

## ARTICLES

### COURTS ON COURTS: CONTRACTING FOR ENGAGEMENT AND INDIFFERENCE IN INTERNATIONAL JUDICIAL ENCOUNTERS

*Paul B. Stephan*\*

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\* John C. Jeffries, Jr., Distinguished Professor and David H. Ibbeken ‘71 Research Professor, University of Virginia School of Law. I am grateful for comments and criticisms from Jack Beatson, George Bermann, Ron Bettauer, Pamela Bookman, Gary Born, Anu Bradford, Curtis Bradley, Rachel Brewster, Sungjoon Cho, Ashley Deeks, Michael Doran, Neil Duxbury, Jack Goldsmith, Larry Helfer, John McGinnis, Anthea Roberts, Bo Rutledge, Bob Scott, and participants in workshops at Northwestern University School of Law, the University of Virginia School of Law, and George Washington University Law School. Derrick Aud contributed invaluable research assistance. My interest in this topic stems in part from puzzles I encountered when working as an expert witness on matters of foreign law before various U.S., foreign, and international tribunals. Throughout this Article I indicate my involvement whenever referring to any of these cases. The reader will have to decide whether the multiple roles in which I find myself, as an apologist for positions taken in litigation as well as an independent researcher, illuminate or compromise my arguments. The views stated are mine alone, as is responsibility for any errors, omissions, or misjudgments.

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COURT-ON-COURT encounters have become a significant part of international life. As people and firms spread their assets and activities over the globe, disputes arise. These matters often end up in more than one country's courts. Judges thus face choices that have consequences abroad, often for foreign judicial bodies. How should courts behave when they know their actions will affect foreign litigation?

Two battles exemplify the trend. In one, lawyers acting for Ecuadorian villagers have spent two decades fighting Texaco, and then Chevron, in both national courts and international tribunals over competing claims of environmental torts and judicial corruption.<sup>1</sup> In another, the owners of Yukos, an energy company seized by the Russian government, have challenged the Russian tax authorities and courts in more than a dozen

<sup>1</sup> The dispute to date has involved U.S. civil suits against Texaco, Ecuadorian litigation against Chevron, and a host of national suits and international arbitrations challenging the validity of the Ecuadorian award. See, e.g., *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994). For an overview of the dispute, see generally Peter B. Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 Va. J. Int'l L. 181 (2012).

judicial forums, both national and international.<sup>2</sup> At the heart of both disputes is foreign and international re-litigation of a domestic lawsuit. The stakes in both amount to billions of dollars, as well as the honor and reputation of those national courts. Private suits have become high international politics.<sup>3</sup>

These developments present the judiciary with new challenges. Prominent scholars assert that courts have responded to the growing globalization of litigation by becoming more cooperative and engaged. Judges, the scholars maintain, increasingly behave like diplomats when they deal with other nations' judiciaries, seeking compromise and cooperation. Judges now devote themselves to building the global rule of law through transnational judicial solidarity, not to parochial national interests. This argument has become the dominant model of international judicial interactions, at least among international lawyers and political scientists.<sup>4</sup>

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<sup>2</sup> See Paul B. Stephan, *Taxation and Expropriation—The Destruction of the Yukos Oil Empire*, 35 *Hous. J. Int'l L.* 1, 30–36 (2013). Yukos retained me to prepare an opinion regarding Russian law as part of a dispute with Sibneft, another Russian energy company, before the London Court of International Arbitration. That matter resulted in a settlement and I ultimately did not render any opinion. I also provided advice and opinions on Russian law to various Yukos shareholders with respect to their efforts to obtain compensation for the loss of their investment, including a proceeding under the Russian-Spanish bilateral investment treaty (“BIT”) that resulted in an award to the shareholders.

<sup>3</sup> A new U.S. statute imposes sanctions on Russian officials implicated in the death of a Russian lawyer who protested official misconduct. *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012*, Pub. L. No. 112-208, 126 Stat. 1496 (2012). The law includes a provision addressing the Yukos claim. *Id.* § 202(a)(1), (b). Russia has retaliated along several fronts, and joint efforts to promote rule of law have been aborted. Ellen Barry, *Russia: U.S. Pulls Out of Joint Project*, *N.Y. Times*, Jan. 26, 2013, at A5.

<sup>4</sup> The principal exponent of this approach is Professor Anne-Marie Slaughter. See generally Anne-Marie Slaughter, *A New World Order* 65–103 (2004) [hereinafter Slaughter, *New World Order*]; Anne-Marie Slaughter, *A Global Community of Courts*, 44 *Harv. Int'l L.J.* 191 (2003) [hereinafter Slaughter, *A Global Community of Courts*]; Anne-Marie Slaughter, *Judicial Globalization*, 40 *Va. J. Int'l L.* 1103 (2000) [hereinafter Slaughter, *Judicial Globalization*]; Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 *U. Rich. L. Rev.* 99 (1994). See also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale L.J.* 273 (1997). Many authors have built on Slaughter's work. A representative sample includes David J. Bederman, *Diversity and Permeability in Transnational Governance*, 57 *Emory L.J.* 201, 212 (2007); Rui Pereira Dias, *Suing Corporations in a Global World: A Role for Transnational Jurisdictional Cooperation?* 14 *Y.B. Private Int'l L.* 493, 494, 510–12 (2013); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 *Am. J. Int'l L.* 179, 181–82, 198 (2010); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 *Tul. L. Rev.* 67, 86–87, 108 (2009). See generally Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 *N.Y.U. L. Rev.* 2029 (2004); Melissa A. Wa-

This Article challenges that scholarly position. What drives judicial behavior in court-on-court encounters, I argue, is a traditional understanding of the judicial function, in particular respect for the instructions given by competent authorities and caution in the face of unclear instructions. Judicial mandates arise out of specific commitments by these authorities, rather than a general command to do what is best for the public as a whole. These commitments necessarily are incomplete and thus require courts to develop a gap-filling strategy.

Modern contract theory posits that courts should and do fulfill their mandates by attempting to ascertain the instructors' preferences and not their own. Further, when the authorities do not clearly express their preference, courts normally choose gap-filling rules that induce greater clarity and precision in their instructions. In most contexts, this means applying formal rules, rather than open-ended standards, to manage incomplete instructions. This approach, which counsels judges to act as agents, not trustees, dictates the outcomes of international judicial encounters.

My focus throughout is international court-on-court encounters, that is to say, interaction among courts from different jurisdictions concerning a common matter or dispute.<sup>5</sup> How courts do and should act in these

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ters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 *Geo. L.J.* 487 (2005). I am happy to provide a more comprehensive list on request. A few critics have challenged Slaughter's claims as either descriptively inaccurate or normatively undesirable. See generally, e.g., Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 *Va. J. Int'l L.* 507 (2011); Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 *Harv. L. Rev.* 1255 (2005); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 *Wash. U. Global Stud. L. Rev.* 345 (2005); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 *Wash. L. Rev.* 523 (2011); Paul B. Stephan, *Process Values, International Law, and Justice*, 23 *Soc. Phil. & Pol'y* 131 (2006); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 *Harv. L. Rev.* 148 (2005).

<sup>5</sup> Several reasons dictate that this Article not extend its inquiry to international judicial encounters in criminal matters. First, international criminal law, both in the traditional sense of extradition and rendition as well as in the modern sense of international criminal courts, rests almost entirely on specific treaties. Questions of judicial behavior thus reduce to issues of treaty interpretation. Second, although in recent years scholars have devoted a remarkable amount of attention to international criminal tribunals, actual practice is scant. This is particularly true with respect to the International Criminal Court. According to the Stockholm International Peace Research Institute, 57 countries spent 2% or more of their gross domestic product on military expenditures in 2012 (or the latest year on which data was available). See *The SIPRI Military Expenditure Database*, Stockholm International Peace Research Institute, available at <http://milexdata.sipri.org> (aggregation on file with author). Only 18 of

encounters is one part of a general set of issues, namely how different kinds of courts—national courts, permanent international courts, ad hoc international tribunals—should and do behave generally. Rather than deducing rules for encounters from a general study of judging, this Article proceeds inductively. It assumes that breaking down the general question into a discrete topic generates useful information that in turn illuminates the larger issue. How judges behave in encounters tells us something important about how they behave in other situations.

The Article proceeds in five Parts. It first describes the various contexts in which court-on-court encounters take place and the analytic choices that confront the courts. It then reviews work by scholars who believe engagement and dialogue among courts motivated by collective promotion of the global rule of law explain what courts do. Third, it offers, as an alternative model of judicial encounters, a contract theory that emphasizes the choices made by actors within an exchange context. These actors include both private persons (firms as well as individuals) and states (which can contract directly with private persons or enter into a kind of contract through international agreements, express and implicit). Fourth, it reviews the evidence of judicial behavior, looking mostly at U.S. practice but also considering other national courts in both common- and civil-law jurisdictions, as well as international tribunals—both permanent and ad hoc. This evidence indicates that contract theory provides a more robust explanation for judicial practice, especially by national courts, than does the dialogue theory described in the second Part. The Article also explains why contract theory provides a normatively more appealing justification for judicial choices than do the rival theories. A conclusion identifies broader implications.

#### I. COURT-ON-COURT ENCOUNTERS: AN ANALYTIC FRAMEWORK

How to handle court-on-court encounters increasingly preoccupies judges around the world. Domestic courts engage with foreign tribunals all the time. In interpreting foreign law that bears on a case before them,

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these states accept the jurisdiction of the International Criminal Court, or 32%. Of the 125 states that spent less than 2%, 104 accept the Court's jurisdiction, or 83%. *Id.* The database does not contain estimates of the military expenditures of Cuba, North Korea, or Somalia, nonparties to the Court that probably devote considerable resources to national security. Moreover, the Court has yet to open a case or investigation not involving events on the African continent. Deriving general conclusions from this functionally and geographically isolated practice thus seems challenging.

they look to foreign judicial practice as a tool for determining its content.<sup>6</sup> When faced with a case that a foreign tribunal previously has heard, they decide whether to give preclusive effect to that tribunal's decision, or whether that body had any right to address the matter at hand.<sup>7</sup> Judges consider whether to assert jurisdiction over a dispute that could come before a foreign court and whether to order the parties not to litigate a case elsewhere.<sup>8</sup> They also entertain requests to render assistance to an ongoing foreign proceeding.<sup>9</sup>

Resolving any of these issues requires the court to consider its relationship with a foreign judicial body. The home court could decide that, for some range of issues, the foreign body has unreviewable authority to render definitive decisions. Alternatively, it might accept the actions or competence of the foreign court only after studying and approving its practice, both in general and in the case at hand. Finally, it may regard the existence of the foreign tribunal as irrelevant and attach no significance at all to its actions.

An assessment of the quality of the foreign court's work demands a kind of engagement. By this I mean an effort to understand the perspective of the other, and a consideration of any and all evidence that will advance that understanding. An engaged home court must try to appreciate what issues confronted the foreign tribunal and how that body went about resolving them, either to evaluate something the tribunal already did or to predict how it will behave in the future. The home court might disagree with the foreign tribunal, and if so, it will seek to persuade. If it criticizes, it will do so hoping that the foreign tribunal will listen.

Alternatively, judges might manifest indifference to foreign tribunals. In deciding an issue involving a foreign court, the home court may refuse to consider possibly relevant information and instead might focus on a few gross, easily ascertainable factors. The home court might ask only if the other body has acted in an official manner, or has the power to act in the future. It might either give full force to the foreign acts, without attempting to evaluate them in terms of the home court's values and norms, or treat them as a legal nullity. In either event, the home court would make no effort to collaborate with, influence, or otherwise engage with the foreign actor.

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<sup>6</sup> See *infra* notes 110–43 and accompanying text.

<sup>7</sup> See *infra* notes 144–64 and accompanying text.

<sup>8</sup> See *infra* notes 165–82, 214–23 and accompanying text.

<sup>9</sup> See *infra* notes 183–209 and accompanying text.

Both strategies have their strengths and weaknesses. The engaged approach leads to contextual decisions and the fuzziness that case-by-case decisionmaking necessarily produces. It may lead a court to make judgments for which it lacks basic competence. The indifferent approach generates binary outcomes: The home court cedes power to the foreign tribunal either totally or not at all. Engagement requires a lot of work, makes it harder to predict litigation outcomes, and may be futile. Indifference blinds the court to potentially useful and perhaps compelling information.

A court encountering the other—foreign tribunals with a potential stake in a matter over which it has jurisdiction—may not like any of its choices. Nor does existing doctrine provide clear guidance as to which path to take. Vague terms, such as “comity,” promise much and deliver little in terms of usable instructions for judges facing a potential encounter with foreign courts.<sup>10</sup>

In providing clarity and guidance, one must begin with a clear definition of the problem. First, for purposes of this Article, a court-on-court encounter arises whenever a home court must do something that will have an impact on a foreign court. By “foreign court,” I mean to include both national courts and international tribunals, permanent as well as ad hoc.<sup>11</sup> Obvious differences between these bodies exist. Individual states

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<sup>10</sup> In the United States, the most influential invocation of the comity doctrine is *Hilton v. Guyot*, 159 U.S. 113 (1895). See infra note 145 and accompanying text. In many cases, including a substantial portion of those cited in Part IV of this Article, a court will invoke comity and then go on to behave in a manner consistent with contract theory. But the cases do not isolate those factors that justify deference to foreign proceedings, much less specify the degree of deference required. As a result, both judicial references to comity and the accompanying behavior seem too unformed, if not promiscuous, to do much work in deciding cases. For scholarly criticism of comity as a useful legal construct in international civil litigation, see generally Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. Davis L. Rev. 11 (2010); Joel R. Paul, *Comity in International Law*, 32 Harv. Int'l L.J. 1 (1991); Michael D. Ramsey, *Escaping “International Comity,”* 83 Iowa L. Rev. 893 (1998).

<sup>11</sup> One should distinguish ad hoc arbitral tribunals from permanent institutions, although both are the subject of this Article. Ad hoc arbitration arises in both commercial matters and as a result of investment disputes. The treaties governing this process include the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 249 [hereinafter *Panama Convention*]; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter *Washington Convention*]; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter *New York Convention*]; and many investment treaties. Numerous cases proceed under these regimes. See, e.g., *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 391 (2d

constitute national courts in many different forms and with disparate functions. Relations among them mostly rest on customary practice, rather than positive law.<sup>12</sup> International tribunals exist only by the grace of treaties, which fix, either expressly or by implication, the scope of the duty of national courts to cooperate with these institutions. Thus courts encountering an international tribunal might face different instructions from authoritative sources than if it were dealing with a foreign national court. The structural similarity of court-to-court encounters, however, justifies lumping together both categories of foreign judicial bodies. When distinctions are needed, I will make them.

Encounters between courts may be retrospective, prospective, or ongoing. The home court may have to decide retrospectively what to make of foreign judicial practice, either in general or in a prior proceeding that overlaps the case with which it is seized. The home court may have to guess prospectively how a foreign court will act when it determines whether to cede jurisdiction to that organ, or to bar that court from deciding disputes that may affect its case. The home court may guess about a foreign court's behavior, subject to revision based on ongoing contacts, when it either collaborates in a current foreign proceeding, perhaps

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Cir. 2011) (invoking New York Convention to enforce arbitration agreement based on bilateral investment treaty). By contrast, the United States has submitted to the jurisdiction of very few permanent international tribunals. The most prominent is the International Court of Justice. Even in that case, U.S. adherence to its obligations is, to put it mildly, complex. See *infra* note 162 and accompanying text. In the case of the World Trade Organization Dispute Settlement Body ("WTO DSB") and Chapter 20 of the North American Free Trade Agreement ("NAFTA"), U.S. law expressly precludes direct effect of tribunal decisions in U.S. law. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(a)(1), 108 Stat. 4809, 4815 (1994); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 102(a)(1), 107 Stat. 2057, 2062 (1993). For more on the distinction between ad hoc tribunals and permanent institutions, see Gary Born, *A New Generation of International Adjudication*, 61 *Duke L.J.* 775, 819-55 (2012); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 *Calif. L. Rev.* 1, 22-27 (2005).

<sup>12</sup>Exceptions to the statement in text include several Hague Private Law Conventions. See, e.g., Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Letters Rogatory Convention]; Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. The Hague Private Law Conventions are available at [http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing). In addition, there exists a Hague Convention on Choice of Court Agreements, which the United States has signed but not ratified and which has not yet gone into effect. For the text and status of this instrument, see Hague Convention on Choice of Court Agreements, June 30, 2005, *reprinted in* 44 *I.L.M.* 1294, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98). Various regional treaties and legislation also exist for Europe and the Americas, respectively.



rendering evidence or assets, or instead withholds cooperation and even obstructs the foreign proceeding. I expand below on the problems raised in each of these contexts.

*A. Retrospective Encounters—Finding Foreign Law*

Some situations demand that a court apply foreign law. The rules dictating when a home court must do this are complex and contentious, but no one questions that the duty does arise.<sup>13</sup> Foreign law might determine, for example, ownership of property, the validity or meaning of a contract, or the scope of a legal duty to prevent harm. Foreign law might frame and provide a context for a question of international law, such as whether a state engaged in unfair and inequitable conduct or effected an expropriation. When called on to use foreign law, a home court normally will look at existing foreign judicial practice as one tool to ascertain the content of that law.

When considering foreign judicial practice, the home court necessarily must assume an interpretive posture. It might, for example, take a plain-meaning approach, refusing to explore behind the text of published decisions to ascertain what a foreign tribunal would do in the situation at hand. It instead might try to divine the underlying jurisprudential context that informs the foreign tribunal's decisionmaking. It could even go a step further by guiding the foreign tribunal as to the considerations that it properly should and should not incorporate into its doctrine. These choices reflect a progression from indifference to engagement.

Imagine, for example, a foreign judicial decision that does not address directly the question before the home court, but does endorse an argument that suggests how that question might be decided. A fully indifferent home court would ask only whether the decision resolves the matter at hand and otherwise would disregard the foreign tribunal's work. Unpacking the reasoning behind the foreign tribunal's decisions would require more engagement. Going beyond the written decision to learn about the unstated jurisprudential context in which the foreign tribunal operates would increase engagement even more. Responding to the knowledge acquired with a reasoned response, perhaps to express an appreciation for the foreign tribunal's coherent viewpoint or instead to criticize it for allowing illegitimate considerations to influence its decisions, would represent engagement in its fullest sense.

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<sup>13</sup> James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 Va. L. Rev. 111 (2014).

