bank and Augusto Pinochet was deeper and more complex than the Senate Report initially revealed. According to the Supplementary Report, Riggs Bank had cultivated a “banking” relationship for twenty-five years with Augusto Pinochet, Mr. Pinochet’s family, and members of the Chilean army that, at minimum, comprised twenty-eight bank accounts and certificates of deposit directly related to Augusto Pinochet.\(^{281}\)

\(^{277}\) Senate Report, supra at 2.

\(^{278}\) Id.


- Not having submitted a Suspicious Activity Report consonant with 12 C.F.R. §2111;
- Having abandoned the “Know Your Customer” stricture, which, among other considerations, requires that banks investigate the source or sources of funds pertaining to their clients or to transactions at issue;
- Disguising the true assets of Augusto Pinochet by using variance of the “Augusto Pinochet Ugarte” name for purposes of referencing a false account holder and beneficiary;
- Facilitating Augusto Pinochet’s efforts to avoid compliance with courts exercising their competent jurisdiction to freeze funds and title to properties and other assets;
- Rendering possible unusual banking transactions without conducting any due diligence concerning the underlying purported commercial purposes for these transactions;
- Ignoring suggestions that would increase the scrutiny and level of due diligence directed at the opening and monitoring of new accounts that pertain to “Politically Exposed Persons” or “PEPs”; and
- Actively or deliberately hiding and not disclosing the existence of Pinochet and Pinochet related accounts from federal banking regulators.

\(^{280}\) Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act – Supplemental Staff Report on U.S. Account used by Augusto Pinochet, Permanent Subcommittee of Investigation, Committee of Governmental Affairs, United States Senate (March 16, 2005).

\(^{281}\) Id. at 9-10.
The Supplemental Report also identified almost 100 accounts, certificates of deposit, and other transactions and financial institutions in the United States that conducted business with Mr. Pinochet on a regular basis without engaging in the requisite due diligence or transparency attendant to commercial activity concerning a PEP. In his capacity as President and Commander in Chief of the Armed Forces, Augusto Pinochet was charged with the obligation of disclosing his income and assets to Chilean taxing and fiscal agencies. Despite this uncontroverted duty, Chilean authorities discovered that Augusto Pinochet never reported or disclosed his U.S. bank accounts or transactions to any of the appropriate Chilean agencies.\footnote{In fact, on September 21, 1973, scarcely ten days after taking control of Chile’s government, Augusto Pinochet executed before a Public Notary a statement of assets and liabilities. This document was signed upon penalty of perjury. Additionally, on October 19, 1989, when Augusto Pinochet was undertaking final steps to “disengage” from his responsibilities as Chile’s President, again he executed yet a new declaration of assets and liabilities before a public notary. Remarkably, none of the assets that Augusto Pinochet had or controlled beyond Chile’s jurisdiction were even referenced, let alone detailed, in either of the two statements of assets and liabilities prepared in 1973 and 1989, respectively.}

Even though Augusto Pinochet affirmatively disclosed to Chilean governmental authorities that he had received less than US$1 million as compensation for his work “as a public servant” from 1973 until 2005, Special Minister and Judge Sergio Muñoz Gajardo’s preliminary investigations reflected that bank accounts in the United States alone pertaining to Augusto Pinochet far surpassed US$17 million. The Chilean court also held that no logical or commercially reasonable relationship existed between the then “disclosed” Augusto Pinochet assets and his income as a public servant.\footnote{Chile’s equivalent to the U.S. Internal Revenue Service determined that Augusto Pinochet’s non-disclosure of assets held in U.S. banks had caused Chile a loss in excess of 2,476,000,000 \textit{Chilean pesos} (approximately US$4,283,737).}

The Republic of Chile found itself at a crossroads that highlighted an exquisite juridic dilemma. Both the CDE and the Chilean taxing authorities had initiated criminal actions against Augusto Pinochet.\footnote{The CDE’s criminal allegations were bottomed on charges of fraud, corruption, improper appropriation of public funds, the exercise of self-gain arising from conflicts of interest, and conspiracy. The charges that the \textit{Servicio de Impuestos Internos de Chile} (Chile’s equivalent to the U.S. Internal Revenue Service) averred violations of Article 94, Number 4 of the Tax Code. This latter prosecution was directed against both Augusto Pinochet and his longtime lawyer and personal aide, Oscar Aitkens as well as others linked to Augusto Pinochet who were responsible for filing false income tax returns during the period commencing 1998 until 2004. The two criminal proceedings were consolidated before a specially appointed judge drawn from the Santiago Court of Appeals.} Despite the moral certainty concerning Augusto Pinochet’s wrongdoings and criminal activities, it was practically impossible logistically to prosecute Augusto Pinochet in Chile for these crimes because the overwhelming majority of the relevant and material proof was controlled by U.S. financial institutions beyond the jurisdiction of Chilean courts. The CDE and the taxing authorities had recourse only to two classical paradigms for purposes of securing
the necessary evidence. First, discovery pursuant to Letters Rogatory constituted a realistic but non-workable alternative. The Letters Rogatory methodology is antiquated, cumbersome, and painfully slow. Hence, it is simply impracticable for purposes of obtaining swift production of documents and deposition testimony pursuant to the speedy time frame of a special criminal prosecution entailing a former head of state, Commander-in-Chief of the Armed Forces, and a Senator for Life. This option was not even theoretically viable when the general norm is applied to the specific facts of the case at issue.

