JUDICIAL COMITY IN INTERNATIONAL DISPUTE SETTLEMENT

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Abstract

The domain of investor-state dispute settlement poses ample risks relating to parallel proceedings involving the same dispute. Various conventional tools available to international arbitrators have, so far, failed to provide a coherent response to these risks. Arbitrators have frequently declined to exercise such tools on the basis of rigid formulations of their technical parameters. In such circumstance, this article explores whether the principle of judicial comity, which is characterized by its inherent fluidity and adaptiveness, may provide a far more suitable response. To answer this question, the article studies the evolution of the principle of comity from a mere extension of sovereignty to a global ordering principle of international dispute settlement.

I. INTRODUCTION

Investment treaty arbitration is a hybrid form of dispute settlement,[1] through which a foreign investor may directly advance claims against the host State in which it had invested. These claims are premised on alleged breaches of the host State's obligations contained in an investment treaty concluded with the State to which the investor belongs. Investment treaties, after all, routinely contain an offer by the host State to arbitrate claims relating to an investor's investment, which an investor may accept by sending a notice of arbitration to the host State to commence the arbitral process. The host State's offer to arbitrate, contained in an investment treaty, and its subsequent acceptance by an investor, cumulatively constitute a *sui generis* arbitration agreement. This *sui generis* arbitration agreement is the basis of jurisdiction of an investment treaty tribunal.[2]

However, investment treaty arbitration is only one of the multiple avenues potentially available to an investor to protect its interests against a host State. An investor may equally challenge an adverse measure adopted by a host State before its municipal courts, to assert its rights under

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[1] Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 B.Y.I.L 151 (2004).

[2] Jan Paulsson, *Arbitration without Privity*, 10 ICSID Rev. 232. (1995).

the municipal law of the host State. Likewise, where an investor has made its investment pursuant to a contractual relationship with the host State or any of its agencies, such contractual agreements also commonly contain an arbitration clause providing for commercial arbitration. Therefore, an investor may also commence a commercial arbitration proceeding with respect to the host State's adverse measure, this time to assert its contractual rights. This plurality of remedies under the investment treaty, municipal law and contractual framework, often creates a situation of parallel proceedings between an investor and the host State concerning essentially the same dispute. While these proceedings may entail a breach of obligations emanating from distinct sources, they nonetheless entitle multiple judicial fora to decide the same issues of facts, thereby creating a visible risk of conflict decisions relating to the same dispute.

Over the past two decades, investment treaty tribunals have struggled to adequately mitigate the risks emanating from such parallel proceedings. Indeed, the community of respondent host States has objected to such proceedings on various grounds, including fork-in-the-road treaty provisions[3] and the principles of *lis pendens*[4] and abuse of process.[5] However, despite a few notable exceptions,[6] investment treaty tribunals have routinely rejected these objections. For doing so, they prefer to adopt a rigid approach and rely on a strict application of the triple identity test,[7] instead of recognizing that the parallel proceedings relate to the same factual dispute. This poses the question – does international law provide an alternative solution to the

[3] Bernardo Cremades & Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24 Arb. Int'. 507 (2008); Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J.W.I.T 231 (2004).

[4] Campbell McLachlan, *Lis Pendens in International Litigation*, Martin Nijhoff (2009); August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 Law and Practice of I.C.T. 37 (2004); Douglas Reichert, *Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and Int'l Arbitration*, 8 Arb. Int'l. 37 (1992).

[5] Yuka Fukunaga, *Abuse of Process under International Law and Investment Arbitration*, 33 ICSID Review 181 (2018); John P Gaffney, *Abuse of process in investment treaty arbitration*, 11 Journal of World Investment & Trade 515 (2010); Carlotta Ceretelli, *Abuse of Process: An Impossible Dialogue Between ICJ and ICSID Tribunals?*, 11 Journal of International Dispute Settlement 47 (2020); Chester Brown, *The Relevance of the Doctrine of Abuse of Process in International Adjudication*, 8 TDM International 1 (2011); Hervé Ascensio, *Abuse of Process in International Investment Arbitration*, 13 Chinese Journal of International Law 763 (2014); Emmanuel Gaillard, *Abuse of Process in International Arbitration*, ICSID Review 1 (2017).