A home court might embrace indifference because it believes that bringing in additional evidence, such as the views of experts in foreign judicial practice, might destabilize the parties' legitimate expectations, induce wasteful arms races among competing experts, or prompt the (illegitimate) production of extraneous information by nonjudicial actors.<sup>14</sup> It might simply prefer on cost-benefit grounds a parsimonious approach to the problem of identifying foreign law. Alternatively, the home court might embrace engagement on the theory that more information is always better, and any opportunity to help foreign peers do their work better should be embraced. In this mode, the home court not only would look behind the actions of foreign courts to determine what the "real" law is, but it also would comment and criticize as it does so. Indifference means not caring about the foreign court's reaction to the home court's pronouncement, while engagement invests in a dynamic relationship between the home and foreign judicial organs that extends beyond the outcome of the case in hand.

*B. Retrospective Encounters—Recognizing and Enforcing Foreign Judgments*

A common court-on-court encounter involves the recognition and enforcement of a foreign judgment.<sup>15</sup> In these transactions, the home court faces a completed foreign proceeding that produced an outcome, typically accompanied by a monetary award (including determinations of no liability). The case comes to the home court either because the winner failed to receive satisfaction outside the United States, or because the loser seeks to re-litigate its claim. The immediate practical effect of the enforcement question is to expose assets in the home jurisdiction to a li-

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<sup>14</sup> This point parallels the argument against consulting legislative history in statutory cases. Advocates of a ban on legislative history argue, among other things, that taking this source of information seriously will lead bureaucrats, lobbyists, and legislative staff to collude in the creation of nontransparent outcomes beyond the effective supervision of the legislature, the nominally authoritative lawmaker. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 *Colum. L. Rev.* 673, 710–25 (1997).

<sup>15</sup> Recognition of a foreign judgment entails a domestic court's determination that the foreign proceeding has conclusively determined the matter in dispute between the parties. Enforcement involves attachment of assets or arrest of persons as a result of the judgment. Recognition and enforcement may proceed in a single proceeding, but need not do so. See, e.g., *New York Convention*, supra note 11, arts. II, III (setting forth distinct standards for recognition and enforcement of an arbitral award); The American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* § 2 & cmts. b, d (2006).

ability that otherwise would not exist within that jurisdiction's legal system. A secondary effect is confirmation or recalibration of the foreign tribunal's expectations about the scope of its ruling.

Enforcement presents the home court with a stark choice. It might, hypothetically, determine simply whether the foreign judgment really is a judgment, that is, whether the foreign tribunal possessed the authority under its law to make the award that it did. It might, for example, invoke the doctrine of *res judicata* to give preclusive effect to a foreign judicial decision, without reopening the dispute to re-litigation. Alternatively, it might fully review the facts and legal arguments to determine whether the foreign court reached the same result that the home court would. The first approach exemplifies indifference, the latter engagement. Variations of course are possible. The home court might express "deference" to the foreign court but also reserve the right to review its work. Deference in turn may encompass anything from a strong presumption in favor of the foreign court to a throwaway rhetorical flourish in the course of full review.

A secondary issue involves the effect of treaties or statutes on a home court's approach to these tasks. Treaty networks exist, and many jurisdictions have statutes that tell courts how to enforce foreign judgments. These instruments, although helpful, do not contain answers to all questions and thus leave room for interpretation and inference. When working within this space, the home court must determine whether the instrument contains a general instruction to act with indifference or engagement as to the foreign court that produced the judgment in question.

### *C. Prospective Encounters—Choosing a Forum and Prescriptive Reach*

Once hailed into a forum, defendants sometimes argue that a court in another jurisdiction has a superior claim to hear the case. The doctrine of *forum non conveniens* does the lion's share of work here. Where a contract selecting a forum exists, the question instead is that agreement's scope and validity.

Normally a challenge to a forum is the converse of enforcing a foreign judgment. The alternative court has not addressed the case, and thus its behavior is only a matter of speculation. The home court must guess how that tribunal might act, and must determine what evidence to consider in making that guess. Because it cannot observe the foreign court directly, the home court must either limit its inquiry to matters other

than the quality of the tribunal, or undertake a broad ranging and systemic assessment.

In considering whether to allow the case to migrate elsewhere over the plaintiff's objections, the home court might focus primarily, or even exclusively, on the characteristics of the lawsuit, such as the governing law and the location of the likely evidence. Alternatively, it might also consider the capacities of the foreign court. The first approach reflects indifference: The home court will act regardless of the character of the foreign court. The second entails engagement: The home court will assess the foreign court based on all available evidence, offer a critique of its work, and reward it with control over the case if the home court approves of the job it is doing.

Another way to defer to a foreign court is to rule that the home court's substantive law has no bearing on a dispute. Normally the home court's jurisdiction will disappear if its nation's laws do not apply, leaving foreign tribunals as the only alternative forum. On the one hand, the home court, in deciding the prescriptive scope of domestic law, might assess a wide range of factors to determine the circumstances under which local law will apply to transactions with some foreign aspects. Greater flexibility would allow implicit or explicit consideration of the quality of the courts in alternative forums. On the other hand, the home court might apply a categorical approach that determines the scope of substantive law in a way that is indifferent to the capacities of the alternative venues.

*D. Ongoing Encounters—Assisting or Obstructing Foreign Civil Proceedings*

With both enforcement of foreign judgments and choosing an alternative forum, courts act in sequence. Enforcement of a judgment means that the home court encounters a completed foreign proceeding; choice of forum implies that the foreign court has not yet taken part in the dispute. In some instances, however, parallel proceedings exist. The foreign proceeding is ongoing or imminent, and one party asks the home court either to assist or obstruct. The home court might render assistance in gathering evidence or ordering local assets to be transferred to the control of the foreign tribunal. The home court also might freeze local assets pending later demands on them by the foreign tribunal. Alternatively, the home court might order persons within its jurisdiction to end the foreign proceedings, or not to undertake a foreign suit. In each case, the

home court must decide whether to credit the foreign proceedings as an acceptable process, and if so, how.

As in the other encounters discussed above, the home court can rest its actions on either indifference or engagement. Indifference would lead to a rule of always cooperating, or always obstructing, depending only on the satisfaction of specified criteria that do not include the characteristics or capabilities of the foreign court. A court might honor all requests for assistance in the gathering of evidence, for example, as long as the request comes from an organ recognized as a foreign court. Alternatively, the home court might pursue engagement with the foreign court. It might assess whether the foreign court itself has behaved in a cooperative manner and respond accordingly. In instances where treaties or statutes instruct the court how to behave, it might employ its interpretive resources to maintain its flexibility to reward or punish other courts based on its assessment of their performance.

#### *E. Summary*

In the abstract, the possibility of a court assuming either indifference or engagement (as well as the infinite gradations in between the two extreme postures) seems easy to understand. But what do courts actually do, and what should they do? Does a preference for indifference or engagement indicate anything more general about judicial behavior?

To answer these questions, I describe two broad conceptions of judicial behavior. One, which I call dialogue theory, depicts judges as actively engaged with their international peers and employed in a common project of developing the global rule of law. This approach resonates with a more general model that ascribes to judges the role of fiduciaries entrusted to act in the best interests of the wider community. An alternative account, which I call contract theory, depicts judges as facilitating bargains among states and between private actors and states. It predicts that judges use their resources to uphold bargains and stay their hands in the absence of contractual obligations that presume judicial enforcement. Contract theory thus provides a model of judging that regards courts as the agent of authoritative lawmakers.

## II. DIALOGUE THEORY—INTERNATIONAL RELATIONS ACCOUNTS OF TRANSNATIONAL JUDICIAL INTERACTIONS

Contemporary scholarly discussion of transnational judicial interactions emphasizes engagement. In particular, a body of work by scholars with an international-relations background portrays a burgeoning international community of courts that seek to bolster each other in pursuit of a common end. These writers argue that these interactions lead to greater cooperation in the construction of the global rule of law.

### *A. Slaughter's Judicial Globalization*

Perhaps the most prominent of the engagement proponents is Professor Anne-Marie Slaughter. She depicts courts as reaching out to each other to achieve cooperative outcomes.<sup>16</sup> Motivated by some mix of public spiritedness, a desire for institutional development, and maximization of their influence, Slaughter's courts search for ways to bolster their authority and that of their foreign and international colleagues. With praise mixed with occasional chiding, these judges study and guide the work of their peers. Slaughter's claims have spawned a substantial literature on judicial networks as part of a larger project on transnational regulatory and judicial cooperation.<sup>17</sup>

Slaughter uses two kinds of evidence to support her claim. First, she looks at ways that judges interact internationally outside the courtroom. She documents general contacts among judges through meetings organized either on a court-to-court basis or by international organizations and citations of foreign and international decisions by national courts.<sup>18</sup> She also considers the subject of this Article, judicial encounters involving shared responsibility for particular lawsuits. Her data, she argues, reveals a growing community of courts:

What these judges share above all is the recognition of one another as participants in a common judicial enterprise. They see each other not only as servants and representatives of a particular government or polity, but also as fellow members of a profession that transcends national borders. They face common substantive and institutional problems; they learn from one another's experience and reasoning. They

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<sup>16</sup> See generally Slaughter, *Judicial Globalization*, *supra* note 4.

<sup>17</sup> See Slaughter, *A Global Community of Courts*, *supra* note 4, at 204–15.

<sup>18</sup> Slaughter, *New World Order*, *supra* note 4, at 65–71, 96–99.

cooperate directly to resolve specific disputes. And they conceive of themselves as capable of independent action in both the international and domestic realms.<sup>19</sup>

She describes an emerging judicial order based on “a rough conception of checks and balances,” principles of positive conflict, pluralism, and legitimate difference, in addition to the “acceptance of the value of persuasive, rather than coercive, authority.”<sup>20</sup> These forces manifest themselves, she asserts, in constitutional cross-fertilization, the construction of global human rights law, formalization of the relationship between transnational and national courts, and face-to-face meetings among judges, as well as in transnational civil litigation.

Slaughter does not develop a fully specified behavioral model to explain these phenomena, but her work suggests several social forces at work. First, cross-fertilization of ideas helps judges “do a better job.”<sup>21</sup> In addition, joining in the transnational dialogue of judges increases a court’s influence.<sup>22</sup> Finally, the transnational nature of particular disputes, especially those involving trade and investment, require judges to “evaluat[e] the independence and quality of fellow judges of other nations” as well as to negotiate “with one another to determine which national court should take control over which part of multinational lawsuits.”<sup>23</sup> Taken together, these observations point in the direction of a complex set of attitudes and incentives that influence judicial practice.

Slaughter first describes judges as sharing a common sense of professional identity that produces a sense of satisfaction and accomplishment upon the proper execution of certain tasks. This hints at a sociological account of judicial behavior. Steeping in a professional culture leads to internalization of its norms.<sup>24</sup> Second, judges have a desire to wield power and thus prefer greater influence to less. Models developed by both sociologists and economists to explain bureaucratic aggrandize-

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<sup>19</sup> Id. at 68.

<sup>20</sup> Id. at 68–69.

<sup>21</sup> Id. at 77.

<sup>22</sup> Id. at 79.

<sup>23</sup> Id. at 86.

<sup>24</sup> Anne-Marie Slaughter, Andrew S. Tulumello & Stephan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *Am. J. Int’l L.* 367, 381 (1998) (discussing Harold H. Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599 (1997)).

ment thus seem to apply.<sup>25</sup> Third, her judges are pragmatic, in the sense that they seek to adjust their actions to reflect obstacles presented by others. Rather than responding to obstruction with frustration and force, they negotiate or, to use a term she frequently deploys, engage in “dialogue.”<sup>26</sup> Dialogue in turn enables them to update their bargaining strategies based on knowledge gained about their judicial counter-parties.

Slaughter’s work does more than account for court-on-court encounters, but encounters seem the most concrete, salient, and direct form of dialogue. Cross-citation may represent nothing more than cheap talk and does not conclusively establish intellectual influence. Conferences may constitute junkets more than platforms for common work. The outcomes of cases, the assigned work of judges, reveal preferences in a manner that the other evidence does not. Hence this Article concentrates on that aspect of the dialogue model.

### *B. Alter’s Trustee Courts*

Several scholars have followed Slaughter in investigating the particular influence of international tribunals on transnational civil litigation. While the fact of the tribunals’ proliferation since the end of the Cold War is interesting in and of itself, political scientists and legal academics also have looked at their interactions with other international courts as well as with domestic judicial systems. They offer an account of these

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<sup>25</sup> See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 223–31, 956–72, 987–98 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968); William A. Niskanen, *Bureaucrats and Politicians*, 18 *J.L. & Econ.* 617, 618–23 (1975).

<sup>26</sup> The concept of interjudicial dialogue has become something of a meme in recent international legal scholarship, not all of it referring expressly to Slaughter. See, e.g., Ludovic Hennebel & Arnaud Van Waeyenberge, *Réflexions sur le commerce transnational entre juges*, in 2 *Le sources du droit revisités* 711, 711–13 (Isabelle Hachez ed., 2013); Eyal Benvenisti & George W. Downs, *The Democratizing Effects of Transjudicial Coordination*, 8 *Utrecht L. Rev.* 158, 162–65 (2012). I am happy to provide a more comprehensive list of such scholarship on request.

An indirect, and perhaps unrecognized, influence on this conception of judicial behavior might be Mikhail Bakhtin’s critical theory of dialogic imagination. See Mikhail M. Bakhtin, *The Dialogic Imagination: Four Essays* 275–300 (Michael Holmquist ed., Caryl Emerson & Michael Holmquist trans., 1981). Bakhtin, however, posits a somewhat more problematic conception of verbal interaction than does Slaughter. For him, the dialogue is the basic model for all discourse, whether internal to the thinker or in engagement with some other. The dialogue functions as the site of an inherent conflict between the felt need to connect and construct a common lexical meaning and the inherent multivoiced nature of all expression, which disturbs and subverts meaning. Dialogue is both courageous and problematic, with empathy and cooperation far from guaranteed.



courts as constitutionalists, in the sense that the tribunals contribute to the construction of a transnational system of governance based on a discrete set of liberal democratic values.<sup>27</sup>

Within this genre, Professor Karen Alter's scholarship is especially significant.<sup>28</sup> To a greater degree than others writing about international judicial influence, she proposes a model of institutional design and actor incentives. She stresses the significance of these tribunals generally in international relations and attributes to them a distinctive capacity to overcome conventional limits of international bargaining.<sup>29</sup> As with Slaughter's courts, discourse and persuasion, rather than rules and power, account for their impact.

Alter bases her model of the behavior of international tribunals on a conception of trust, rather than agency. She limits the principal-agent model to delegations based exclusively on the principal's interests.<sup>30</sup> In

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<sup>27</sup> The literature on international tribunals is vast, and not all of it focuses on judicial dialogue. A representative sample of the field includes Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* 32–67 (2014) [hereinafter Alter, *The New Terrain of International Law*]; Alec Stone Sweet, *The Judicial Construction of Europe* 1–2 (2004); Gary Born, *supra* note 11, at 819–55; Gráinne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 *Harv. Int'l L.J.* 1, 4–7 (2010); William W. Burke-White, *International Legal Pluralism*, 25 *Mich. J. Int'l L.* 963, 965–67 (2004); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 *Va. J. Int'l L.* 411, 414–17 (2008); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 *Va. J. Int'l L.* 631 (2005); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 *U. Chi. L. Rev.* 469, 472–74 (2005).

<sup>28</sup> Alter also has written several articles with Laurence Helfer, an early co-author of Slaughter's. See, e.g., Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 *Theoretical Inquiries L.* 479 (2013); Helfer & Slaughter, *supra* note 4; Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 *Calif. L. Rev.* 899 (2005). There is every reason to believe that Helfer broadly agrees with the models advanced by Slaughter and Alter, and the dialogue concept appears in his 1997 co-authored article with Slaughter. The fullest and least bounded statements of the model, however, rest on work that Slaughter and Alter wrote without a co-author. In focusing on their scholarship, I do not mean to diminish Helfer's immensely rich and valuable contributions.

<sup>29</sup> For representative examples of her work, see Karen J. Alter, *Delegation to International Courts and the Limits of Re-Contracting Political Power*, in *Delegation and Agency in International Organizations* 312–38 (Darren G. Hawkins et al. eds., 2006); Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 *Eur. J. Int'l Rel.* 33, 40–56 (2008) [hereinafter Alter, *Agents or Trustees?*]. One should note that Alter more recently has moderated some of her claims about the trustee nature of international courts and shifted her focus more to the terms of delegation of authority to these bodies. Alter, *supra* note 27, at 359–64.

<sup>30</sup> Alter draws on Giandomenico Majone, *Two Logics of Delegation—Agency and Fiduciary Relations in EU Governance*, 2 *Eur. Union Pol.* 103 (2001), and Ruth W. Grant & Robert

this relationship, agent discretion exists because of information asymmetries and recontracting costs. But agents, including international tribunals, will not go beyond the policy space permitted by agency slack, and hence will not systematically frustrate the interests of powerful states, who by hypothesis would not consent to interference with their significant policy choices.<sup>31</sup>

Alter contrasts agency contracts with fiduciary delegation, in which “the goal is to convince some third party that [its] interests are being protected.”<sup>32</sup> Instead of an agent, the principals choose a trustee:

‘Trustees’ are chosen because they personally, or their profession in general, bring their own source of legitimacy and authority. Thus in addition to delegated authority, Trustees can have *moral authority* that comes from embodying or serving some shared higher ideals, with the moral status as a defender of these ideals providing a basis of authority. . . . Because the Trustee’s reputation as an authoritative actor is so central to their professional and personal identity and success, Trustees care greatly about maintaining their authority and may even

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O. Keohane, Accountability and Abuses of Power in World Politics, 99 Am. Pol. Sci. Rev. 29 (2005). I argue below, *infra* notes 74–77 and accompanying text, that she extends the arguments of these authors, and criticize the extension.

<sup>31</sup> For further discussion of the trustee-agent distinction as an explanation for judicial behavior, see generally Ethan J. Leib, David L. Ponet & Michael Serota, A Fiduciary Theory of Judging, 101 Calif. L. Rev. 699 (2013); Alec Stone Sweet & Thomas L. Brunell, Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO, 1 J.L. & Courts 61 (2013); see also Eyal Benvenisti, Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders, 107 Am. J. Int’l L. 295 (2013); Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int’l L. 331 (2009). For the agency account of judging, see generally Paul B. Stephan, Courts, Tribunals, and Legal Unification—The Agency Problem, 3 Chi. J. Int’l L. 333 (2002). As this present Article demonstrates, the distinction between fiduciary and agency courts is subtle and turns on definitional specifications as much as deep conceptual divides. It might be more precise to say that, when involved in an international encounter, courts act more like agents, and less like trustees.