The second option is equally unavailing. The production of documents pursuant to the Hague Convention, the Inter-American Convention, or diplomatic means is as inefficient and dilatory as the Letters Rogatory methodology. None of these disclosure rubrics concerning the taking of evidence has been amended so as to conform to an economic environment where porous commercial borders and a macroeconomic theory of globalization prevail. The swift transfer of funds and attendant logistical communications that characterize the "communications revolution" commenced at the end of the Twentieth Century simply is yet to spawn a corresponding international system of legal assistance in the field of evidence gathering.

The dilemma posed by the Pinochet predicament constitutes a paradigmatic case study for a scenario that currently may only be addressed pursuant to §1782. Indeed, it was exclusively by filing §1782 petitions in three different jurisdictions\(^285\) that the CDE was able to (i) secure documents in an expedited and timely manner that comported with the procedural requirements of Chilean tribunals for purposes of the gathering and presentation of evidence, and (ii) manage to have expedited access to key witnesses designated by the various financial institutions and to secure these witnesses’ respective deposition testimony so that the memorialized statements could be presented as evidence in a time frame of less than four months since the date of the initial filing.

Despite the well reasoned critiques of §1782 that have been chronicled by commentators and practitioners, there is little margin for debating the efficacy of this procedural methodology in facilitating the equitable administration of justice in a cross border, transnational context.

The new standards that have issued, together with those clarified by the Supreme Court, demonstrate a meaningful trend towards and commitment to amplifying §1782’s purview. This trend conceptually comports with (i) the “new” restrictive theory of foreign sovereign immunity, (ii) jurisdiction to prescribe, i.e. the extraterritorial application of U.S. law and congressional authority to legislate such jurisprudence, and (iii) the Act of State Doctrine. These three doctrinal precepts (and a fourth that 28 U.S.C. §1782 embodies), appear to provide U.S. courts with a normative foundation for the application of substantive and procedural jurisprudence to acts and forbearances ascribable to foreign nationals within the physical and juridic territory of foreign states.

\(^{285}\) Petitions were filed with the Federal District Court for the Southern District of Florida, the Federal District Court for the Southern District of New York, and the Federal District Court for the District of Columbia.
The four doctrines are *per se* susceptible to violating the sovereignty of foreign states in multiple and diverse manners, many of which have here been identified based upon the construction placed on the facts and doctrine at issue. To be sure some of these problems are perhaps difficult, if not altogether impossible, to harmonize. The principle of *comity*, however, as here defined and redefined beyond the penumbra of a doctrinal tenet that is less than an obligation but more than a mere courtesy, may serve as a protagonist capable of at minimum mitigating some of the more salient difficulties that have come to light in the formation and transformation of the common law in the arena of private procedural international law. The extant doctrinal rubrics need not be profoundly or essentially reconfigured. To the contrary, a relatively simple paradigm has been proposed leading to the preservation of these tenets and preserving their underlying good faith substantive policies by analyzing them in the context of a “new” rubric of *comity*. The challenge remains overwhelming and the goal of harmonizing these principles of private international law is equally ambitious. But it is essential to take a modest first step, if step at all it is, towards a coherent judicial theory in the arena of private international jurisprudence that will foster *uniformity*, *predictability*, *party autonomy*, *judicial restraint*, *reasonableness*, and *reliability* within the U.S. political framework resting on the normative legitimacy of the separation of powers.

**Conclusion**

We return to the initial point of departure. Perhaps Hans Kelsen was correct. This past Twentieth Century was witness to some of the most denigrating atrocities in the history of mankind. Two world wars, countless examples of genocide, unprecedented global wealth that every day faces the tragedy of a child dying of hunger every 2 seconds, while 44,000 more infants perish every month as victims of readily curable diseases, seem to argue in favor of the diminution of our human condition and to militate towards the stark proposition that there has been no progress in the moral condition of mankind despite the landmark advances in science, biochemistry, physics, and technology.

The paradox is less than clear. It is possible that the aborigines who sacrificed human lives to the gods enjoyed the same or greater ethical standing than does our “modern civilization.” It is necessary, nevertheless, to highlight a perhaps significant difference between that civilization and the current one. The consciousness of wrongdoing, despite the referenced transgressions and atrocities, may suffice to give rise to a significant and meaningful difference that in turn may lead to greater hope. We do know that this hope shall never come to fruition if we do not confront the task before us and undertake the burden intrinsic to every effort, as Kelsen suggests, of attempting to initiate a judicial reform and not a revolution of the established international legal order. The task at hand is terribly complex and must be approached with humility and the understanding that every contribution will always be miniscule and progress imperceptible. But having responsibility arising from our consciousness of wrongdoing, do we have a choice?