[6] Pantechniki S.A. Contractors & Engineers v. The Republic of Albania, ICSID Case No. ARB/07/21, Award (30 Jul. 2009); H&H Enterprises Investments, Inc v Arab Republic of Egypt, ICSID Case No ARB/09/15, Award (6 May 2014); Supervision Y Control S.A. v. The Republic of Costa Rica, ICSID Case No. ARB/12/4, Award (18 Jan. 2017); Ampal-American Israel Corp., EGI Fund (08-10) Investors LLC, EGI Series Investments LLC, BSS-EMG Investors LLC, and David Fischer v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016); Orascom TMT Investments S.A.R.L v. People's Democratic Republic of Algeria ICSID Case No. ARB/12/35, Award (31 May 2017).

[7] S.A.R.L. Benvenuti and Bonfant SRL v. The People's Republic of the Congo, Award (8 Aug. 1980), ¶1.14; Azurix Corp. v. The Argentine Republic, Decision on Jurisdiction (8 Dec. 2003), ¶89.

menace of parallel proceedings which is incapable of being sacrificed at the altar of technicalities?

It is in the above context that this article explores the utility of the principle of judicial comity as part of an increasingly fragmented framework of international dispute settlement. Part II begins by discussing the theoretical foundations of the principle of comity, and Part III thereafter studies the emergence of judicial comity as a global ordering principle and how it may alleviate the risks created by parallel proceedings by foreign investors. Finally, Part IV concludes the paper.

II. THE ORIGINS OF COMITY

The principle of comity is commonly misunderstood by many as mere courtesy or deference.[8] But in reality, it is akin to a Hindu God with multiple incarnations; periodically remerging in different avatars. In fact, it is considered to have as many meanings as the notion of sovereignty.[9] And in both municipal and international law systems, the understanding of the principle varies with the context in which it is invoked. As such, prior to assessing the role of comity as a tool for preventing parallel proceedings, one must study its theoretical origins.

The origin of comity is linked with the concept of sovereignty.[10] It arose in the aftermath of the Peace of Westphalia, which denotes a series of treaties that not only ended the Eighty Years' War between the Kingdom of Spain and the newly independent Dutch Republic, but also established a new political order in central Europe. This Westphalian order was based on the principle of territorial sovereignty and non-interference, which rendered personal statuses irrelevant in the face of the territorial law of the state.[11] In other words, a sovereign enjoyed absolute legal control over all subjects, property and transactions within its territory, but as an extension, had no similar influence beyond its own territory.[12]

Yet, increasing commercial transactions between the European sovereigns, coupled with the rise of the Netherlands as a centre of trade, posed novel questions that the conception of sovereignty was unable to address. Particularly, it was unclear which law should regulate

[8] Adrian Briggs, *The Principle of Comity in Private International Law*, 91.
[9] Anne-Marie Slaughter, *Court to Court*, AM. J. INT. LAW 708, 708 (1998).
[10] Thomas Schultz & Niccolò Ridi, *Comity in US Courts*, 2 Northeastern University Law Review 1, 10 (2017).
[11] *Id.*
[12] Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 University of California 11, 17 (2010); Emer De Vattel, *The Law of Nations; Or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns*, Joseph Chitty trans. (1883), 149.

private dealings that transcended more than one sovereign territory. Eventually, the conflict of laws[13] and the principle of comity arose to resolve this dilemma and mitigate the ill-effects of a strict allegiance to territoriality.[14] And while many jurists contributed to this process, the contributions of Ulrich Huber and Justice Joseph Story are paramount.

The primary function of comity was to reconcile a sovereign's need to occasionally recognize and give effect to foreign laws within its territory, without threatening the principles of sovereignty and non-interference.

Ulrich Huber answered this dichotomy by crafting three axioms. He posited that *firstly*, the laws of a sovereign State have force within the limits of that government and bind all who are subject to it, but not beyond. *Secondly*, all persons within the limits of a government, living there permanently or temporarily, are deemed to be subjects thereof. And *thirdly*, sovereigns will, pursuant to the principle of comity, ensure that the rights acquired within the limits of a government retain their force everywhere as long as they do not cause prejudice to the power or rights of other governments or their subjects.[15] Huber's third axiom is of particular significance here.