One might note in passing that the trust metaphor, as applied to judges, indicates some confusion about the rules of private law. What distinguishes fiduciaries from agents, as a matter of private law, is the imposition of *greater* restrictions on the range of permissible action than those applicable to agents. These restrictions reflect the greater risk of opportunism in the case of fiduciaries. See Henry E. Smith, Why Fiduciary Law Is Equitable, in *Philosophical Foundations of Fiduciary Law* (Andrew S. Gold & Paul B. Miller eds., forthcoming 2014). The trustee concept invoked in the articles cited above, in contrast, borrows the idea that the trustee may act for the benefit of someone other than the settlor of the trust, but ignores the safeguards that private law uses to restrict trustee discretion, as well as the reasons for those safeguards.

<sup>32</sup> Alter, Agents or Trustees?, *supra* note 29, at 38–39.

choose a political sanction over an action that would be seen as compromising their identity as a moral, rational-legal, and/or expert decision-maker.<sup>33</sup>

She argues that states delegate authority to trustees to overcome problems caused by transitory shifts in state preferences that could undermine the value of the commitments that the trustee is delegated to enforce.<sup>34</sup>

What distinguishes the fiduciary concept that Alter expounds from traditional agent-principal analysis is the assertion that the states making the delegation act not out of their own interests, either individually or collectively, but rather in the interests of the presumed collective beneficiary. The fiduciary accordingly is not bound by the terms of the delegation except in the loosest sense. Rather, the fiduciary must interpret its authority teleologically, with the best interests of the benefited group as the principal criterion for wielding the fiduciary's authority.<sup>35</sup>

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<sup>33</sup> Id. at 39. Professors Alec Stone Sweet and Thomas L. Brunell, although broadly sympathetic to Alter's project and conclusions, have criticized this definition of trustee courts. They argue that Alter fails to distinguish bodies subject to low-cost overturning from those whose decisions enjoy a significant degree of entrenchment. Stone Sweet & Brunell, *supra* note 31, at 68 n.10; cf. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 *Colum. L. Rev.* 1832, 1872–75 (2002) (discussing forum shopping with respect to international tribunals). Stone Sweet and Brunell instead would define a trustee court as one that acts as an authoritative interpreter of the regime's law, enjoys compulsory jurisdiction, and cannot be reversed except at an extraordinary cost. Stone Sweet & Brunell, *supra* note 31, at 62. Because their model does not focus on court-on-court encounters as such, I do not dwell on it here.

<sup>34</sup> Alter, *Agents or Trustees?*, *supra* note 29, at 41.

<sup>35</sup> As Alter puts it:

Trustees have a putative beneficiary that differs from the Principal. The beneficiary may be entirely an artificial construction; what is important is that there is a third party who the Trustee supposedly is serving. The existence of the third party beneficiary means that the Principal's position is no longer hierarchically supreme; rather, both the Principal and the Trustee are trying to convince the third party audience that their behavior is legitimate. The Trustee cannot put the interests of the Principal over that of the beneficiary without engendering legitimacy problems for itself. The Principal also cannot only care about controlling the Trustee because the Trustee may in fact be deemed a superior decision-maker, and efforts cast as 'political interference' or exceeding state or Principal authority can alienate the Trustee's constituency and members of the Principal whose support is needed for recontracting.

These three differences contribute to the different politics . . . .

Alter, *Agents or Trustees?*, *supra* note 29, at 40. See also Roberts, *supra* note 4, at 187 ("Normatively, a court's or tribunal's trustee status is enhanced where it has a strong claim

Embedded in fiduciary theories of judging is the prospect of mission creep. By separating the delegator from the beneficiary, the trust structure allows the delegatee great discretion in determining the identity and interests of the benefited class. For national courts, this means greater judicial discretion to select and promote the values that determine the outcome of important debates. For international and supranational courts, this means a shift in focus from the discrete concerns of particular populations to universalist and cosmopolitan values that bind humanity. Once this shift occurs, a trustee court naturally looks to the work of other organs with similar responsibilities. The construction of a global rule of law through collaboration with peer institutions becomes a natural extension of the elastic definition of the court's mandate.

As support for the fiduciary theory, Alter presents case histories involving the World Trade Organization ("WTO") Appellate Body, the International Court of Justice ("ICJ"), and the European Court of Justice ("Luxembourg Court").<sup>36</sup> In each of these instances, an international tribunal reached an outcome that imposed legal obligations that went beyond those found in the relevant express treaty language and to which powerful actors were opposed. She believes that these outcomes are inconsistent with agency accounts of tribunal behavior, essentially because a powerful state did not block an unwanted outcome.

Like Slaughter, Alter grounds her account of these delegations on a set of historical narratives. She argues that the proliferation of these tribunals since the end of the Cold War reflects an evolutionary process. Their success breeds further success, as part of a general trend toward global and regional economic and political integration.<sup>37</sup> And like Slaughter, much of the confirmation of her model awaits future events. She has identified a tendency that, she predicts, will become a trend and, over time, the dominant form of international judicial behavior.

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to legitimacy based on reputation and independence and/or is tasked with adjudicating in the interests of a beneficiary other than the principal.").

<sup>36</sup> Karen J. Alter, *The European Court's Political Power: Selected Essays* 254–58 (2009) [Hereinafter *Alter, The European Court's Political Power*]; Alter, *Agents or Trustees?*, *supra* note 29, at 48–54. I criticize her use of these case histories at *infra* notes 81–90 and accompanying text.

<sup>37</sup> Karen J. Alter, *The Evolving International Judiciary*, *Ann. Rev. L. & Soc. Sci.* 387, 408–09 (2011); see also Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic* (or, *The European Way of Law*), 47 *Harv. Int'l L.J.* 327, 331–33 (2006).

The primary focus of Alter's research is the politics around international tribunals, rather than court-on-court encounters as such. Her case histories consider the interactions of tribunals with national governments, rather than with national courts. Inter-tribunal interactions are not entirely absent, however. She argues that one element of a tribunal's success is its ability to reinforce, and be reinforced by, peer organs. The effectiveness of one tribunal benefits its counterparts. She cites supportive encounters of the Luxembourg Court and the European Court of Human Rights ("Strasbourg Court") as illustrating this dynamic.<sup>38</sup> Thus within her model, as in Slaughter's, interactions between courts are constructive, engaged, and driven by a larger project of promoting transnational legitimacy.

### *C. Implications of Dialogue Theory*

The model of court-on-court encounters indicated by dialogue theory has several elements, some implied more than posited by the scholarship. Foremost is the characterization of both international and domestic courts as powerful and independent.<sup>39</sup> The model assumes that such courts enhance the credibility, and therefore the value, of the commitments that states make when they submit certain policy areas to a court's authority. Under a rational-actor account of international relations, states make such submissions because the benefits from doing so exceed the cost in terms of surrendered policymaking discretion.<sup>40</sup> Alternatively, under a sociological account, states may both respond to and participate in the construction of norms that make such submissions attractive to key decisionmakers.<sup>41</sup> To the extent the model emphasizes the ability of tribunals to interpret their authority in light of values and goals, rather

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<sup>38</sup> E.g., Karen J. Alter, *The European Court's Political Power*, supra note 36, at 254–58. For additional arguments along these lines, see generally Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 *N.Y.U. J. Int'l L. & Pol.* 959 (2009).

<sup>39</sup> To be clear, the theory does not posit that all courts are powerful and independent. Rather, it indicates that states have good reasons to create such organs, and then predicts what happens when they do.

<sup>40</sup> Majone, supra note 30.

<sup>41</sup> Alter, *Agents or Trustees?*, supra note 29, at 39. In other words, one does not have to commit to a particular school of international relations thought to embrace the argument that such submissions take place. For more on the different types of international relations theories and their thinking about law, see generally Slaughter, Tulumello & Wood, supra note 24.

than the terms of the delegation constituting their authority, the sociological account does more of the heavy lifting.

Second, the delegation of authority to strong and independent courts has dynamic consequences. To bolster the signal that the courts will be strong and independent, the states staffing these bodies will select judges who manifest these attributes. Such qualities in turn will incline the judges to exercise their discretion vigorously and creatively. Within a significant range of issues, they will initiate policy changes rather than simply react to the actions of others. To do otherwise would degrade the signal that states wish to send and gain from sending.

Third, courts identify with, and thus support, the policy changes that other courts have initiated. They both act within and seek to enrich a culture in which judicial authority is celebrated and respected. Accordingly, whatever their substantive preferences, judges *ceteris paribus* will seek to bolster judicial authority wherever it originates. Bolstering might mean cooperation in instances of shared jurisdiction or submission to a superior body's leadership where hierarchical relations exist.

Fourth, judges are likely to instigate policy change, rather than serving as passive agents that implement policies commanded by other actors. A failure to innovate would undercut the purpose of the delegation and indicate that the attributes of the judges selected were mis-assessed. For at least some tribunals, judicial activism is a feature, not a bug.<sup>42</sup> Disagreements among judges about desirable policies might blunt this feature, but they will not eliminate it.

Fifth, courts that reach consensus on policy changes are likely to invoke legal forms that entrench their choices. To raise the costs of overturning their choices, courts will tie them to those structures that entail the greatest resistance to change. In countries with supermajority voting rules for certain categories of enactments, such as constitutional amendments, they will attribute the policy choice to an instrument within that category. International tribunals faced with a choice between a treaty, subject to a unanimity exit rule, and an inferior act, subject to re-

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<sup>42</sup> For fuller development of the point, see generally Helfer & Alter, *Legitimacy and Law-making: A Tale of Three International Courts*, *supra* note 28. Helfer and Alter do not argue that all international tribunals have this characteristic, but that regional human rights bodies typically do.

vision by a less costly procedure, will attribute the policy choice to a treaty.<sup>43</sup>

Sixth, judges will support each other's entrenching choices even if they lack the capacity to implement them directly. Courts will engage with each other. They will try to suppress their disagreements when they cannot resolve them, and when debating their differences, they will try not to manifest a lack of respect for a foreign or international tribunal.<sup>44</sup>

In its essence, dialogue theory focuses on the capacity of courts to initiate and implement policy choices. Engagement follows from the policy agenda, although a process of socialization might also reinforce both policy innovation and engagement. It is the court's ability to make significant decisions on society's behalf, rather than constraints on that ability, that motivates the theory.

### III. A CONTRACT THEORY OF COURT-ON-COURT ENCOUNTERS

An alternative perspective on international judicial interaction focuses on the limits that bind courts and other tribunals. Why don't judges always seek to do what, in their own lights, is best for society? Why do societies set boundaries on judicial discretion, and why do judges respect them (to the extent that they do)?

Contract theory offers the most satisfying answers to these questions. The metaphor of a social contract is, of course, a longstanding feature of political theory, with antecedents in Socrates and full articulations in Hobbes, Locke, and Rousseau.<sup>45</sup> What I mean here, however, is more

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<sup>43</sup> For discussion of this question in the context of the European Court of Justice, see Robert Cooter & Josef Drexler, *The Logic of Power in the Emerging European Constitution: Game Theory and the Division of Powers*, 14 *Int'l Rev. L. & Econ.* 307, 313–14 (1994); Geoffrey Garrett, R. Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments and Legal Integration in the European Union*, 52 *Int'l Org.* 149, 160 (1998); George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 *Int'l Org.* 357, 369–70 (2001).

<sup>44</sup> For example, the International Court of Justice, in the course of rejecting the resolution by the Court of Justice of the Economic Community of West African States of a legal issue involving the same facts, explained simply that "Senegal's duty to comply with its obligations under the Convention [Against Torture] cannot be affected" by the other tribunal's decision. *Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, 2012 *I.C.J.* 460, ¶ 111 (July 20).

<sup>45</sup> Plato, *Euthyphro*, *Apology*, *Crito*, *Phaedo*, *Phaedrus* 181–91 (Harold North Fowler trans., Harvard Univ. Press 1990); 2 Thomas Hobbes, *Leviathan* 264–346 (Noel Malcolm ed., 2012) (1651); John Locke, *Two Treatises on Government* 258–60 (Legal Classics Li-

specific. Economists and legal academics over the last three decades have developed an impressive theoretical apparatus to explain the function and value of contracts. This theory provides an explanation not only for bargain formation as such, but also for the use of third-party agents (such as courts) to enforce bargains.<sup>46</sup> Professor Robert Scott and I in turn extended this theory to explain the enforcement of international law.<sup>47</sup>

Contract theory advances several abstract propositions: Both states and persons use contracts to shape their behavior; contracts resulting from bargains add value (both material and moral) to the extent that the benefits from altering the impact of future contingent events exceed the costs; agents such as courts facilitate valuable bargaining by attaching consequences to contracts; agents such as courts undermine valuable bargaining when they create contracts for parties who have not reached agreement on the point at issue. Contract theory thus indicates that the presence or absence of a consensual bargain is and should be central to the resolution of disputes by courts.

Contract theory posits actors that seek to survive and perhaps prosper in an uncertain and challenging environment. These actors bargain with others to allocate risks in a manner that, *ex ante*, they consider mutually beneficial. Once regret contingencies materialize and the risk allocations are triggered, one side or the other may suffer from the resulting distribution of consequences. The person who bears the burden of the regret contingency would prefer not to honor the bet. Contract law raises the cost of dishonoring the commitment and thus lowers the cost of taking actions that presuppose and depend on fulfillment of the commitment. In a nutshell, contract law seeks to make certain kinds of promises, namely those originating in a bargain context, more reliable, because this kind of reliance is likely to enhance social welfare.

The risks that contracts allocate are either external or internal to the parties. In the first category fall risks over which the parties have no control, such as the spot-market price of a commodity at some future

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brary 1994) (1698); Jean-Jacques Rousseau, *The Social Contract and Discourses* 173–74 (G.D.H. Cole trans., 1973) (1754).

<sup>46</sup> The classic, and still best, account of the judicial role in bargain enforcement is Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *Yale L.J.* 1261 (1980).

<sup>47</sup> Robert E. Scott & Paul B. Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* 147–79 (2006).



date. A manufacturer, for example, might want to lay off the risk of fluctuations in the price of materials that it uses in making its product. A contract to buy the inputs at a future date at a specified price achieves this outcome. It enhances welfare to the extent that the holder of the risk contingency can do a better job of minimizing its cost, such as by assembling a diversified portfolio of risks to blunt the impact of any particular regret contingency materializing.

In the second category fall risks associated with what contract theorists call the hold-up problem. Many cooperative ventures require relation-specific investments, that is, investments that are necessary for the venture to work but the cost of which cannot be recovered in full (if at all) if the venture does not go forward. Once a co-venturer makes such an investment, she is vulnerable to hold-up, that is, the other co-venturer may demand a renegotiation of the venture's payoffs in light of the investor's sunk costs. Knowing in advance of hold-up risk, parties will shy away from potentially valuable enterprises.<sup>48</sup>

Contract law evolved as a means of holding actors to their bargain in the face of both kinds of risks. It rests on the premise that empowering people to enter into and rely upon these bargains generates net social benefits. Contract theorists defend contract enforcement as a welfare-maximizing solution to the problem of costly precautions against party default.<sup>49</sup> Moral theorists also maintain that holding actors to their bargains extends personal autonomy and thus reinforces those values associated with human agency.<sup>50</sup>

To say that bargaining can be valuable, and thus that legal enforcement of the results of bargaining can be justified, is not to say that all bargaining and contract enforcement are desirable. For example, bargaining can thwart socially desirable outcomes (such as by restricting competition), unfold where information asymmetry impairs the parties' ability to identify optimal bargains, or generally advance the parties' private interests at the cost of significant negative externalities resulting from their cooperation. Contract theory thus indicates limits on the en-

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<sup>48</sup> Scott & Stephan, *supra* note 47, at 65–67.

<sup>49</sup> For a full statement of the argument, see Goetz & Scott, *supra* note 46, at 1264–70. For discussion of the normative underpinnings of social welfare maximization as an object of legal rules, see Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *Yale L.J.* 541, 544 (2003).

<sup>50</sup> For a review of the arguments, see generally Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 *Colum. L. Rev.* 1603 (2009).

forcement of bargains, as well as justifying the devotion of public resources to some contract enforcement.

Contract theory also addresses questions of comparative institutional competency. Obstacles to desirable bargaining, such as market failures due to monopolies, information asymmetries, or externalities, might be addressed either through legislation, administrative regulation, or common-law adjudication. Any of these approaches might encompass blanket bans on bargaining or instead screen bargains to identify successful adaptations to market failures.<sup>51</sup> Contract theory is agnostic as to the normative desirability of particular solutions to these problems, or, more precisely, it maintains that these solutions should turn on empirical evidence. As a positive matter, contract theory predicts that actors will react to these problems through trial and error, and that their adaptations will reflect some of the same dynamics that motivate evolutionary theories in other fields.

Finally, contract theory addresses gap-filling in the absence of clear contractual provisions. All contracts are incomplete, in the sense that they do not adequately address all possible states of the world.<sup>52</sup> Agents assigned to manage disputes, such as courts, must determine whether a contract applies at all to the situation before it, and if so, what rule to impose in the absence of clear instructions from the contract. Both these issues entail contractual interpretation.<sup>53</sup> The current scholarly literature indicates that courts should and do pursue the task of interpretive gap-filling with the goal in mind of maximizing the joint surplus generated by the contractual relationship, viewed from the perspective of the parties to the contract. It further specifies the conditions under which the optimal interpretive strategy involves action-forcing approaches that force the parties to reveal their preferences more clearly.<sup>54</sup>

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<sup>51</sup> See R.H. Coase, *The Lighthouse in Economics*, 17 *J.L. & Econ.* 357, 374–76 (1974).

<sup>52</sup> To be precise, due to contracting costs, no contract can provide for the efficient set of obligations that the parties would prefer in each possible state of the world. Contracts thus are informationally incomplete even when they are obligatorily complete, in the sense that they provide across-the-board rules. See Scott & Stephan, *supra* note 47, at 76; Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 *Case W. Res. L. Rev.* 187, 190–91 (2005).

<sup>53</sup> For a helpful discussion of the problem, see generally Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 *Yale L.J.* 926 (2010).

<sup>54</sup> For representative discussions of the judicial role in contract interpretation and enforcement, see generally Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual*

*A. Contract Theory, International Relations, and International Law*

Earlier work lays out the case that contract theory and its model of bargaining illuminates international law generally.<sup>55</sup> I will briefly reprise those arguments here, and then focus on particular bargains that affect the contexts in which court-on-court encounters arise.

*1. States as Contracting Parties*

Most conceptions of international law and international relations depict the state as the principal actor in both undertaking transactions and generating rules that take on the character of law. Even theorists that seek to disaggregate the state, such as Slaughter, concede that states serve as the focal point for managing and responding to the pressures brought by transnational networks of public and private actors.<sup>56</sup> States in turn resemble other large, complex organizations, such as private firms and nonprofits.<sup>57</sup> Contract theory thus illuminates state behavior to the extent states bargain as a means of advancing their interests and adapt to problems encountered in bargaining, much in the manner of private organizations.

An initial conceptual hurdle is establishing the general relevance of contract theory to issues of public law. As Professors Jack Goldsmith and Daryl Levinson have observed, constitutional and international law both entail distinct problems of uncertainty, enforcement, and sovereignty due to the fundamental problem of sovereign self-limitation.<sup>58</sup> Can

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Forms, 88 N.Y.U. L. Rev. 170 (2013); Jody S. Kraus & Robert E. Scott, Contract Design and the Structure of Contractual Intent, 84 N.Y.U. L. Rev. 1023 (2009).

<sup>55</sup> For a full statement of the case, see Scott & Stephan, *supra* note 47, at 59–83. More concretely, this work demonstrates that the reasons why bargainers write contracts and courts enforce them also explain why states produce international law and various actors enforce that law. For subsequent books applying the tools of law and economics more generally to illuminate international law, see, for example, Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* 119–81 (2008); Joost Pauwelyn, *Optimal Protection of International Law: Navigating Between European Absolutism and American Voluntarism* 45–49 (2008); Eric A. Posner & Alan O. Sykes, *Economic Foundations of International Law* 63–78 (2013); Joel P. Trachtman, *The Economic Structure of International Law* 119–49 (2008).

<sup>56</sup> Slaughter, *A New World Order*, *supra* note 4, at 31–35.

<sup>57</sup> For the classic comparison of states and firms, see Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 62–75 (1970).

<sup>58</sup> See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791 (2009).

contract, which binds private actors through third-party enforcement, have anything to say about commitments by states to bind themselves?

Two responses seem apt, one technical and the other theoretical. As a technical matter, self-enforcing contracts are at the heart of contemporary contract theory.<sup>59</sup> Moreover, as Goldsmith and Levinson observe, courts and other third-party actors can enforce commitments made by states, even though their task is complicated by their position as agents of the state.<sup>60</sup> The public nature of a commitment does not erase its nature as a contract: A constitution is, among other things, a compact.

More generally, one must recognize that contemporary contract theory may have its origins in the study of private transactions, but that its intellectual apparatus is abstract, versatile, and generalizable. It is relevant, indeed fundamental, to the study of all problems of public choice, including the management of collective action problems, information asymmetries, and strategic behavior. It may not solve all puzzles presented by social behavior, but it illuminates many.<sup>61</sup>

One might raise two more specific objections to the use of contract theory to understand international relations.<sup>62</sup> First, state interests may be too different from private interests for any comparison of bargaining behaviors to work. Second, agents who act on behalf of states may have sufficiently different interests from those who act on behalf of private organizations to undermine any comparison of their bargaining. Upon careful analysis, neither of these arguments seems generally true, although in particular cases state behavior might diverge from that of comparable private actors.

First, states, as predominantly producers of public goods, might act differently than firms, which mostly supply private goods.<sup>63</sup> They might

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<sup>59</sup> My collaboration with Scott began with a contribution to a symposium on self-enforcing contracts. Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 *Wis. L. Rev.* 551.

<sup>60</sup> Goldsmith & Levinson, *supra* note 58, at 1822–24, 1840–42.

<sup>61</sup> See Scott & Stephan, *supra* note 47, at 70–75, 79–80, 148. One should not read the statement as text as claiming that contract theory is the exclusive lens for viewing these problems. Rather, it always functions in competition with other social theories. The point is simply that contract theory can contribute to our understanding of a wide range of problems, including the choice of an optimal strategy to govern court-on-court encounters.

<sup>62</sup> See *id.* at 52–58.

<sup>63</sup> I mean public goods in the economic sense, that is, goods that entail very high exclusion costs (non-excludable) and the consumption of which does not appreciably impair its consumption by others (non-rivalrous). While other conceptual definitions of public and private exist, such as the distinction between public and private law that seems ingrained in civil le-

pursue diffuse benefits saddled with staggering costs that would deter a private actor. This attribute might lead them to cooperate more, and care less about spillovers that rebound to the benefit of other states, than would private firms.

But states, whether democratically accountable or run by entrenched elites, do not normally pursue universal and global public goods. Rather, they act on behalf of their national constituencies. In their interactions with each other, they compete or cooperate based on interest, and adjust their behavior over time based on experience gleaned from earlier interactions as well as on other information obtained about their environment. History records few examples of states that consistently and systematically act contrary to national interest, which at least suggests that states face external as well as internal constraints on their behavior. True, international relations theorists and some international lawyers have evinced some interest in cosmopolitanism, a viewpoint that rejects local interests in favor of universal concerns.<sup>64</sup> But this literature is entirely aspirational, and does not purport to describe the actions of states as we currently find them.

One might also argue that private firms regularly fail, while states rarely do. States, unlike firms, cannot go bankrupt. Under the UN Charter, states supposedly enjoy a fundamental right of collective protection from armed aggression. This legal concept expresses the interest of the entire global community in preventing the annihilation of any state. Protecting the right not to be extinguished, while obviously desirable, relieves states from threats that usually drive adaptive behavior. Accordingly, even if states bargain, there is no reason to believe that their bargains will respond to evolutionary pressure.

This argument confuses form and substance. Even if we have seen little absorption of smaller states into larger entities since 1945, the salient examples from earlier years remain. The history of state security achieved by the UN Charter is, to put it gently, not unblemished. More importantly, regime changes that result in wholesale turnover of ruling

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gal systems, those conceptions have no bearing on the incentives faced by states or their agents.

<sup>64</sup> E.g., Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* passim (2006); Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* 224–72 (2006); Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, in *Political Restructuring in Europe: Ethical Perspectives* 89–122 (Chris Brown ed., 1994). For discussion and critique, see generally Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *Stan. L. Rev.* 1667 (2003).

elites have occurred often during the modern era, and ruling elites by definition make a state's international relations, bargaining included. National decisionmakers face existential pressures, even if the survival of particular states in some form is likely.<sup>65</sup>

But, one might say, concentrating on decisionmakers rather than the state raises new difficulties. There exist no residual claimants on a state's product.<sup>66</sup> Rather, all who act on behalf of the state do so on the basis of express or implicit agency relationships that may give them imperfect incentives to maximize the value of the enterprise. An extreme but realistic example would be a dictator (or a kleptocratic class) who allows foreigners systematically to loot the nation's resources while banking his payoffs offshore. A less extreme and more pervasive example would be government agents who accept financial penalties paid out of the public fisc as a means of advancing their parochial instrumental goals.<sup>67</sup> When these agents bargain on behalf of states, they have no particular reason to pursue the national interest, rather than their own.

Yet agency slack is a pervasive problem in large and complex organizations, whether states or firms. Competitive pressures drive firms to address the problem through a mixture of monitoring and bonding mechanisms.<sup>68</sup> With states, these pressures may not be as acute, but they are not absent. Regimes with especially high agency costs do fail, and states in general continue to experiment with monitoring and bonding arrangements to constrain their agents. Even peaceable Europe, supposedly immune from grave threats due to the supranational structures created in the 1950s and given greater mandates in the 1990s, recently has seen Greece and Italy put into a kind of receivership, as technocratic governments and intimidated parliaments strive to appease the global financial markets and the international financial institutions. This new

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<sup>65</sup> Cf. Daron Acemoglu & James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (2012) (discussing political economy of regime failure).

<sup>66</sup> On the distinction between residual ownership and contractual claims on a joint enterprise, see generally Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 *J. Pol. Econ.* 691 (1986).

<sup>67</sup> See, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915, 968–71 (2005); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. Chi. L. Rev.* 345, 354–57 (2000).

<sup>68</sup> See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305, 309–10 (1976); Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 *Nw. J. Int'l L. & Bus.* 470, 511–13 (1996–1997).

governmental structure might have many purposes and may not serve those states well, but one still can see this episode as an experiment in monitoring and bonding in the face of difficult policy choices.

## 2. *Enforcement of Contracts Formed by States*

The last hurdle is whether contract theory provides a useful account not only of why states make commitments in the form of international law, but also of why states look to independent courts and tribunals to enforce these commitments. To answer this question, it is useful to recall what the theory says about judicial enforcement of private contracts. These insights remain relevant in the international context.

Contract theory contrasts third-party enforcement with self-enforcement. For third-party enforcement to work, the contingency on which enforcement turns must be *contractible*. Contract theorists mean by this that the information that establishes the satisfaction (or not) of the contingency is *verifiable*, in that the information can be assembled and demonstrated to a disinterested third party at an acceptable cost. The theory distinguishes verifiable information from that which is only *observable*, that is information that parties to the relationship can discover but not convincingly demonstrate to a third party, and information that is *private*, that is either not shared or not capable of being shared.<sup>69</sup>

Even when a condition is contractible, third-party enforcement is not the only option. Self-enforcement functions through several mechanisms. A party to a relationship can retaliate against a defaulting counterparty by punishing it in some fashion, such as cutting off further exchanges, or reward a cooperating counterparty, such as by extending the relationship. Good parties can incur reputational rewards, and bad parties reputational penalties, which extend to prospective contractual partners in a position to observe the parties' behavior. Finally, a substantial portion of the population, but not everyone, has a preference for cooperation, and a distaste for opportunism, that extends beyond the direct costs and benefits that result from a partner's performance. If a substantial fraction of the relevant audience shares this taste, then even those who do not may have an incentive to cooperate.<sup>70</sup>

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<sup>69</sup> Scott & Stephan, *supra* note 47, at 67–72.

<sup>70</sup> *Id.* at 84–94. For example, an opportunist might not defect from a commitment if he knows that a substantial portion of his community will choose to incur costs to punish him even in the absence of direct payoffs for them.

Whether third-party or self-enforcement provides the better alternative for maximizing the value of commitments as to future conduct depends on many factors. Poor prospects for a future relationship will blunt the effect of both retaliation and rewards. The cost to nonparties of monitoring performance might impede the generation of reputational effects. The benefits from dishonoring a commitment might exceed the cost of transgressing a norm supporting cooperation. In these instances, third-party enforcement may offer a superior solution, providing that the parties can overcome problems of contractibility.<sup>71</sup>

Contract theorists have devoted considerable attention to the contractibility problem in recent years. They discuss a range of approaches to get around informational deficiencies. The parties might use a verifiable rule as a proxy for the observable but nonverifiable condition that would optimize the value of the contract.<sup>72</sup> Mechanisms that defer specification of a rule pending the development of further information can complement this strategy. The additional information might accrue over time, or the mechanism might operate so as to induce the disclosure of private information.<sup>73</sup> These devices can extend the range of third-party enforcement of bargains.

International relations scholars in turn have seized on contract theory's explanation for open-ended delegations of authority to third parties. Some have drawn on contract theory directly to explain why states rationally might transfer to a delegate the authority to develop policy governing a particular problem.<sup>74</sup> Simply put, the costs of downstream decisionmaking by a tribunal, including lack of clear rules for actors to internalize in advance and the risk that the tribunal might exploit indefinite instructions to pursue its own agenda, may be acceptable. The benefits achieved through lower ex ante contracting costs and the ability either to induce the disclosure of hidden information to the decisionmaker

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<sup>71</sup> *Id.* at 98–101.

<sup>72</sup> *Id.* at 72–75.

<sup>73</sup> Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 *J. Legal Stud.* 503, 506–07 (2008); Chris W. Sanchirico & George Triantis, *Evidentiary Arbitrage: The Fabrication of Evidence and the Verifiability of Contract Performance*, 24 *J.L. Econ. & Org.* 72, 89–90 (2008); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *Yale L.J.* 814, 840–44 (2006).

<sup>74</sup> See Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in *The Impact of International Law on International Cooperation: Theoretical Perspectives* 85, 92–93 (Eyal Benvenisti & Moshe Hirsch eds., 2004); Grant & Keohane, *supra* note 30, at 32; Majone, *supra* note 30, at 104; Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 *Am. J. Int'l L.* 225, 240–48 (2012).



or to take advantage of information that becomes available after formation of the contract may exceed those costs.

At first glance, this contract-theory account of indefinite delegations to third-party enforcement bodies might seem virtually identical to Alter's depiction of fiduciary courts. If so, has anything useful has been accomplished? What then distinguishes the contract-theory account from that provided by dialogue theory?

The difference may be a matter of degree, but still is significant. Contract theory focuses on the terms of all relevant agreements, including those designating the third-party enforcer. It recognizes that, in the case of a multilateral agreement in particular, the collective principals may have diverse and competing interests, just as members of a legislature do when they enact a law. But, at the end of the day, the third-party enforcer's job is to determine what the collective principals intended. Contract theory, in sum, posits that third-party enforcers will regard the terms of their authority as a prior question to be resolved based on the known or presumed intentions of those constituting that authority. Teleological considerations derived from the needs of a benefited group will be secondary and subject to override.

A critic might respond that this distinction is meaningless, because collective principals rarely reveal their intentions in any useful form and thus compel third-party agents to fall back on general principles.<sup>75</sup> This argument, however, runs the risk of abandoning the legal enterprise altogether. The great majority of legal sources have collective authors: Outside a monolithic dictatorship, nothing else is possible. For essentially the same reasons that complete specification of a contract's terms is impossible, absolute *ex ante* legal clarity is unattainable.<sup>76</sup> The interpreter of legal edicts, whether treaties, statutes, or contracts, must fall back on some kind of screen, some set of default assumptions. The logical next question becomes the criteria for setting those defaults. Under dialogue theory, the court sets them according to its preferences; under contract theory, the court begins with a conjecture about the preferences of the law's authors. Only if judges lack any powers of self-reflection, and

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<sup>75</sup> E.g., Alter, *Agents or Trustees?*, *supra* note 29, at 37 ("Principals may be divided and unable to act, and Principals may also self-censor if sanctioning a wayward Agent will cause more grief than benefit.").

<sup>76</sup> Cf. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 *Va. L. Rev.* 1089, 1095–98 (1981); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 *Nw. U. L. Rev.* 847, 848 (2000).

thus always attribute their preferences to legal authors, does this become an empty distinction.

The criticism also misses the point of second-order gap-filling rules. Contract theory recognizes that delegations of broad discretion to a third party can function as a valuable response to particular contracting problems, but it does not assume that this solution generally achieves an optimal outcome. To the contrary, it also recognizes that parties may prefer to retain control over recontracting in light of new information. Where the costs of living with outdated terms pending recontracting are less than the costs of coping with the choices made by third-party delegates, the parties would prefer, and courts therefore should impose, a formal gap-filling rule that limits the court's discretion to craft specialized terms for the relationship.<sup>77</sup> This approach does not bar principals from assigning broad-ranging rule-generating tasks to the delegated decisionmaker, but it raises the barrier to inferring such delegations from unclear instructions.

### *3. Third-Party Enforcement of Contracts in Practice—The General Case*

How do courts actually behave? A substantial literature discusses the judicial role in contract enforcement.<sup>78</sup> It establishes, as well as non-quantitative legal scholarship can establish anything, that courts tend both to embrace their role as bargain enforcers and to understand that this role includes limiting enforcement to terms that the parties either agreed upon, or would have agreed upon in the absence of contracting costs. The literature does not explore whether courts do so because they have internalized the normative values of bargaining, or because they see themselves as bound by the terms of their employment to take a certain approach to contract enforcement (in other words, to act as faithful agents of a state that values this kind of contract enforcement). For whatever reason, courts in general have behaved in a way that enhances the value of bargaining by enforcing, but not creating, contracts.

Earlier work that I produced with Scott marshaled anecdotal evidence indicating that, at a minimum, many courts and tribunals tend to enforce international law in a manner that reflects the outcomes predicted by

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<sup>77</sup> See Gilson, Sabel & Scott, *supra* note 54, at 213; Kraus & Scott, *supra* note 54, at 1028.

<sup>78</sup> Goetz & Scott, *supra* note 46. See generally William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & Econ.* 875, 877–79 (1975).

contract theory.<sup>79</sup> In particular, the architects of the bodies base the choice between formal and informal enforcement on the likely impact of the choice on the value of the relevant bargain. Put simply, contract theory not just explains why states produce international law, but also identifies when courts and tribunals will pursue the bargain's enforcement.<sup>80</sup>

What is the opposing argument? Alter offers several case studies to back up her claim that judges decide disputes on the basis of their general sense of social benefit, rather than the preferences of the actors that constitute their authority. On closer examination, however, her evidence seems rather thin.<sup>81</sup> She discusses the WTO Appellate Body's safeguards jurisprudence, the ICJ's decision regarding U.S. support for the anti-Sandinista resistance in Nicaragua, and the female-military decisions of the Luxembourg Court.<sup>82</sup> It is not clear that any of these episodes illustrates the functioning of a fiduciary court, and there are good reasons to regard the episodes as, in any event, not indicative of a general pattern.

In the case of the safeguards decisions, WTO law expressly restricts the authority of states to impose "emergency"-based limits on imports of goods to protect distressed domestic producers, and the Appellate Body has rejected arguments that would make it easier to surmount these restrictions.<sup>83</sup> The United States lost the argument, and Alter infers from that fact that the Appellate Body did not see itself as constrained by the wishes of a principal. But this conclusion ignores two salient factors, one conceptual and the other relentlessly pragmatic. First, the Appellate Body has collective principals, with no great-power veto. The United States plausibly might have agreed to a process that occasionally would disapprove of some of its policies, especially if those policies emanate more from Congress than the Executive.<sup>84</sup> Second, the structure of WTO dispute resolution makes violations costless to states, as long as they

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<sup>79</sup> Scott & Stephan, *supra* note 47, at 147–79.

<sup>80</sup> For a fuller discussion of the normative implications of enforcement of international law through courts and tribunals, see Paul B. Stephan, *Privatizing International Law*, 97 Va. L. Rev. 1573 (2011).

<sup>81</sup> More generally, Leib, Ponet & Serota, *supra* note 31, develop the normative arguments for trustee courts but do not demonstrate extensive practice consistent with this vision of adjudication.

<sup>82</sup> See Alter, *The European Court's Political Power*, *supra* note 36, at 251–58.

<sup>83</sup> The precise issue was whether the 1994 Uruguay Round Agreements changed prior law that had mandated that the domestic crisis be unforeseen. Alter, *Agents or Trustees?*, *supra* note 29, at 48–49.