By postulating his third axiom, which allowed the law of one sovereign to also retain its force in the territory of another sovereign through the latter's consent, Huber sought to mitigate any conflict between the principle of comity and territorial sovereignty.[16]

Justice Joseph Story, an American jurist and former Associate Justice of the Supreme Court of the United States ["**SCOTUS**"], adopted Huber's three axioms, in particular the emphasis on sovereignty, to formulate his system of conflict of laws.[17] To him, an essential attribute of state sovereignty was the fact that *"[w]hat [a State] yields, it is its own choice to yield, and it cannot be commanded by another to yield it as a matter of right.*"[18] Echoing Huber, he also conceived three general maxims in this regard. *Firstly*, he stated that "*every nation possesses an exclusive sovereignty and jurisdiction within its own territory*."[19] *Secondly*, that "*no state or nation can*

[13] Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 University of California 11, 18 (2010).
[14] Thomas Schultz and Niccolò Ridi, *Comity and International Courts and Tribunals*, 50 Cornell International Law Journal, 11 (2017) [citing Cedric Ryngaert, *Jurisdiction in International Law* 150 (2008)].
[15] Campbell McLachlan, *supra* note 4 at 77.
[16] Donald Earl Childress III, *supra* note 13, at 22.
[17] Joseph Story, *Commentaries on the Conflict of Laws*, (1883); Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 376 (1945).
[18] Joseph Story, *Commentaries on the Conflict of Laws*, (1883), §8.
[19] *Id.* at §18.

by its laws directly affect or bind property out of its own territory, or bind persons not resident therein."[20] And *thirdly*, it followed "*that whatever force and obligation the laws of one country have in another depend solely upon the laws and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent*."[21] Accordingly, for Justice Story, comity formed a holistic explanation for "*the true foundation and extent of the obligation of the laws of one nation within the territories of another*",[22] which was essentially rooted in the latter's consent.

The history of comity reveals "*that the principle was borne out of the need to make sense of a new model of allocation of regulatory authority*."[23] It was, by design, couched in flexibility such that it may be formulated in different terms to attain a variety of goals depending on the context in which it is invoked. The very existence of legislative, executive and judicial comity in the United States is an example of this tenet.[24] This is why Campbell McLachlan states that the principle of comity is "*a springboard from which [jurists] proceeded to develop a highly organized and sophisticated set of choice of law rules*."[25] It was not an invitation to replace law with mere courtesy or discretion, but instead it "*supplied the basis for the elaboration of a detailed set of positive rules, grounded in practical reality*."[26] The emphasis on the notion of practical reality, without diminishing the efficacy of a rule, was intended to clothe the principle with an inherent sense of functional malleability.

Over time, a number of jurists, national courts and international tribunals have relied on the principle of comity in varied contexts. It has been invoked, among other things, to restrain the applicable domain of municipal law, recognize foreign and international judicial decisions, issue anti-suit injunctions, and also relevant to this discussion, refrain from deciding a dispute in case of parallel proceedings.[27] Yet, a precise definition of comity nonetheless remains elusive.

A popular description of the comity was given by the SCOTUS in *Hilton v. Guyot*. Judge Gray, while elaborating in the context of recognition of foreign judgments, wrote that:

[20] Joseph Story, *supra* note 18, at §20.
[21] Joseph Story, *supra* note 18, at §23.
[22] Joseph Story, *supra* note 18, at §38.
[23] Thomas Schultz & Niccolò Ridi, *supra* note 10, at 19.
[24] Donald Earl Childress III, *supra* note 13, at 47.
[25] Campbell McLachlan, *supra* note 15, at 223.
[26] *Id*. at 223.
[27] Thomas Schultz and Niccolò Ridi, *supra* note 14, at 13.

> "[C]omity in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons was are under the protection of its laws."[28]

However, he added that this principle operates on the basis of mutuality and reciprocity.[29] While one may question the acceptance of this constraint of reciprocity,[30] SCOTUS's description of comity confirms its intrinsic relationship with the notion of sovereignty. Similar to its theoretical origins, it also provides a justification for the extra-territorial recognition of the sovereign acts of another State. This understanding laid the foundations from which the principle of comity eventually also emerged to operate in the international dispute settlement framework, as a springboard for addressing the risks of parallel proceedings.

III. UNDERSTANDING JUDICIAL COMITY

Comity "*arises from the horizontal arrangement of state jurisdictions*."[31] As previously stated, it plays a significant role in balancing the sovereign interests of a State with that of another; enabling the peaceful co-existence of their respective municipal laws. In the judicial context, its derivative principle, referred to as judicial comity or even comity of courts[32], requires municipal courts to adhere to two cardinal tenets.

Firstly, they shall respect and not interfere with the integrity of judicial orders of a foreign court to the extent that such orders apply to persons and properties within the territorial jurisdiction of the foreign State.

Secondly, they shall respect and not interfere with the integrity of judicial proceedings before courts of a foreign State.[33]

The application of comity of courts in the context of proceedings before municipal law courts is not a matter of controversy. However, one may legitimately question whether this principle can also regulate parallel proceedings before an international arbitration tribunal. To answer

[28] Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) [hereinafter *Hilton v. Guyot*].
[29] Hilton v. Guyot, *supra* note 28, at 228.
[30] Thomas Schultz & Niccolò Ridi, *supra* note 10 at 41. [citing De la Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1383 (D. Del. 1991); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 387 (1926)].
[31] James Crawford, *Brownlie's Principles of Public International Law*, 485 (8 Edition Ed. 2012).
[32] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993).
[33] Adrian Briggs, *supra* note 8, at 181.

this question, one must scrutinize how the principle of comity evolved into its judicial incarnation, encompassing a sense of respect for the parties' agreements to arbitrate and the related expectation of orderly arrangement of an international dispute settlement framework.

A. Judicial Comity as Respect for the Parties' Agreement

As noted above, the principle of judicial comity is understood by some as the comity of courts. This understanding, however, can be challenged by reference to the explanations given by Justice Story. In his treatise on Conflict of Laws, Justice Story conceptualizes judicial comity as a matter of comity of nations, and not courts, since the principle ultimately owes its origin to the tacit consent granted by a State.[34] In his view, the role of the courts – as an organ of the State – is limited to merely interpreting and applying the sovereign's will, and nothing more.[35] Simply put, judicial comity denotes comity of nations that is merely implemented by municipal courts.

Notwithstanding this minor conceptual distinction, this is not the only prevalent understanding of the principle of judicial comity.

Since the Westphalian era, the object of comity has changed, or at least diversified, with time. While municipal courts initially relied on comity to justify the application of foreign law, they gradually began to also justify their decisions not only on the basis of the sovereignty of other States but also by reference to the autonomy of transacting parties and the global market.[36] Though surprising, this practice is consistent with the origins of comity, which was developed to address the conflict of law challenges that arose from an increase in cross-border trade. After all, comity was developed as a response to prevalent commercial practices that threatened to contradict the sovereignty of States but was eventually found to be consistent with it. Naturally, any change in this global market or commercial practices, and the challenges posed by it, was likely to influence how the principle of comity could be suitably adapted without deviating from its core objectives.

For instance, the consistent growth of international trade post the Second World War brought before the American courts several cases for enforcement of international contracts containing foreign choice-of-law and choice-of-forum clauses, and arbitration clauses that were

[34] Joseph Story, *supra* note 18, at §38.
[35] Joel R. Paul, *Comity in International Law*, 32 Harv. Int'l L.J. 1, 23 (1991).
[36] Joe R. Paul, *The Transformation of International Comity* 71 L. & Contemp. Probs., 20 (2008).

inconsistent with American statutes.[37] It is evident that such stipulations were rare when the principle of comity was first conceived. However, acknowledging how international trade has evolved, the American courts adapted their understanding of comity to justify the enforcement of such contractual stipulations.[38]

This is best evidenced by the decision in *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc.*, where the SCOTUS held that anti-trust claims concerning an international transaction were arbitrable.[39] The court noted that as international trade had expanded over the recent decades, so too had international arbitration.[40] In such a scenario:

> "[Concerns] of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause […] even assuming that a contrary result would be forthcoming in a domestic context."[41]

This sensitivity to the need of the international commercial system remains one of the core tenets of the principle of judicial comity. It is for this reason that the Restatement (Third) on Foreign Relations Law of 1987 re-characterized the traditional principle of comity as a principle of 'reasonableness', which applied to not only prescriptive but also adjudicatory and enforcement jurisdictions.[42] This way, by tying a novel understanding of comity as reasonableness to foreign sovereigns and the autonomy of private parties, the American courts added further nuance to the principle of comity.[43]

Similarly, with respect to foreign-choice-of-court clauses, if a party had initiated court proceedings in breach of a contractual agreement, it became acceptable for a subsequent court to decline jurisdiction and hold the parties to their agreement. The grant of such remedy did not infringe the non-interference aspect of comity.[44] As Adrian Briggs remarked, private international law has two aspects – the international aspect concerned with giving effect to acts and adjudications of courts, and a private one concerned with the distinct relationships that