<sup>84</sup> For development of the argument, see Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 Va. L. Rev. 251 (2006).

withdraw the offending measure once the Appellate Body has determined its illegality. In the case of safeguards, which by their nature are likely to be temporary, this feature means that a government can impose a measure to appease domestic constituencies and then withdraw it after WTO adjudication without incurring either an international sanction or a domestic penalty. Moreover, although the litigating state cannot impose exactly the same safeguard again, it can impose new ones on different imports without any fear of consequences, no matter how hard the Appellate Body precedent might become.<sup>85</sup> In short, the Appellate Body safeguards decisions, if anything, advanced the interests of a great power's government.

As for the Nicaragua case, both the conceptual point and a pragmatic one apply. The ICJ, like the WTO Appellate Body, has a collective principal, and as a collective most members of the UN desire rules that restrain the use of force by great powers. In that sense, the ICJ decision simply reflected the desires of the overwhelming majority of its principals.<sup>86</sup> As one of the contracting principals, of course, the United States might have retained a veto over ICJ activity in this area. Indeed, in the case at hand, the United States asserted that it had made exactly such a valid reservation to the Court's jurisdiction. In the wake of the ICJ's refusal to honor the reservation, the United States recontracted with what it saw as an unfaithful agent, withdrawing its general consent to ICJ jurisdiction. Since the episode, the ICJ's relationship with the United States, as well as with other great powers, has deteriorated.<sup>87</sup>

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<sup>85</sup> In essence, WTO dispute resolution does not provide for compensation for victims of an illegal measure. Rather, states may retaliate against illegal conduct that continues after a finding of illegality. Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 *Geo. Wash. L. Rev.* 102, 102–05 (2011).

<sup>86</sup> For a study of ICJ armed-force decisions that documents the institution's hostility to projections of military power, see John Norton Moore, *Jus ad Bellum Before the International Court of Justice*, 52 *Va. J. Int'l L.* 903, 916–46 (2012).

<sup>87</sup> Alter downplays the significance of this recontracting, arguing that the United States lost more from this move than the ICJ did. Her evidence, however, consists of cheerleading academic work, exercises of (pro-ICJ) advocacy more than serious scholarship. Alter, *Agents or Trustees?*, supra note 29, at 52. Since the 1987 episode, the United States has continued its near total withdrawal from ICJ jurisdiction, with France following in its wake. In effect, the ICJ's authority has become confined to disputes involving European countries or a range of developing countries, with significant actors such as Brazil, China, and Russia staying out, and India carving out so many exceptions to its consent as effectively to nullify any jurisdiction. See Born, supra note 11, at 803–08.

Finally, Alter considers the practice of the Luxembourg Court in extending Community antidiscrimination legislation to cover certain military functions. The legislation rests on an express treaty provision and contains a carve-out for activities where “the sex of the worker constitutes a determining factor.”<sup>88</sup> It does not have any express exception for military activities, but several powerful states did ban women from work that supported combat and maintained that their rules complied with European law. The Luxembourg Court rejected any categorical exception for the military, but did allow states to justify their particular bans.<sup>89</sup> Alter regards the assertion of jurisdiction over military organization as a remarkable instance of a court rewriting its terms of reference to act as a policy innovator. Given that the relevant legislation did not provide for a categorical military exception, however, it is hard to imagine how else the Court have acted, were it to serve as a faithful agent in applying valid Community laws. The fact that the Court did not exercise this jurisdiction so as to transform national practice, but rather largely upheld most of the national rules that it reviewed, further undermines the proffered explanation.<sup>90</sup>

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<sup>88</sup> Alter, *The European Court’s Political Power*, supra note 36, at 254 (citing Council Directive 76/207, art. 2(2), 1976 O.J. (L 39/40) (Council of European Communities)).

<sup>89</sup> Case C-186/01, *Dory v. Fed. Republic of Ger.*, 2003 E.C.R. I-2508 (upholding German conscription rules); Case C-285/98, *Kreil v. Fed. Republic of Ger.*, 2000 E.C.R. I-69 (striking down German limits on female employment in the military as overbroad); Case C-273/97, *Sirdar v. Army Bd.*, 1999 E.C.R. I-7403 (upholding U.K. ban on women in Royal Marines).

<sup>90</sup> In Europe, the military is a rather small and insignificant establishment, and judicial interference in its structure does not raise the same kind of issues that would arise in great powers. In 1999, the year of the litigation discussed by Alter, the 15 members of the EU spent 1.9% of their collective gross national product on military expenditures. That year, the United States spent 3%, Russia 3.4%, India 3.1%, Pakistan 3.8%, and Israel 8.4%. For data on military spending, see Stockholm International Peace Research Institute, supra note 5.

In her more recent work, Alter has scaled back her account of international tribunal autonomy and does not revisit these particular case histories. Alter, *The New Terrain of International Law*, supra note 27. She concedes that “[t]he multiple roles of [international courts] reveal that these courts do not exist solely to compromise national sovereignty.” Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, in *Interdisciplinary Perspectives on International Law and International Relations – The State of the Art* 345, 366 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013). Rather, she observes, tribunals have multiple functions, in some instances leading to checking supranational authority and reinforcing enforcement of national rules. Alter, *The New Terrain of International Law*, supra note 27, at 4–41. She also concedes that some international courts function more like agents, although others conform to her trustee model. *Id.* at 43–49.

At the end of the day, what distinguishes contract theory from dialogue theory as a positive account of tribunal structure and international judicial encounters is a prediction about the distribution of judicial behavior. Dialogue theory presumes that judges, whether domestic or international, and whether serving in permanent or ad hoc tribunals, receive a relatively broad mandate from their principals, even though the terms of particular mandates may vary. Configuring the mandate as a trustee relationship for the benefits of persons other than the principals simply underlines how long the leash is. Contract theory, by contrast, acknowledges that such delegations are possible but predicts that they will be exceptional.<sup>91</sup> More often, contract theory asserts, courts will regard themselves as bound by formalistic rules that limit their ability to improvise in the face of obscure instructions.

In sum, contract theory does provide a distinctive account of judicial behavior, whether in national courts or international tribunals. The relevant question here is whether that account does a better job than dialogue theory does of explaining court-on-court encounters. To conduct that test, one first must specify exactly what contract theory indicates about these encounters.

### *B. Contract Theory and Court-on-Court Encounters*

Contract theory provides an explanation not just for the enforcement of international law in general, but for the results of court-on-court encounters that are this Article's focus. This explanation rests on the proposition that these encounters unfold in the context of implicit bargains between actors and host states that inform what the courts and tribunals do. Moreover, explicit bargains among states also affect the capacities of courts and tribunals. Both actors and states make choices in a bargaining

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<sup>91</sup> A focal point of much of the scholarship on international tribunals is human rights courts. Because human rights commitments mostly bind states with respect to their own populations, rather than in their state-to-state dealings (as conventional public international legal obligations do) or with respect to foreign nationals (as investment treaties do), some scholars doubt that the conventional exchange and investment framework in which contracts operate can illuminate these obligations. E.g., Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *Int'l Org.* 217, 219–20 (2000) (explaining broad delegations to human rights courts as a rational precommitment on the part of newly established democracies to prevent backsliding). Contract theory scholarship does not deny the point, but also argues that these commitments might also serve as an inducement to foreign trade and investment. Scott & Stephan, *supra* note 47, at 164. Which explanation comes closer to the truth is a matter for empirical investigation.

context that affect the competence of courts and tribunals. The behavior of courts and tribunals in turn is generally consistent with the terms of these bargains, both implicit and explicit.

### *1. The Implicit Bargain of Territorial Sovereignty*

All significant litigation that engenders court-on-court encounters stems from an actor's decision to engage with one nation's economy while conducting some other activity elsewhere. Only transnational disputes have the potential to invoke multiple courts. Disputes take on a transnational character because components of a transaction—buying, selling, or making—occur in multiple countries. The producer might be a national of country *A*, its production facility might be a factory in country *B*, and the largest market for the product might be in country *C*. The producer also might own assets in country *D*. Depending on how events unfold, the courts of countries *A*, *B*, *C*, or *D*, as well as various international tribunals, might wind up judging a dispute involving this actor.

One can portray the actor's business choices, as well as the various interested states' regulatory decisions, as embedded within a series of bargains. First, the decision to operate transnationally is optional, in the sense that a firm chooses to conduct some operations outside its home country or park its assets abroad.<sup>92</sup> Second, the choice entails clear and foreseeable consequences. The international legal system functions with a baseline of territorial sovereignty. The default rule, absent consensual adjustments, is that a sovereign can do what it wills within its own territory. By operating in a particular place, an actor thus submits itself to the jurisdiction of the local sovereign. Regulatory exposure is the *quid pro quo* for the opportunity to engage in transactions on its territory.

The idea that doing something on a nation's territory means submitting to the authority of its sovereign is fundamental to the international system. Chief Justice Marshall provides a clear statement of the principle:

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<sup>92</sup> I am subsuming in the concept of choice the idea that a firm always has the option of shutting down rather than going forward in the face of economic adversity. Thus, even if transnational operations are the only way that a business can survive, there remains a choice between going ahead or liquidating. Put simply, metaphorical life-and-death decisions in business are not the same as actual life-and-death decisions made by real people.

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.

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.<sup>93</sup>

Contemporary debates involve not the validity of this proposition, but rather the extent to which sovereigns have agreed through treaties and custom to encroachments on their exclusive and absolute jurisdiction. Sovereign authority is the foundation; its consensual surrender is exceptional and must rest on international law. Instruments such as the UN Charter expressly acknowledge this baseline when they endorse the concepts of sovereign equality and domestic jurisdiction.<sup>94</sup>

International law's binding of sovereignty to territory goes back at least to the Westphalian settlement.<sup>95</sup> It reflected a deep historical reality

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<sup>93</sup> *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812). For evidence of the contemporary resonance of these words, see *Jurisdictional Immunities of the State* (Ger. v. It.), 2013 I.C.J. 162–63, ¶ 5 (Feb. 3) (separate concurring opinion of Judge Keith), which quotes this passage in the course of discussing the customary international law of sovereign immunity.

<sup>94</sup> E.g., U.N. Charter art. 2, para. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”); id. art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .”). For scholarly work that depicts international law as concerned fundamentally with exchanges among sovereigns of regulatory entitlements that rest on the principle of territorial sovereignty, see, for example, Pauwelyn, *supra* note 55, at 26–45; Trachtman, *supra* note 55.

<sup>95</sup> Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, art. 64, Oct. 24, 1648, *reprinted in* A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers 1, 19 (London, J. Darby 1710) (“And to prevent for the future any Differences arising in the Politick State, all and every one of the Electors, Princes and States of the Roman Empire, are so establish'd and confirm'd in their antient Rights, Prerogatives, Libertys, Privileges, free exercise of Territorial Right, as well Ecclesiastick, as Politick Lordships, Regales, by virtue of this present Transaction: that they never can or ought to be molested therein by any whomsoever upon any manner of pretence.”); id. art. 76, at 23 (“all the Rights, Regales and Appurtenances, without any reserve, shall belong to the most Christian King, and shall be for ever incorporated with the Kingdom of France, with all manner of Jurisdiction and Sovereignty, without any contradiction from the Emperor, the Empire, House of Austria, or any other; so that no Emperor, or any Prince of the House of Austria, shall, or ever ought to usurp, nor so much as pretend any Right and



as well as a profound technological insight: Until very recently, significant human activity always had a location, and clarifying authority over particular locations advanced accountability, predictability, and thus the capacity of people to engage each other in a manner that might lead to fulfillment and happiness. In an age when humans could not interact easily at a distance, due to limits in the means of travel and communication, physical proximity meant everything. Power and authority turned on location: Legitimate force, namely that exercised or authorized by the sovereign, could be applied only to people and things within the sovereign's grasp, and until fairly recently that grasp was local. Regulatory jurisdiction thus rested on the extant technology of state power.

In today's world of electronic commerce, Internet platforms, and highly mobile financial assets, this emphasis on locality might seem outdated. As location becomes more ephemeral and contestable, its significance as a criterion for regulatory jurisdiction might diminish. But it has hardly disappeared. Even electronic events have a location, because the person who commands such events exists somewhere. And the mobility of assets complicates, but does not negate, the importance of location.<sup>96</sup>

The core principle of territoriality not only divides regulatory power among sovereigns, but has direct implications for private persons. From the point of view of the transnational actor, submitting oneself to a sovereign's jurisdiction means accepting that place as one finds it, warts and all. Instability comes with territory: Reasonable expectations must include the possibility that a current, business-friendly regime may give

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Power over the said Countrys, as well on this, as the other side the Rhine."); id. art. 120, at 35 ("For the greater Firmness of all and every one of these Articles, this present Transaction shall serve for a perpetual Law and establish'd Sanction of the Empire, to be inserted like other fundamental Laws and Constitutions of the Empire in the Acts of the next Diet of the Empire, and the Imperial Capitulation; binding no less the absent than the present, the Ecclesiasticks than Seculars, whether they be States of the Empire or not: insomuch as that it shall be a prescrib'd Rule, perpetually to be follow'd, as well by the Imperial Counsellors and Officers, as those of other Lords, and all Judges and Officers of Courts of Justice.").

<sup>96</sup>For ruminations on territoriality in international law once locality lost its self-evidence, see, for example, Ralf Michaels, *Territorial Jurisdiction after Territoriality*, in *Globalisation and Jurisdiction* 105, 120–21 (Piet Jan Slot & Mielle Bultermann eds., 2004); Joachim Zekoll, *Jurisdiction in Cyberspace*, in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* 341, 341–43 (Günther Handl, Joachim Zekoll & Peer Zumbansen eds., 2012); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 *Am. J. Comp. L.* 631, 632–35 (2009). For the argument that territoriality and location still matter even in the age of the Internet, see Jack L. Goldsmith & Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* 1–10 (2006).

way to xenophobic populists. Actors who choose to buy, sell, or make in a particular place must be understood to have accepted the risks that come with that choice.

The law does not leave actors with only an all-or-nothing choice, however. A nearly universal feature of business operations is asset partitioning. Various legal forms allow actors to manage their risk by partitioning assets from liability exposure. Separate legal personality, which segregates a legal entity's liability from that of its owners, is the most prominent. Such partitioning is rarely absolute, but instead distinguishes between acceptable and disapproved uses. Breaches of the rules for partitioning result in veil-piercing and other mechanisms that override the effect of the partition.<sup>97</sup>

The most conventional form of partitioning involves the use of a business form that protects the business owner from unlimited liability for activity occurring within the form. Absent veil-piercing, for example, shareholders of a typical U.S. corporation risk losing only their investment in the firm if the corporation incurs liability. What is not as widely appreciated is that the international law principle of territorial sovereignty functions in the same manner. Assets located in one jurisdiction are not automatically subject to attachment and execution because of liability arising in another. Rather, some concession of sovereignty, attributable to bargains expressed in customary international law or a treaty, is a prerequisite of enforcement. Such concessions rarely are absolute, but rather come with conditions and limitations that define the bargain.

Contract theory, in short, offers a comprehensive account of civil liability resulting from transnational conduct. First, the foundational international contract pursuant to which all states recognize each other's territorial sovereignty means that assets deployed within a particular jurisdiction can be seen as hostage to that jurisdiction's authority. Absent some supervening constraint on the host sovereign (which itself must arise out of international contracts, either explicit or implicit), the owner of those assets must be considered as having submitted them to the vagaries of local justice. Second, asset partitioning takes on considerable importance, because it separates those assets subject to local risks from those that are not. Because local sovereignty is not global sover-

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<sup>97</sup> On asset partitioning, see Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *Yale L.J.* 387, 393–98 (2000).

eignty, some mechanism is needed to distinguish local assets from those not placed at risk by the implicit bargain.

For purposes of understanding court-on-court encounters, it suffices to make two general points. First, some kind of asset partitioning, which allows the owner of assets to allocate the risks associated with them on an ex ante basis, is widely accepted around the world and rests on highly plausible welfarist arguments.<sup>98</sup> Second, asset partitioning is not impregnable. Some kind of corporate-veil-piercing rule also is widely accepted and seems to advance welfare.<sup>99</sup> In the case of the 1984 Bhopal disaster, for example, Union Carbide, a U.S. firm, found itself liable to the Indian victims, even though Union Carbide India Limited, the Indian legal entity directly responsible for the tragic gas leak, was majority-owned by Indian nationals and legally distinct from Union Carbide. Allegations of a failure to exercise due care in the design of the plant and the provision of supervisory services sufficed to pierce the veil represented by the Indian entity.<sup>100</sup> The partitioning of Union Carbide's Indian and U.S. assets, in other words, did not immunize its U.S. assets from liability, but rather constructed only pregnable barriers.<sup>101</sup>

Combining territorial sovereignty with asset partitioning, one can derive a contract-derived rule that will guide courts in their interactions with other courts. Foreign judicial proceedings that affect assets found in that jurisdiction normally should receive maximum deference. By doing business in that jurisdiction, an actor agrees to accept whatever risk inheres in the vagaries of that country's judicial system. This is part of the implicit bargain under which submission to state actions is the quid pro quo for operating in a jurisdiction. But this risk does not extend to assets located elsewhere. The decision where to locate assets effectively partitions those assets, whether the owner employs formal devices such as separate corporate form or not. Accordingly, efforts to export the effect

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<sup>98</sup> Id. at 404.

<sup>99</sup> Id. at 400–01; see, e.g., *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628–33 (1983) (interweaving international and federal common law to develop standard for piercing veil of state-owned entity).

<sup>100</sup> *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195, 198–200 (2d Cir. 1987).

<sup>101</sup> Union Carbide chose to submit all issues, including the question of its liability for negligent design and supervision, to the Indian justice system. The U.S. courts later ruled that the settlement reached in the Indian proceedings precluded relitigation of those claims in the United States, without conducting an inquiry into the adequacy or fairness of the Indian process. *Bano v. Union Carbide Corp.*, 273 F.3d 120, 129–30 (2d Cir. 2001).

of local judicial outcomes, such as by foreign enforcement of a judgment, do not require anything like the kind of deference owed a tribunal that disposes of local property.

This rule is surprisingly powerful. It provides a rationale for a variety of observed judicial behavior, as the next section of this Article will demonstrate. To appreciate fully its scope and validity, however, one must take into account a parallel set of bargains, namely those allocating judicial competence. The first set of rules, one must remember, is simply a default that enables interested actors to contract for alternative distributions of entitlements. I next consider the express bargains that states have reached concerning regulatory entitlements, asset partitioning, and judicial authority.