[37] Joe R. Paul, *supra* note 36, at 25.
[38] Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972); Roby v. Corporation of Lloyds, 996 F.2d 1353, 1363 (2d Cir. 1993); Ingersoll Milling Machine Co. v. Granger, 833 F.2d 680, 685 (7th Cir. 1987).
[39] Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (SCOTUS, 1985) [hereinafter *Mitsubishi Motors*].
[40] Mitsubishi Motors, *supra* note 39, at ¶13.
[41] Mitsubishi Motors, *supra* note 39, at ¶8.
[42] Restatement (Third) of Foreign Relations Law of the United States (1987), §403.
[43] Joe R. Paul, *supra* note 36, at 29.
[44] Penn v. Lord Baltimore (1750) 1 Ves Sen 447.

individuals assume for themselves.[45] The principle of comity understands both, and requires the courts to accord respect not just to the former, but also to the latter as long as they do not implicate the interests of a State.[46]

The above developments illustrate how the principle of comity has evolved to encourage the courts to respect not just foreign sovereignty, but also private dispute settlement agreements between parties. This includes an agreement to arbitrate. After all, the principle of comity was developed to make the notion of sovereignty work in the face of pragmatic transnationalism and incidental changes in the manner in which international commerce took place.[47]

B. Judicial Comity as a Global Ordering Principle

The principle of comity as respect for the parties' agreement can justify why municipal courts defer to parallel proceedings before an international tribunal with respect to the same dispute. However, it cannot explain whether an arbitral tribunal, which derives its jurisdiction from the consent of the parties and not a municipal law, must adopt a similar approach. In other words, while a State may require its own courts to respect the parties' agreement, does this responsibility also extend to an investment treaty tribunal?

The above question introduces several hurdles in the discourse. Despite the aforementioned evolution, judicial comity is still considered by some to be rooted to the notion of sovereignty, and thus distinct from mere judicial administration.[48] This creates a dilemma for international tribunals which hold no allegiance to the legal norms of a particular State, and have no direct obligation to vindicate its dictates.[49] Their resort to comity, understood in its traditional sense, accordingly may appear suspicious.

However, it is equally trite that the principle of comity has not remained immune to a transformation of the international dispute settlement framework, in which the disputing parties now prefer to replace the ordinary jurisdiction of municipal law courts with that of consent-based arbitral tribunals. The respective domains of commercial and investment treaty arbitration, which exemplify this transformation, have also undergone a significant alternation,

[45] Adrian Briggs, *supra* note 8, at 92.
[46] *Id.*
[47] Thomas Schultz & Niccolo Ridi, *How Comity Makes Transnationalism Work*, King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2017-14, 2, 4.
[48] Donald Earl Childress III, *supra* note 13, at 61.
[49] Mitsubishi Motors, *supra* note 39, at ¶12.

creating a jurisdictional conflict far in excess of what was envisaged when the principle of comity was first conceived. The proliferation of international law forums has further reinforced this conflict. Therefore, in such a fragmented framework of international dispute settlement, characterized by a conflict between jurisdictions of both municipal courts and international tribunals, each of which enjoy a comparable competence of decision-making,[50] to limit the principle of judicial comity to only municipal courts would defeat its objective.

It is for this reason that both scholars and international tribunals recognize the principle of comity as a principle capable of being applied to regulate parallel proceedings relating to the same dispute.

Yuval Shany, for instance, considers that there are no compelling reasons to restrict the application of the principle of judicial comity only to jurisdictional interactions between municipal courts since the same considerations also apply, perhaps with greater force, in the international sphere.[51] Towards the same end, Thomas Schultz adds that "*comity may assist international courts and tribunals in mediating jurisdictional conflicts between themselves*."[52] He then defines it as "*a primary rule of conduct addressed to judges and arbitrators, asking them to balance some of the variegated interests implied in making one legal regime prevail over another in a specific instance*."[53]

Likewise, several international tribunals have affirmed the relevance of the principle of comity as part of the international dispute settlement framework, albeit without necessarily giving it full effect.

In *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* ["**SPP v. Egypt**"], the tribunal, while addressing the issue of parallel arbitrations, noted that when the jurisdictions of two independent tribunals extend to the same dispute, then "*in the interest of international judicial order, either of the tribunals in its discretion and as a matter of comity, stay the exercise of its jurisdiction pending a decision by the other tribunal*."[54]

[50] Thomas Schultz & Niccolò Ridi, *supra* note 10, at 84.
[51] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals,* OUP 261, (2003).
[52] Thomas Schultz and Niccolò Ridi, *supra* note 14, at 26.
[53] Thomas Schultz and Niccolò Ridi, *supra* note 14, at 16.
[54] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No ARB/84/3, Decision on Jurisdiction (27 November 1985), ¶30.