## 2. *Explicit Bargains on Judicial Competence*

The implicit bargain of territorial sovereignty has drawbacks from the point of view of sovereigns as well as private actors. The lack of any checks on the host sovereign's discretion may discourage holders of foreign assets from undertaking valuable transactions, including doing business with the sovereign and investing in its territory. The sovereign thus has an incentive to contract out of its complete regulatory discretion so as to enhance the volume and value of these transactions. Even in the era when the technology for simultaneous distant relations did not exist, sovereigns and subjects alike could profit from transnational cooperation. Thus the traditional formulation of absolute territorial sovereignty always contained a proviso permitting the sovereign to consent to limits on its authority in deference to some international project.<sup>102</sup> Revolutions in transportation and, especially, communications technology have greatly expanded the possibilities for cooperative gains, leading to even more extensive surrenders of territorial sovereignty.<sup>103</sup>

Under international law, limits on sovereign regulatory discretion come through contract.<sup>104</sup> A sovereign might, for example, commit not

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<sup>102</sup> See *supra* text accompanying note 93.

<sup>103</sup> See, e.g., Michaels, *supra* note 96, at 120–21; Zekoll, *supra* note 96, at 341–43; Buxbaum, *supra* note 96, at 632–35. For the argument that territoriality and location still matters even in the age of the Internet, see Goldsmith & Wu, *supra* note 96, at 1–10.

<sup>104</sup> Over the last quarter century, some theorists have maintained that international law also comprises a set of imperative rules, called *jus cogens* norms, that exist independently of state consent. At the moment many advocates see these norms as embracing and protecting human rights, although earlier versions of the concept were invoked by states seeking to insulate

to change the tax and regulatory rules governing a foreign investment (what is known in investment law as a stabilization clause). Alternatively, it might cede to another sovereign either full or shared authority to regulate a transaction on its territory.<sup>105</sup> Many instances of this practice exist.

Commitments based on international law, however, raise a follow-on problem of enforcement. While violating an express promise might cost a sovereign even more in reputational terms than would general arbitrariness, foreign counterparties might want more credible assurance that the sovereign either will not breach, or will pay compensation if it does. Sovereigns also might want to make this secondary promise credible to increase its reliability and therefore value. Finally, a sovereign might welcome the opportunity to convince well regarded third-party decisionmakers that it did not breach this commitment, so as to protect its reputation for reliability and probity.

A common device to bolster the credibility of sovereign promises is a contractual waiver of defenses to a tribunal's jurisdiction. If the local courts have a reputation for impartiality and holding their sovereign to account, a waiver of sovereign immunity may suffice. If the local courts are suspect, the sovereign might need to contract for an alternative forum as well as to waive its immunity. Sovereign borrowing, for example, normally combines an immunity waiver with a designation of a particular foreign jurisdiction, typically New York or London, as having the authority to hear disputes. These contracts allow sovereigns to recruit

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their practices from international human-rights-law scrutiny. It is evident, then, that the assertion that some part of international law does not depend on state consent, and thus on international agreement, is controversial and potentially destabilizing of international order. For further discussion, see Paul B. Stephan, *The Political Economy of Jus Cogens*, 44 *Vand. J. Transnat'l L.* 1073 (2011).

A separate and distinct issue is state regulation of contracts, including state refusal to enforce contracts that contravene local public policy. One should see this behavior as grounded on international law's foundational principle of territorial sovereignty. Thus, states both exercise the authority to disregard private contracts (including contracts providing for a forum for disputes) and memorialize the authority to privilege local public policy through exceptions to treaties that otherwise call for greater cooperation and respect for foreign judicial acts.

<sup>105</sup> In particular, a state might cede to a collective of sovereigns, organized internationally, full or partial discretion to regulate matters that otherwise would be within its exclusive territorial sovereignty. See Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 *L. & Contemp. Probs.* 1, 1–2 (2008); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 *U. Ill. L. Rev.* 71, 74–75.

the credibility of these experienced and well regarded courts to the task of lowering the price of services that it purchases.<sup>106</sup>

A quotidian rational-behavior model would posit that sovereigns (or other sophisticated actors seeking to address the deficiencies of the local dispute resolution system) will make such commitments when the benefits from their adoption exceed the cost of making them. Sovereigns might do this episodically, by linking third-party dispute resolution to particular transactions, or wholesale, by making general, across-the-board commitments. Most often, the across-the-board agreements take the form of state-to-state treaties that provide third-party benefits to private actors.

The treaties that allocate judicial competence fall into three categories. First, regional human rights conventions provide some protection for property rights, more or less along the lines of the Takings Clause of the U.S. Constitution.<sup>107</sup> These instruments also establish international tribunals that have the authority to enforce these rights. Second, an extensive network of bilateral investment treaties (“BITs”) contains commitments to limit sovereign discretion over the assets of foreign businesses.<sup>108</sup> Third, two multilateral conventions—the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Washington Convention on the Settlement of Investment Disputes between States and Investors of Other States—empower ad hoc arbitration tribunals that can enforce both particular deals between actors and states and the rights specified in BITs.<sup>109</sup> Together, these treaties function as contracts that allow sovereigns to extend the range of bargaining over business transactions by making their commitments more reliable.

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<sup>106</sup> See, e.g., *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521–22 (2d Cir. 1985) (upholding contractual right of bank to sue sovereign debtor in U.S. court).

<sup>107</sup> Normally less. The European Convention on Human Rights, for example, confines its protection to a provision in a later protocol to the Convention. Recent practice of the Strasbourg Court, as noted below, has been to minimize protection, especially for exactly those persons with the most to lose. See Stephan, *supra* note 2, at 39–42.

It is worth remembering that the U.S. Takings Clause had its origin as part of a package of provisions intended to make the United States more attractive to foreign merchants and investors. Paul B. Stephan, *Redistributive Litigation—Judicial Innovation, Private Expectations and the Shadow of International Law*, 88 *Va. L. Rev.* 789, 820–21 (2002).

<sup>108</sup> Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* 129–56 (1995); Born, *supra* note 11, at 831–44.

<sup>109</sup> See Washington Convention, *supra* note 11; New York Convention, *supra* note 11.

Contract theory predicts that courts will take these agreements seriously. BITs, as well as the treaties that enable enforcement of arbitral awards, represent a surrender of the exclusive territorial sovereignty that the fundamental international law bargain assigns to states. States presumably give up this authority because it suits their interests. Although BITs are controversial, their supporters maintain, and states seem to believe, that investor reassurance will both lead to more foreign direct investment, with its attendant collateral benefits, and induce a virtuous competition between local courts and international arbitral tribunals to improve the delivery of legal security to all people engaged in economic transactions.

### *3. The Judge and Contract Theory*

One still must explain why judges might take contracts seriously. Dialogue theory at least implies a set of judicial attributes, including socialization, empire-building, and mutual protection. Contract theory similarly must both account for judges as we find them and posit the character of a good judge.

Traditional law-and-economics scholarship supposed that evolutionary pressure in the selection of both judges and lawsuits weeds out outcomes that diminish welfare. Contract enforcement, properly cabined, does create value. A process of natural selection thus might promote judges who internalize the value of welfare maximization and thus find the task of contract enforcement attractive.

One does not have to insist on this rather naïve account of judicial incentives, however, to embrace a contract account of judging. Judges might enforce contracts because they believe that they have a general obligation to carry out instructions from authoritative lawmakers, and that these instructions comprise contract enforcement. They might honor this general obligation, as well as the specific instance of contract enforcement, for any of several reasons: They might want to be seen as faithful agents, in the sense that they don't want others to think that they disobey lawful commands; they might fear that if they disobey lawful instructions, other judges will too, leading to a harmful norm cascade ending up with judicial freebooting and anarchy; they might welcome the freedom from responsibility that comes from obeying rather than resisting an order; and they might fear opprobrium and other costs that come from disregarding their obligations as faithful agents.

Whether judges and arbiters have internalized the values that bargained commitments express or (I think more likely) believe that a condition of their employment is using their powers to enforce contracts, they will take contracts seriously. Contract theory indicates that they should treat the rules derived from legitimate bargaining as authoritative. This indication would apply both to the basic background norm of territorial sovereignty, with all that this norm implies, and to the implicit and explicit agreements to depart from this baseline.

To summarize, contract theory predicts that courts, when considering their relationship with other courts and tribunals, base their behavior on several considerations: (1) which court has jurisdiction over the assets involved in the dispute; (2) whether the parties have contracted for jurisdiction in a particular forum; (3) whether the parties otherwise have addressed dispute resolution in a contract, such as by waiving immunity from judicial process; and (4) whether treaties (express state-to-state contracts) or customary international law (implicit state-to-state contracts) address the issue of judicial competence. The theory predicts these considerations will explain most outcomes of court-on-court encounters.

Note also what this theory does not predict. It does not indicate that courts will seek to open dialogues with other courts to promote common projects. It does not rule out coercion as a means of holding other courts to the terms of particular contracts. In short, it corresponds to a world where indifference as well as engagement characterizes court-on-court encounters, and where the choice between the two turns on explicit and implicit contracts.

Here I have sketched, rather than fully drawn, an account of court-on-court encounters that can compete with those that focus on dialogue and the global rule of law. The comparison proceeds on two fronts: Which theory does a better job of explaining judicial behavior as we find it in the present world, and which provides a more appealing vision of how we would like the global community of judges to behave? I consider both questions in the next Part.

#### IV. DIALOGUE AND CONTRACT THEORIES COMPARED: JUDICIAL PRACTICE

In the first Part of this Article, I developed a typology for court-on-court encounters. Here I return to that typology to review actual judicial practice. Both types are idealized, in the sense that one rarely sees pure indifference or full engagement in the real world. The question thus be-



comes which theory does a better job of predicting the observed mix of indifference and engagement in judicial behavior.

On balance, the model derived from contract theory provides a better account of existing judicial practice than does the dialogue model. Moreover, as a normative matter, the bargain approach rests on clearer and perhaps more widely accepted values. The general judicial approach to enforcing contracts, including those that cut off dialogue, thus is defensible, even if not unequivocally morally superior.

#### *A. Retrospective Encounters—Finding Foreign Law*

Strategies for finding and applying foreign law are as varied as the contexts in which the question arises. The home court seeking to determine foreign law faces two fundamental challenges. First, it must determine what kinds of evidence it will entertain to ascertain the content of foreign law. Second, it must determine what it will do with evidence of foreign judicial practice in cases where the practice suggests inferences rather than direct answers to questions.<sup>110</sup>

On the issue of evidence, the home court might limit its inquiry to a few clear and widely available sources, or instead look wherever it can for information about the content of foreign law, judicial practice included. Courts might, for example, permit battles of experts over the significance and interpretation of particular foreign court decisions. Opening up the range of admissible evidence promotes engagement; shutting it down reflects indifference.

An extreme form of indifference would be to disregard foreign judicial practice altogether and regard the foreign executive as the authoritative exponent of its country's law. The act of state doctrine, an internationally recognized but highly controversial legal rule, does just this. Where it applies, the doctrine obligates a home court to accept a foreign

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<sup>110</sup> I do not consider here the prior question of what rules courts follow to decide which law to look to for a rule of decision. One should note, however, two things about this complex field. First, courts work hard to uphold private contracts that select applicable law. See Joachim Zekoll, Michael Collins & George Rutherglen, *Transnational Civil Litigation* 533–54 (2013). Second, in the absence of contractual choices, the modern trend has been in the direction of using formal rules that avoid extensive evaluation of the interests and practices of foreign courts when deciding which jurisdiction's law to apply. E.g., *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844 (7th Cir. 1999); *Blue Sky One v. Mahan Air*, [2010] EWHC (Comm) 631, [172]–[185] (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/Comm/2010/631.html>. Both these tendencies resonate more with contract theory than with dialogue theory.

official act at face value, no matter what evidence might exist that a foreign court would invalidate the act.<sup>111</sup>

The scope of the act of state doctrine and the existence of exceptions are unclear.<sup>112</sup> Many scholars criticize it and some call for its abolition. Within its domain, however, it requires unquestioning acceptance of the determinations of foreign governments, that is, resolute indifference to foreign courts.

Symmetrically, the act of state doctrine does not apply to judicial judgments themselves.<sup>113</sup> Were it otherwise, foreign judgments would enjoy automatic preclusive effect on litigation in the home court.<sup>114</sup> If the foreign judgment were automatically to have full legal effect in the home jurisdiction, it would determine the ownership of assets in the home jurisdiction. This outcome, in the absence of an international

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<sup>111</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964) (noting that the doctrine applies to determining ownership of property located in the territory of the state that seized it; the legality of seizure under local law is irrelevant). To be clear, the doctrine is recognized in many jurisdictions, but international law itself does not require its application. *Id.* at 427 (noting that the doctrine is “compelled by neither international law nor the Constitution”).

<sup>112</sup> *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990) (holding that the doctrine is limited to disputes over the validity of foreign official acts); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693–95 (1976) (noting that not all official acts count as acts of state); *id.* at 695–706 (plurality opinion) (recognizing commercial exception); *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767–69 (1972) (discussing the counterclaim exception); *Sabbatino*, 376 U.S. at 436–37 (holding that the doctrine applies to determine ownership of property located in the territory of the state that seized it; the legality of seizure under local law is irrelevant); *Sarei v. Rio Tinto, P.L.C.*, 671 F.3d 736, 757 (9th Cir. 2011) (asserting *jus cogens* exception), vacated, 133 S. Ct. 1995 (2013). On the act of state doctrine, see Paul B. Stephan, *International Law and Competition Policy*, in *Competition and the Role of the State* (D. Daniel Sokol et al. eds., forthcoming 2014) (manuscript at 15–22) (on file with the Virginia Law Review Association); Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 325–30 (1986); Anne-Marie [Slaughter] Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 Colum. L. Rev. 1907, 1909–13 (1992).

<sup>113</sup> *Yukos Capital S.A.R.L. v. Rosneft Oil Co.*, [2012] EWCA (Civ) 855, [2013] 1 All E.R. 223 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/855.html>. The dispute involved a Russian arbitral award that a Russian court had subsequently invalidated. The claimant, who prevailed in the arbitration, sought to enforce the award in the United Kingdom, where the losing party had substantial assets. *Id.* at [3]–[7]. The Court of Appeals ruled that the Russian court decision would not have automatic preclusive effect with respect to the claimant’s right to enforce the award, which U.K. law otherwise respected. The claimant thus could attack the Russian court decision by demonstrating that it was inconsistent with U.K. public policy. *Id.* at [125]–[133].

<sup>114</sup> Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 812–13, 1114 (5th ed. 2011).

agreement to do so, in turn would violate the concept of asset partitioning that is a corollary to the principle of territorial sovereignty.<sup>115</sup>

Outside the act-of-state doctrine, foreign court decisions do have some bearing on a home court's determination of foreign law, but less than what dialogue theory would suggest. U.S. practice on the admissibility of evidence regarding foreign law is complicated but trending toward indifference.<sup>116</sup> Rule 44.1 of the Federal Rules of Civil Procedure cedes considerable discretion to the trial court.<sup>117</sup> It states that a judge may consider any evidence of the content of foreign law, regardless of the otherwise applicable rules of evidence and regardless of the parties' submissions or lack thereof. At the end of the day, however, the question is a matter of law, not fact, and thus fully reviewable on appeal. One significant appellate decision, in turn, has indicated significant limits on what a court may consider.

In *Bodum U.S.A. v. La Cafetière, Inc.*, the United States Court of Appeals for the Seventh Circuit directed trial courts to curtail their past practice of hearing expert testimony. Judge Easterbrook's opinion argued:

Sometimes federal courts must interpret foreign statutes or decisions that have not been translated into English or glossed in treatises or other sources. Then experts' declarations and testimony may be essential. But French law, and the law of most other nations that engage in extensive international commerce, is widely available in English. Judges can use not only accepted (sometimes official) translations of statutes and decisions but also ample secondary literature, such as treatises and scholarly commentary. It is no more necessary to resort

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<sup>115</sup> For discussion of the rules for recognition and enforcement of foreign judgments and their basis in contract theory, see *infra* notes 145–64 and accompanying text.

<sup>116</sup> I do not discuss European practice in any detail. It is instructive, though, that several decades ago, most members of the Council of Europe entered into a treaty that, in theory, would allow a strongly dialogic relationship among their courts by permitting one court to certify to another country's judiciary questions about the latter country's law. European Convention on Information on Foreign Law, June 7, 1968, E.T.S. No. 62. As a matter of practice, that Convention is rarely invoked. Commission Green Paper on Maintenance Obligations, at 14, COM (2004) 254 final (Apr. 15, 2004), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0254:FIN:EN:PDF>. The reluctance of European courts to use this tool is inconsistent with dialogue theory.

<sup>117</sup> Rule 44.1 states: "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1.

to expert declarations about the law of France than about the law of Louisiana, which had its origins in the French civil code, or the law of Puerto Rico, whose origins are in the Spanish civil code.<sup>118</sup>

Accordingly, trial courts usually should consider only the sources that an appellate court might consult, namely publicly available materials.<sup>119</sup>

The decision in effect instructs judges not to try to get into the minds of their foreign colleagues. They should not attempt a deep reading of the intentions, influences, or context of the foreign sources. By rejecting expert opinion, it excludes additional information that might enrich the interpretive act (at the cost of bias and waste, the court asserts). Instead, the court looks for the objective meaning of acts of foreign law, judicial decision included. The stance is, in short, indifferent.

Easterbrook's indifferent approach to finding foreign law binds one important circuit and elsewhere has enjoyed a generally positive reception.<sup>120</sup> It conforms to the implicit bargain generated by the principle of territorial sovereignty. Foreign law applies to a transaction because someone did something that brought about subjugation to foreign prescriptive jurisdiction. The transactor, the implicit bargain holds, must be seen as accepting the law there as he or she finds it. The objective evidence of that law, including the interpretations that appear on the face of decisions by that jurisdiction's tribunals, inform the court because they would have informed the transactor. But an engaged reading that tries to

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<sup>118</sup> 621 F.3d 624, 628–29 (7th Cir. 2010). Judge Posner, concurring in the outcome, expressed even greater skepticism than did Easterbrook about the value of experts as a means of ascertaining foreign law. *Id.* at 633–34 (Posner, J., concurring) (“[Admission of expert testimony] is excusable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn.”).

<sup>119</sup> Judge Wood, while concurring in the result, objected to Easterbrook and Posner's approach. *Id.* at 639–40 (Wood, J., concurring). To date, however, no other court has championed her position.