The tribunal in *Achmea BV v. The Slovak Republic* echoed this proclamation. While the tribunal did not deem the parallel proceeding in question as sufficiently co-extensive to claims raised before it so as to warrant a suspension of proceedings, it nevertheless expressed its inclination "*to organize its proceedings with full regard for considerations of mutual respect and comity as regards other courts and institutions.*"[55]

The tribunal in *British Caribbean Bank Ltd. v. The Government of Belize*[56] also cited the observations in *SPP v. Egypt* to affirm the relevance of comity in international arbitration, even though it also ultimately refused to stay its proceedings. It cautioned that the principle of comity, although key, must not "*frustrate a claimant's right to the arbitral forum and, potentially, to the relief offered by the bilateral investment treaty*."[57]

The tribunal in *The MOX Plant Case (Ireland v. United Kingdom)* ["**The MOX Plant Case**"], which was constituted under the United Nations Convention on the Law of the Sea ["**UNCLOS**"], provided one of the most prominent affirmations of judicial comity in international dispute settlement. The Republic of Ireland had brought a dispute concerning the discharge of certain radioactive wastes into the Irish Sea by the United Kingdom, alleging that the latter's acts were in breach of its obligations under the UNCLOS.[58] However, the tribunal noticed that the respondent had also raised certain objections under the law of the European Communities, and there was a real possibility that the European Court of Justice may have jurisdiction over similar issues.[59] The tribunal also noted that it could not firmly establish its jurisdiction until the European Law issues were finally resolved. As such, it held that "*bearing in mind considerations of mutual respect and comity, which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two states*", it will be inappropriate for it to proceed further with the proceedings.[60]

[55] Achmea BV (Formerly Eureko BV). v. The Slovak Republic, PCA Case No 2008-13, Award on Jurisdiction (26 October 2010).
[56] British Caribbean Bank Limited v. The Government of Belize, PCA Case No. 2010-18, Award (19 December 2014), ¶187.
[57] *Id.*
[58] The MOX Plant Case (Ireland v. United Kingdom), Order No. 3 (24 June 2003), ¶9 [hereinafter *MOX Plant Case*].
[59] *Id.* at ¶21.
[60] MOX Plant Case, *supra* note 58, at ¶28.

Thus, notwithstanding their varying conclusions, international tribunals do recognize the principle of comity as a relevant tool for addressing instances of parallel proceedings before the international fora.[61]

In a nutshell, in addition to encompassing respect for the parties' agreement, the principle of comity is considered to have undergone a further evolution to mirror the renovation of the international dispute settlement system and it remains capable of addressing the problems arising from overlapping jurisdictions.[62] Consequently, today, comity is as much a principle of global ordering,[63] as that relating to the sovereignty of States. This recognition not only values inter-forum courtesy but equally enables a dialogue between the various competing forums to improve the quality of judicial outcomes and increase their legitimacy.[64]

In light of the above, while the contemporary understanding of comity may appear surprising at first, it nonetheless remains consistent with its origin.

The principle of comity, as originally conceived, had two components: *firstly*, demonstrating mutual trust and confidence in foreign judicial institutions by not interfering with them; and *secondly*, respecting the conclusiveness of the acts of foreign institutions.[65] The contemporary understanding of comity retains these traits even today, despite also being characterized as a global ordering principle. To then insist that these "*foreign judicial institutions*" which merit respect must only be institutions attached to a sovereign as part of its municipal law framework, to the exclusion of arbitral tribunals resulting from the consent of the same sovereigns, would be an unfair limitation imposed on the principle of comity. Equally, it would be inconsistent with the contemporary reality of international relations, which has naturally evolved since the Westphalian peace. This was not the objective with which comity was conceived, including as "*a springboard from which [jurists] proceeded to develop a highly organized and sophisticated set of choice of law rules.*"[66]

[61] Allan Rosas, *With a Little Help from My Friends: International Case-law as a Source of Reference for the EU Courts*, [2005] 5 The Global Community: Yearbook of International Law and Jurisprudence 203, 230.
[62] Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts*, OUP 166, (2007).
[63] Thomas Schultz & Niccolò Ridi, *supra* note 10, at 82.
[64] Yuval Shany, *supra* note 62, at 167.
[65] Adrian Briggs, *supra* note 8, at 91.
[66] Campbell McLachlan, *supra* note 15, at 223.