<sup>120</sup> For at least tepid support for the *Bodum* majority by other courts, see *Ancile Inv. Co. v. Archer Daniels Midland Co.*, No. 08 CV 9492(KMW), 2012 WL 6098729, at \*5–6 (S.D.N.Y. Nov. 30, 2012); *Oak Point Partners v. Lessing*, No. 11-CV-03328-LHK, 2012 WL 4121109, at \*5 n.3 (N.D. Cal. Sept. 18, 2012); *JPMorgan Chase Bank v. PT Indah Kiat Pulp & Paper*, 854 F. Supp. 2d 528, 535 (N.D. Ill. 2012); *Semi-Materials Co. v. MEMC Elec. Materials*, No. 4:06CV1426 FRB, 2011 WL 134062, at \*1 (E.D. Mo. Jan. 10, 2011); *Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 WL 4166773, at \*1–2 (D.D.C. Oct. 20, 2010); *In re Nortel Networks*, 469 B.R. 478, 499 (Bankr. D. Del. 2012); *Fernandez de Iglesias v. United States*, 96 Fed. Cl. 352, 357 (2010). I have found no post-*Bodum* decision in which a court ruled that it was obligated to consider non-textual materials to determine foreign law.

determine what the foreign tribunal “really” meant normally would have no bearing on the risk assumed by the transactor at the time that he or she acted in their jurisdiction. Such speculation more often would amount to noise rather than signal.<sup>121</sup>

In practice, foreign judicial opinions rarely play a significant role in disputes over foreign law. Often the home court looks at legislation and treatises, especially if the jurisdiction falls into the civil-law family and thus downplays the role of judicial precedent. If the foreign jurisdiction instead takes a common-law approach, the home court normally will focus on holdings and not the implications of the court’s reasoning.<sup>122</sup>

One striking exception exists. In *Films by Jove v. Berov*,<sup>123</sup> a U.S. court had to determine whether a Russian entity owned, and therefore could transfer, certain overseas copyrights. The entity, Soyuzmultfilm Studio (“SMS”), had taken over the assets and personnel of the identically named Soyuzmultfilm Studio (“Studio”), a state entity, during the first wave of privatization in the Soviet Union. Litigation in Russia challenged SMS’s claim to be the legal successor of Studio, and the Russian court of last resort ultimately determined that SMS did not own real estate associated with Studio. Aspects of that court’s opinion could be read as concluding that SMS also never owned the copyrights, although that question had not been put in issue there.<sup>124</sup>

When confronted with the outcome of the Russian litigation, the U.S. court did not simply dismiss the intimations of the Russian court as dicta. Rather, it attributed to the Russian court a statement of general legal

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<sup>121</sup> For the statement of the signal-noise distinction, see C.E. Shannon, A Mathematical Theory of Communication, 27 Bell Sys. Tech. J. 379, 379–82, 392–96 (1948). For popularization of the concept and its application to predictions, see Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail—But Some Don’t* (2012).

<sup>122</sup> For decisions downplaying the significance of foreign judicial practice, see, for example, *Ancile*, 2012 WL 6098729, at \*5 (distinguishing cases); *Licci v. Am. Express Bank*, 704 F. Supp. 2d 403, 409–10 (S.D.N.Y. 2010) (refusing to predict what a foreign court might do); *In re Nortel Networks*, 469 B.R. at 499 (same).

<sup>123</sup> *Films by Jove v. Berov (Films by Jove III)*, 341 F. Supp. 2d 199 (E.D.N.Y. 2004); *Films by Jove v. Berov (Films by Jove II)* 250 F. Supp. 2d 156 (E.D.N.Y. 2003); *Films by Jove v. Berov (Films by Jove I)*, 154 F. Supp. 2d 432 (E.D.N.Y. 2001). In this litigation, Films by Jove (“FBJ”) hired me to provide several opinions on issues of Russian law, as indicated in the first two of the court’s decisions. In particular, I argued that SMS owned the copyrights and had the right to convey them to FBJ. I did not offer an opinion, however, on what became the decisive issue in the case, namely whether the High Arbitrazh (Commercial) Court of the Russian Federation decided a particular case in the way it did due to improper government pressure.

<sup>124</sup> *Films by Jove II*, 250 F. Supp. 2d at 173–75.

principles that would lead to the conclusion that SMS never owned the copyrights.<sup>125</sup> But, rather than stopping there, the court next considered evidence that representatives of the Russian government made an improper *ex parte* approach to the Russian court in advance of its decision.<sup>126</sup> In light of this intervention, the U.S. court held that the Russian decision represented the illegitimate product of government meddling, rather than an authoritative statement of Russian law.<sup>127</sup> The court's opinion reads as an extended evaluation of the quality of the Russian court's performance. In effect, it condemned one of the highest organs of the Russian judicial system for lack of integrity.

*Films by Jove* is, as best I can tell, a unique instance where a home court, in seeking to determine foreign law, looked behind a decision of a country's highest court to ascertain the judges' motives and integrity and accordingly refused to accept the decision as evidence.<sup>128</sup> On the one hand, the case does support the dialogue-theory account of judicial encounters. On the other hand, its very uniqueness suggests that home courts generally manifest indifference to the underpinnings of foreign judicial products when ascertaining foreign law, as contract theory would predict.<sup>129</sup>

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<sup>125</sup> Id. at 188–91. The U.S. court in particular rejected my interpretation of the Russian court's intimations as irrelevant to the question before it.

<sup>126</sup> Id. at 205–13.

<sup>127</sup> Id. at 214. In a later decision, the court rejected as irrelevant a subsequent directive by the Russian government that purported expressly to include copyrights among the assets held by the Federal State Unitarian Enterprise Soyuzmultfilm Studio. *Films by Jove III*, 341 F. Supp. 2d at 214. FBJ and the Russian government then settled the dispute.

<sup>128</sup> Specifically, the court used the standards for determining whether to give preclusive effect to a foreign judgment, which are consistent with contract theory, in a different context, namely when the foreign decision is offered as evidence of foreign law. *Films by Jove II*, 250 F. Supp. 2d at 191–92, 205. For discussion of preclusion and enforcement, see *infra* notes 145–64 and accompanying text.

In *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), the U.S. court refused to enforce a Nicaraguan judgment because, among other reasons, the Nicaraguan first-instance court had, in the view of the U.S. court, misinterpreted the Nicaraguan statute governing its jurisdiction. Id. at 1324–26. Unlike the court in *Films by Jove*, however, the *Osorio* court based its conclusion on an interpretation of the statute by Nicaragua's highest court.

<sup>129</sup> The *Films by Jove II* court might instead have based its outcome on some variant of the doctrine of accession. Much of the value of the U.S. copyrights derived from the investment that the U.S. purchaser had made in reformatting the original films for the materially different U.S. video format. This investment, based on a good faith belief in the investor's ownership rights, might have justified allowing it to retain the rights. Cf. *Wetherbee v. Green*, 22 Mich. 311, 319–21 (Mich. 1871) (holding that an unintentional trespasser could retain property after transforming the property with substantial improvements); *Producers Lumber &*

One should contrast the reticence of most courts to engage in judicial review when determining foreign law to the robust review of national courts mandated by BIT commitments. Superficially, the evaluation of the Russian judicial system undertaken in *Films by Jove* resembles what BIT tribunals often do. As a structural matter, however, those tribunals operate in an entirely different environment, where treaties instruct them about what to make of foreign judicial practice. The tribunals largely base their level of review of domestic courts on those instructions, not on general principles of judicial interaction.

International investment law accepts that courts as much as legislatures or governments may effect an expropriation. The typical claim is one of hold-up, that is, a dramatic shift in legal entitlements initiated or endorsed by the courts that destroys much or all of an asset's value. The legal issue is not whether the local court misinterpreted or misapplied local law, but rather whether the propositions endorsed by the local courts represent such a departure from settled practice as to constitute a treaty violation. The reviewing tribunal accordingly does not determine whether the local court correctly applied existing legal authorities, but rather whether the local court's actions so dramatically disregarded prior understandings of those authorities so as to amount to a denial of fair and equitable treatment or to qualify as an expropriation. Prior law, including prior judicial practice, frames the issue of whether the decision in question is a predictable extension of existing doctrine, or instead a surprising departure that constitutes a violation of an international obligation.<sup>130</sup>

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Supply Co. v. Olney Bldg. Co., 333 S.W.2d 619, 623–24 (Tex. Civ. App. 1960) (reviewing authority for unjust enrichment compensation); see also PPL Mont., L.L.C. v. Montana, 132 S. Ct. 1215, 1235 (2012) (indicating willingness to reconsider traditional doctrine that neither laches nor estoppel may be invoked against a state).

<sup>130</sup> E.g., *Mondev Int'l v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 144–54 (Oct. 11, 2002), 6 ICSID Rep. 192 (2004) (evaluating a claim of novel sovereign immunity defense announced by a state court leading to loss of compensation for breach of contract); *Loewen Grp. v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶¶ 119–23 (Jun. 26, 2003), 7 ICSID Rep. 442 (2005) (evaluating a claim of flagrantly unfair state trial court proceedings leading to an unprecedented jury award); *Duke Energy Int'l Peru Inv. No. 1 v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, ¶¶ 201–09 (Aug. 18, 2008), 15 ICSID Rep. 146 (2010) (evaluating judicial enforcement of a tax award based on a novel legal theory). The parallel issue in U.S. takings law is identified, but not resolved, in *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 130 S. Ct. 2592, 2610–12 (2010). For a fuller discussion, see Stephan, *supra* note 107.

The Yukos dispute exemplifies how these treaties shape court-on-court encounters. Yukos had been the largest privately owned energy company in Russia. The Russian government imposed a tax assessment that Russian courts enforced, leading to an auction through which Rosneft, a state-owned company, acquired Yukos's largest production asset. The government then put Yukos into bankruptcy, resulting in the transfer of nearly all its remaining assets to Rosneft. Yukos's foreign shareholders brought claims under three bilateral investment treaties, and the company itself went to the Strasbourg Court to vindicate its rights.<sup>131</sup>

Two BIT tribunals, each formed by the Stockholm Chamber of Commerce pursuant to the relevant BIT, determined that the Russian courts endorsed new interpretations of Russian law that were inconsistent with established tax law and previous administrative practice.<sup>132</sup> Taking into account how the changes in the court's position affected Yukos compared to the treatment of other taxpayers, the tribunal could not accept the "objectivity and fairness of the process."<sup>133</sup> The Russian courts' behavior, when considered against "the cumulative effect of the totality of [the Russian government's] conduct," constituted a breach of the treaty.<sup>134</sup>

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<sup>131</sup> For a fuller description of the controversy, see Stephan, *supra* note 2.

<sup>132</sup> Rosinvest Co. U.K. v. Russian Fed'n, Case No. 79/2005, Final Award, ¶ 495 (Arb Inst. of the Stockholm Chamber of Commerce 2010) [hereinafter Rosinvest Final Award], [http://opil.ouplaw.com/view/10.1093/law:iic/471-2010.case.1/IIC471\(2010\)D.pdf](http://opil.ouplaw.com/view/10.1093/law:iic/471-2010.case.1/IIC471(2010)D.pdf); Quasar de Valores S.I.C.A. v. Russian Federation, Case No. 24/2007, Final Award, ¶¶ 67–68, 80 (Arb. Inst. of the Stockholm Chamber of Commerce 2012) [hereinafter Quasar de Valores Final Award], [http://opil.ouplaw.com/view/10.1093/law:iic/557-2012.case.1/IIC557\(2012\)D.pdf](http://opil.ouplaw.com/view/10.1093/law:iic/557-2012.case.1/IIC557(2012)D.pdf). Another investment treaty proceeding is pending as of the time of this writing. Yukos Universal Limited (Isle of Man) v. Russian Federation, PCA Case No. AA227, Interim Award of Jurisdiction and Admissibility (Perm. Ct. of Arb. 2009), [http://www.encharter.org/fileadmin/user\\_upload/document/Yukos\\_interim\\_award.pdf](http://www.encharter.org/fileadmin/user_upload/document/Yukos_interim_award.pdf).

<sup>133</sup> Rosinvest Final Award, *supra* note 132, ¶ 496.

<sup>134</sup> *Id.* ¶ 498; Quasar de Valores Final Award, *supra* note 132, ¶¶ 179, 186. A clear parallel exists with the Chevron dispute. See sources cited *supra* note 1. Chevron alleges that an Ecuadorian court ordered a massive judgment against it due to bribery and other improper interference in the judicial process, and that the judgment in turn violates a settlement Chevron reached with Ecuador a decade earlier regarding the underlying tort claims. The investment arbitration tribunal has not yet reached a final judgment on the integrity of Ecuador's judicial process, but it has ordered interim relief requiring Ecuador to block enforcement of its court's award. Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, Second Interim Award on Interim Measures, ¶ 3 (Perm. Ct. Arb. Feb. 16, 2012), [http://opil.ouplaw.com/view/10.1093/law:iic/527-2012.case.1/IIC527\(2012\)D.pdf](http://opil.ouplaw.com/view/10.1093/law:iic/527-2012.case.1/IIC527(2012)D.pdf); Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, First Interim Award on Interim Measures, ¶ 2 (Perm. Ct. Arb. Jan. 25, 2012), [http://opil.ouplaw.com/view/10.1093/law:iic/521-2012.case.1/IIC521\(2012\)D.pdf](http://opil.ouplaw.com/view/10.1093/law:iic/521-2012.case.1/IIC521(2012)D.pdf); Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, Order



Considering the same facts, if not necessarily the same evidence, the Strasbourg Court reached a somewhat different result. It stated that:

Overall, having regard to the margin of appreciation enjoyed by the State in this sphere and the fact that the applicant company was a large business holding which at the relevant time could have been expected to have recourse to professional auditors and consultants . . . the Court finds that there existed a sufficiently clear legal basis for finding the applicant company liable in the Tax Assessments . . . .<sup>135</sup>

Accordingly, while the Court believed that some of the procedures used by the courts to enforce the tax assessment breached the European Convention, it did not question the determinations of the Russian courts regarding the amount of taxes owed.<sup>136</sup>

On their face, the international tribunals appear to take inconsistent approaches. The Strasbourg Court was largely indifferent to the conduct of the Russian courts, refusing to look behind their decisions to determine if they rested on coherent and consistent judicial practice.<sup>137</sup> The BIT tribunals, in contrast, looked extensively into the legal sources on which the Russian courts relied and found their arguments wanting. Acting in an engaged fashion, they carefully examined Russian law to determine whether the courts could justify their decisions.

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for Interim Measures, ¶ E (Perm. Ct. Arb. Feb. 9, 2011), [http://opil.ouplaw.com/view/10.1093/law:iic/477-2011.case.1/IIC477\(2011\)D.pdf](http://opil.ouplaw.com/view/10.1093/law:iic/477-2011.case.1/IIC477(2011)D.pdf).

<sup>135</sup> O.A.O. Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, ¶ 599 (Eur. Ct. H.R. Sept. 20, 2011) (provisional judgment on the merits), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106308>.

<sup>136</sup> The Strasbourg Court ruled, *inter alia*, that a change in interpretation of the applicable statute of limitations, which both the Constitutional Court and the SAC had endorsed, represented an unforeseeable change in the law that departed from established practice and thus violated Article 1 of Protocol 1. *Id.* ¶¶ 572–74.

<sup>137</sup> In its earlier review of the criminal trial of Mikhail Khodorkovsky, the principal Yukos shareholder, the Strasbourg Court had found procedural violations but no political animus, again noting the heavy burden of proof on a claimant to establish the latter. *Khodorkovsky v. Russia*, App. No. 5829/04, ¶¶ 242–61 (Eur. Ct. H.R. May 31, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104983>. In a later decision concerning the punishment of Khodorkovsky and Platon Lebedev, Khodorkovsky's lieutenant, the Court again rejected any conclusion about political animus, although it did determine that holding the defendants liable in a criminal trial for the company's unpaid taxes lacked any basis in Russian law. *Khodorkovskiy & Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05, ¶¶ 869–85, 897–909 (Eur. Ct. H.R. July 25, 2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122697>.

The inconsistency between the tribunals, however, dissipates if one considers the legal standards that each applied.<sup>138</sup> Framed in this manner, all the cases confirm the contract theory. Part of the explicit bargain found in a BIT is protection from conduct attributable to the signatory state, whatever the form of state action. Judicial actions, whether obtained by undue influence of the government or on the initiative of an independent judiciary, are attributable to the state and, when they produce results forbidden by a treaty, result in international responsibility.<sup>139</sup> Those arbitral tribunals that have investigated and condemned the actions of national courts have done nothing more than uphold a bargain memorialized in treaties to which those countries are parties.

Like the BIT tribunals, the Strasbourg Court had jurisdiction over the case because of a treaty, namely the European Convention on Human Rights. But the European Convention, unlike a BIT, addresses property and investment rights only indirectly and provides only weak protection of these interests.<sup>140</sup> In addition, the European Convention is understood to constrain the Strasbourg Court by mandating a “margin of appreciation” with respect to state actions.<sup>141</sup> No similar doctrine limits BIT tribunals in their review of state conduct that impairs investments. Moreover, BIT tribunals only award compensation and thus have no authority

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<sup>138</sup> Compare Rosinvest Final Award, ¶¶ 273–80, 620–33 (discussing and applying a “denial of justice” standard based on the totality of the circumstances), with *Yukos*, App. No. 14902/04, ¶ 566 (noting that the government is entitled to a “wide margin of appreciation”). See also Quasar de Valores Final Award, ¶¶ 125–27 (discussing the different standards applied in the *Rosinvest* and *Yukos* cases). One should note that the two cases involved not only different treaties, but different claimants with materially distinct interests. The various shareholders of *Yukos* own only a claim to compensation under the international law of foreign investor protection, because the entity in which they had shares no longer exists. *Rosinvest* Final Award, supra note 132, ¶¶ 605–09. The overseas successors who acted on behalf of the extinguished Russian company, by contrast, had no claims under international law other than those based on Protocol 1 to the European Convention. *Yukos*, App. No. 14902/04, ¶¶ 552–54.

<sup>139</sup> See supra note 130 and accompanying text.

<sup>140</sup> It in particular states that its obligations “shall not . . . in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, E.T.S. No. 009. The original Convention provided no protection for property as such. On the limited applicability of Protocol 1, Article 1 to tax litigation, see Paul B. Stephan, Comparative Taxation Procedure and Tax Enforcement, in *International Investment Law and Comparative Public Law* 599, 618 n.43 (Stephan W. Schill ed., 2010).