Viewed from this perspective, the principle of comity bears resemblance to the vague, but often-cited principle of sound administration of justice in international law.[67] This principle was first expounded by the PCIJ in *The Mavrommatis Palestine Concessions* case, explaining that the court "*[was] at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with fundamental principles of international law*."[68] Indeed, investment treaty tribunals commonly refer to some variant of this principle, giving further evidence of its acceptance.[69] This parallel resonates with Thomas Schultz' observation that:

> "[When] domestic courts employ comity, they do so by dismissing or staying proceedings […] demanding the surrender of legal (or judicial) authority from one […] regime to another. The same applies in international adjudication."[70]

Thus, whether the principle of judicial comity can help alleviate issues of parallel proceedings will ultimately depend on one's conception of it. If it is perceived as a principle strictly rooted in the concept of sovereignty, then one may incorrectly dismiss its significance in the context of international tribunals and arbitration. But if one conceives it as a legal tool conceptualized to address the challenges of international commerce without threatening the notion of sovereignty, whilst recognizing "*the occasional need for law to apply trans-nationally in a number of commercial and judicial circumstances*"[71], then its significance as a global ordering principle becomes obvious. Fortunately, the latter conception has gained acceptance as a recognized principle, which resonates with its elasticity and adaptiveness.[72]

This does not mean that the application of the principle, particularly by investment treaty tribunals, is not without challenges. This is particularly so since its application rests completely on the discretion of a tribunal.[73] Nevertheless, as *The MOX Plant Case* demonstrates, its utility as a jurisprudentially sound tool to address the risks created by parallel proceedings ought not

[67] Case concerning Alleged Violations of Sovereign Rights and Maritime spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Separate Opinion of Judge Trindade, ¶21.
[68] The Mavrommatis Palestine Concessions, Judgment (30 August 1924), Publications of the Permanent Court of International Justice, Series A – No.2, 16.
[69] Bayiindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), ¶264 ("orderly settlement of disputes"); Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No ARB/84/3, Decision on Jurisdiction (27 November 1985), ¶30 ("in the interest of international judicial order").
[70] Thomas Schultz and Niccolò Ridi, *supra* note 14, at 32.
[71] Thomas Schultz and Jason Mitchenson, *Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts*, 12 Journal of Private International Law 1, 4 (2016).
[72] Joe R. Paul, *supra* note 36, at 38.
[73] Yuval Shany, *supra* note 62, at 169.

to be undermined, especially considering the relative ineffectiveness of other remedial treaty provisions and doctrines.

IV. CONCLUSION

A series of decisions by investment treaty tribunals have, unfortunately, and many a time erroneously blunted the traditional tools available to address the risk posed by parallel proceedings involving the same dispute. These include fork-in-the-road treaty provisions and the principle of *lis pendens*. However, where these tools were considered inadequate, the principle of comity, or its incarnation of judicial comity, holds the potential to provide a more coherent response. Indeed, considering its inherent fluidity and aversion to rigid formulations, one can argue that time is ripe for the principle of comity to realize its immeasurable potential in international dispute settlement.

After all, traditionally linked to the notion of sovereignty, judicial comity has evolved to inculcate a sense of respect for not only other sovereign States but also the parties' agreement to arbitrate. Further, in view of the proliferation of international courts and tribunals across international and municipal law, and their increasingly overlapping jurisdictions, judicial comity has equally been baptized as a principle of global ordering. As such, while the application of the principle is discretionary, its potential is unbridled.

To then borrow words from Yuval Shany, "*while judicial comity is hardly a magic solution to all of the difficulties associated with overlapping jurisdictions, it may provide international arbitrators with a way to break the legal deadlock that the current uncertainty surrounding the ascertaining of 'sameness' of parties and issues entails*."[74] The only remaining question is whether a tribunal will now demonstrate the necessary will to do so.

[74] Yuval Shany, *Similarity in the Eye of the Beholder: Revisiting the Application of Rules Governing Jurisdictional Conflicts in the Lauder/CME Cases* in Arthur W. Rovine (ed)., *Contemporary Issues in International Arbitration and Mediation – The Fordham Papers 2007*, 138 (Martinus Nijhoff Publishers 2008).