<sup>141</sup> Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence 192 (1996).

to reverse a governmental action. The European Convention, by contrast, presumes that state parties will forego violations and thus obligates states to abide by Strasbourg Court decisions going forward.<sup>142</sup>

On balance, this evidence confirms contract theory. *Films By Jove* stands out as a remarkable exception against a general background. The treaty cases, understood in the context of the terms of the treaties, indicate the willingness of international courts to comply with their instructions. Where treaty commitments require a tribunal to look behind the assertions of national courts, they do so. When the treaty instead leans in the direction of taking those assertions at face value, the tribunals do that instead. What they do not do is make an independent determination of the desirability of engagement and constructive interaction with other courts. On balance, then, contract theory fits what judges do when they determine foreign law better than the dialogue theory does.

Dialogue theory, in contrast, is at a loss to explain either the general indifference of home courts to the reasoning of foreign judicial decisions when ascertaining foreign law, or the particular form of indifference expressed by the act of state doctrine.<sup>143</sup> As a general matter, it explains only why judges might be drawn to engagement. It does not predict the existence of a systematic on-off switch for judicial encounters. Observing the switch in practice thus casts doubt on the theory.

### *B. Retrospective Encounters—Enforcing Foreign Judgments*

The most common court-on-court encounter involves the enforcement of a foreign judgment. In these interactions, the home court faces a completed foreign proceeding that produced a decision, resulting either in a grant of relief or a determination of no liability. The case comes to the

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<sup>142</sup> Scott & Stephan, *supra* note 47, at 130–31. But see sources cited in note 148 *infra* (discussing *R v. Horncastle*, [2009] UKSC 14, [2010] 2 A.C. 373, [107]–[111] (appeal taken from Eng.), available at <http://www.bailii.org/uk/cases/UKSC/2009/14.html>, and general resistance to Strasbourg Court decisions outside the context of money judgments).

<sup>143</sup> An early article by Slaughter provides an account of the act of state doctrine that does resonate with dialogue theory. Burley, *supra* note 112, at 1980–83. She argued that in practice the doctrine applies only with respect to the acts of illiberal states, largely because they lack independent judiciaries. In her view, courts in liberal jurisdictions discriminate between foreign peers worth engaging and those who lack the capacity to interact constructively. *Id.* at 1909–11. This account is imaginative but not fully consistent with a careful reading of the cases cited, and has had no impact on subsequent judicial practice. José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 *Eur. J. Int'l L.* 183, 184 n.7 (2001). In any event, Slaughter does not address the broader tendency of home courts not to look behind the decisions of foreign judiciaries when ascertaining foreign law.

home court either because the winner failed to receive satisfaction in the foreign jurisdiction, or because the loser seeks to relitigate its rights. The practical effect of the enforcement question is to put assets in the home jurisdiction at risk to a claim that otherwise would not apply. Where the plaintiff in the foreign proceeding seeks to enforce a foreign judgment, it hopes to extend that judgment's domain to alter the ownership of local assets through attachment and sale. Where the defendant in the foreign proceeding seeks to give preclusive effect to a foreign judgment, it wishes to insulate its local assets from otherwise permissible relitigation of claims already resolved in the foreign litigation.

Actual practice turns largely on the presence or absence of a treaty. A network of multilateral treaties covers arbitral awards, and several regional treaties involve mutual recognition and enforcement of judicial judgments.<sup>144</sup> Where these instruments apply, the home court must adopt something midway between an indifferent and engaged stance: It may refuse to enforce the judgment if gross procedural defects infected the foreign proceeding, or if the judgment manifestly violates a strong public policy of the home jurisdiction. Where these treaties do not apply, home courts tend more towards greater engagement or complete indifference.

Superficially, U.S. doctrine in non-treaty cases resembles the treaty rules. *Hilton v. Guyot*<sup>145</sup> contains the leading statement of the governing standards in the absence of a treaty:

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the

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<sup>144</sup> Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, 1439 U.N.T.S. 91; Washington Convention, *supra* note 11; New York Convention, *supra* note 11; Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC), to be superseded by Council Regulation 1215/2012, 2012 O.J. (L 351) 1 (EU) (effective Jan. 10, 2015).

<sup>145</sup> 159 U.S. 113 (1895).

matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.<sup>146</sup>

In essence, judgments issued by foreign tribunals enjoy presumptive enforceability, as long as the foreign tribunal honored fundamental principles of due process, did not transgress a fundamental public policy, and themselves would accord the same treatment to U.S. judicial judgments.<sup>147</sup>

Practice in other countries varies greatly. Some jurisdictions invoke comity to permit engagement with foreign judgments, some add to this approach a reciprocity requirement, and yet others insist on complete indifference by refusing to recognize or enforce any foreign judgment in the absence of a treaty obligation.<sup>148</sup> National courts within the EU are

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<sup>146</sup> *Id.* at 205–06.

<sup>147</sup> In 33 U.S. states and territories, some version of the Uniform Foreign Money-Judgments Recognition Act, and in 19 U.S. states, some version of the Uniform Foreign-Country Money Judgments Recognition Act, governs this issue. Unif. Foreign Money-Judgments Recognition Act, 13(II) U.L.A. 39 (2002); Unif. Foreign-Country Money Judgments Recognition Act, 13(II) U.L.A. 19 (Supp. 2013). These statutes condition both recognition and enforceability on, among other things, adequate process by the foreign tribunal and non-repugnance of the foreign judgment to local public policy. A model federal statute endorsed by the American Law Institute would unify these rules and also impose a reciprocity condition, something that only a minority of states do at present. Am. Law Institute, *supra* note 15, § 7.

<sup>148</sup> Most commonwealth countries invoke comity in a manner that grossly resembles U.S. doctrine. E.g., *Beals v. Saldanha*, [2003] S.C.R. 416 PP 27–29, 35 (Can.). Many other countries will not give legal effect to a foreign judgment in the absence of a treaty obligation. E.g., *Grazhdanskiy Protssessual'nyi Kodeks Rossiiskoi Federatsii* [GPK RF] [Civil Procedural Code] art. 409(1) (Russ.). Others do not require a treaty but do insist on reciprocity. E.g., *Zivilprozessordnung* [ZPO] [Code of Civil Procedure], § 328(1)5 (Ger.). See generally Linda J. Silberman, *Some Judgements on Judgments: A View from America*, 19 *King's L.J.* 235, 259–62 (2008) (reviewing international practice on reciprocity of foreign judgment enforcement). As best I can determine, no country treats foreign court judgments as generously as it does international arbitral awards, absent a treaty obligation to do so.

One might think that judgments of one international court, namely the Luxembourg Court, do receive indifferent treatment when the various European national courts confront enforcement suits, given the strong treaty language that seems to compel national organs to give effect to them. The actual practice of national organs, however, is far more mixed. Recognizing the failure of existing mechanisms to induce compliance with Luxembourg Court decisions, the 1992 Maastricht Treaty amended Article 171 of the Treaty of Rome (now Article 228 of the Consolidated Treaty) to give the Court authority to fine noncompliant states.

indifferent in the opposite direction: They may not refuse to enforce the domestic-relations judgments of other EU-Member courts.<sup>149</sup>

U.S. judicial practice since *Hilton v. Guyot*, however, suggests other distinctions matter. In particular, courts treat non-treaty cases differently from those involving treaty obligations to enforce an arbitral award. At least in the United States, courts display considerable deference to arbitral discretion and hesitate before invoking public policy as an obstacle to enforcement of treaty-based arbitral awards.<sup>150</sup> Foreign judicial judgments, by contrast, receive more searching scrutiny, and courts more frequently invoke defective proceedings or public policy as a ground for non-enforcement.<sup>151</sup> In particular, U.S. courts have sided with arbitral

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Treaty on European Union art. 171, Aug. 31, 1992, 1992 O.J. (C 224) 1. So far it has used this authority sparingly. Similarly, while parties to the Strasbourg Court regularly pay the (modest) money judgments ordered by the Strasbourg Court, there is little evidence that most states alter their public law and practice to conform them to that Court's strictures. Even the United Kingdom, which has done more than almost any other state to domesticate the Strasbourg Court's jurisprudence, has found occasion to resist particular judgments. E.g., *R v. Horncastle*, [2009] UKSC 14, [2010] 2 A.C. 373, [107]–[111] (appeal taken from Eng.), available at <http://www.bailii.org/uk/cases/UKSC/2009/14.html> (refusing to throw out convictions in spite of Strasbourg Court determinations of human rights violations going to guilt or innocence).

<sup>149</sup> Council Regulation 2201/2003, art. 25, 2003 O.J. (L 338) 1 (EC).

<sup>150</sup> See, e.g., *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1098–1100 (9th Cir. 2011) (holding monetary award in favor of Iranian military not inconsistent with U.S. public policy); *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973–74 (2d Cir. 1974) (holding that withdrawal of U.S. governmental support for project in wake of armed conflict did not make award of damages for breach of contract unenforceable). But see *Republic of Arg. v. BG Grp. PLC*, 665 F.3d 1363, 1373 (D.C. Cir. 2012) (vacating arbitral award because arbiters ignored limits on their jurisdiction), cert. granted, 133 S. Ct. 2795 (2013); *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 391–93 (2d Cir. 2011) (vacating suit to enforce arbitral award on *forum non conveniens* grounds).

<sup>151</sup> E.g., *Osorio v. Dow Chem. Co.*, 635 F.3d 1277, 1279 (11th Cir. 2011); *Overseas Inns S.A. v. United States*, 911 F.2d 1146, 1149–50 (5th Cir. 1990); *Ackermann v. Levine*, 788 F.2d 830, 841–45 (2d Cir. 1986); *S. Ionian Shipping Co. v. Hugo Neu & Sons Int'l Sales Corp.*, 545 F. Supp. 323, 324–25 (S.D.N.Y. 1982); see also *Allstate Ins. Co. v. Administratia Asigurarilor de Stat*, 962 F. Supp. 420, 425–26 (S.D.N.Y. 1997) (putting burden of proof as to quality of Romanian judicial system on party seeking to give effect to Romanian judgment). But see *S.C. Chimexim S.A. v. Velco Enters. Ltd.*, 36 F. Supp. 2d 206, 213–15 (S.D.N.Y. 1999) (enforcing Romanian money judgment because court system affords due process). *Slaughter* represents *Allstate* as an instance where the U.S. court condemned the Romanian judicial system. *Slaughter*, *New World Order*, *supra* note 4, at 93 & n.130. As *Chimexim* makes clear, however, the *Allstate* court only applied a general burden-of-proof rule, and made no findings about the Romanian courts. *Chimexim*, 36 F. Supp. 2d at 213–15. Similarly, in *Osorio*, *supra*, the court of appeals upheld nonrecognition of a Nicaraguan

tribunals that have refused to recognize prior foreign judicial proceedings that purported to bar arbitration of the underlying dispute.<sup>152</sup> Much the same is true in other jurisdictions.

In this, as in other aspects of international civil litigation, the Yukos dispute remains the gift that keeps on giving. Yukos Capital S.a.r.L. (“Yukos Capital”), a Luxembourg finance company, sued Rosneft, the state-owned energy company, in the Netherlands to enforce a Russian arbitral award. Rosneft raised as a defense a Russian judicial decree setting aside the award.<sup>153</sup> The Amsterdam Court of Appeal, reversing a first-instance court, ruled that the Russian courts had not acted in an independent or impartial manner and upheld the Russian arbiters. Accordingly, it refused to give effect to the Russian court order and approved enforcement of the arbitral award.<sup>154</sup> Then the English courts, in a later proceeding to enforce the same award, endorsed the same analysis.<sup>155</sup>

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judgment on the foreign court’s lack of jurisdiction, and expressly disavowed the lower court’s finding that Nicaragua generally does not provide impartial tribunals. 635 F.3d at 1279; see also *Franco v. Dow Chem. Co. (In re Girardi)*, 611 F.3d 1027, 1036–37 (9th Cir. 2010) (holding nonrecognition of Nicaraguan judgment because it named wrong defendant, not because of judicial misconduct).

<sup>152</sup> E.g., *Telenor Mobile Commc’ns, AS v. Storm LLC*, 584 F.3d 396, 409 (2d Cir. 2009) (arbitral tribunal may disregard Ukrainian judicial judgments obtained through collusion and without notice to party seeking to enforce arbitration agreement; enforcement of arbitral award upheld).

<sup>153</sup> The sequence of events is complex but significant. Yukos Capital had made significant loans to YNG, Yukos’s principal production company, before the Russian government’s attack on the parent firm. In 2005, after Russia had seized YNG and transferred it to Rosneft, but before Yukos went into bankruptcy, Yukos Capital sought to enforce the loan agreement, which provided for arbitration in Russia. The International Court of Commercial Arbitration of the Moscow Chamber of Commerce, the designated arbitral body, issued an award in favor of Yukos Capital. Rosneft responded by persuading the Moscow Arbitrazh [Commercial] Court to set aside the award. Yukos Capital then sought to enforce the award in the Netherlands in spite of the Russian court order. See Stephan, *supra* note 2, at 21–32.

<sup>154</sup> HoF Amsterdam 28 april 2009, JOR 2009, 208 m.nt. Makkink, Broekhuijsen-Molenaar (Yukos Capital SARL/OAO Rosneft) (Neth.), *discussed in* Vera van Houtte, Stephan Wilske & Michael Young, *What’s New in European Arbitration?*, Disp. Resol. J., May–July 2009, at 12, 12–13. The Supreme Court of the Netherlands turned down Rosneft’s request for an appeal. Vera van Houtte, Stephan Wilske & Michael Young, *What’s New in European Arbitration?*, Disp. Resol. J., Nov. 2010–Jan. 2011, at 16, 91.

<sup>155</sup> *Yukos Capital Sarl v. OJSC Rosneft Oil Co.*, [2011] EWHC (Comm) 1461, [98]–[107], [2011] 2 C.L.C. 129 at 153–58, modified, *Yukos Capital Sarl v. OJSC Rosneft Oil Co.*, [2012] EWCA (Civ) 855, [2013] 1 All E.R. 223 (Eng.); see also *supra* note 113 and accompanying text. Yukos previously had obtained a freeze order covering Rosneft’s English bank accounts. *Yukos Capital Sarl v. OJSC Rosneft Oil Co.*, [2010] EWHC (Comm) 784, [29]–[30], [2011] 1 All E.R. (Comm.) 172, 180 (Eng.). Most recently, a U.S. court allowed Yukos Capital to enforce a different arbitral award against another Rosneft subsidiary, also a former

Both the Dutch and English courts, in effect, accepted the formal regularity of the arbitral tribunal, but looked closely at the actions of the Russian courts and their surrounding environment.

The Chevron dispute also illustrates the distinction between enforcement of arbitral awards and of foreign judicial judgments. The litigation, a tort suit alleging environmental damage, commenced in the United States in the early 1990s and then moved to Ecuador after U.S. courts dismissed the complaints on grounds of comity and *forum non conveniens*.<sup>156</sup> In 2011, an Ecuadorian court granted the plaintiffs a judgment for more than \$18 billion. Chevron turned back to the United States to fight that outcome, claiming fraud, perjury and corruption in the Ecuadorian proceedings. It sued both the Ecuadorian plaintiffs and the U.S. lawyers who represented them, seeking damages and an injunction against efforts to enforce the Ecuadorian judgment.<sup>157</sup>

In addition to suing in the United States to block enforcement of the Ecuadorian award, Chevron also brought a claim under the U.S.-

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Yukos asset, in spite of a supervening Russian court decree invalidating the loan contract that the award enforced. *Yukos Capital S.A.R.L. v. OAO Samaraneftgaz*, No. 10 Civ. 6147 (PAC), 2013 WL 4001584, at \*2–3, \*6–9 (S.D.N.Y. Aug. 6, 2013).

<sup>156</sup> *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63–65 (S.D. Tex. 1994). Chevron acquired Texaco in 2001 and succeeded to its liability for the drilling in Ecuador, even though Texaco's local subsidiary had stopped participating in 1990. The subsidiary reached a settlement with the government of Ecuador in 1995 that required it to perform remediation in return for a release of claims. A 1998 agreement with the government declared that the subsidiary had fully performed its obligations and purported to free Texaco of all further liability. In 2003, Ecuadorian legal officials began to back away from this settlement by opening criminal investigations of the former officials who had entered into it. See *In re Chevron Corp.*, 633 F.3d 153, 156–60 (3d Cir. 2011); *Republic of Ecuador v. Chevron Texaco Corp.*, 376 F. Supp. 2d 334, 341–42 (S.D.N.Y. 2005).

<sup>157</sup> *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011) (enjoining collection efforts), *rev'd sub nom. Chevron v. Naranjo*, 667 F.3d 232, 241–42 (2d Cir. 2012) (ruling that dispute was not ripe until plaintiffs sought to enforce the judgment in the United States). In passing, the district court ruled that the oil company's earlier arguments about the adequacy of Ecuadorian courts had no bearing on its determination of the gross deficiencies manifested by the later Ecuadorian proceedings. It observed that "there is no inconsistency between saying that Ecuador was an adequate forum in 1998–2001 and maintaining that it is not so today and has not been during the entire period since the Lago Agrio litigation began in 2003." *Id.* at 649. On appeal, the Second Circuit treated the compromised integrity of the Ecuadorian courts as irrelevant. *Chevron v. Naranjo*, 667 F.3d at 238–41. Trial on the merits of Chevron's claims against the plaintiffs and their lawyers began in October 2013.



Ecuador BIT<sup>158</sup> seeking damages from the government for any money it ended up paying out to the Ecuadorian plaintiffs.<sup>159</sup> The Ecuadorian plaintiffs and Ecuador sued in the United States to force Chevron to stay this proceeding. The U.S. courts threw out these suits, ruling that the arbiters have jurisdiction to determine the arbitrability of the dispute.<sup>160</sup>

As in the European suits to enforce the Yukos Capital arbitral award, the U.S. courts treated the BIT arbitral tribunal and the Ecuadorian judiciary differently. The U.S. courts presumed that the arbitral body would behave in a responsible fashion. The district court even cited the interim relief ordered by the tribunal as support for its decision to condemn the Ecuadorian judiciary, without first considering whether the tribunal had the authority to make its order or faced any improper pressure from outsiders.<sup>161</sup> In contrast, when passing judgment on the Ecuadorian courts, the district court performed a comprehensive review of their history and background. The U.S. court evaluated the quality of those courts based on the totality of facts, social and political as well as legal. The Second

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<sup>158</sup> Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. No. 103-15 (1993).

<sup>159</sup> Chevron's claim relies in part on the settlement reached with the government in the 1990s. For more on the arbitration, see sources cited supra note 1. The tribunal has issued several orders providing interim relief to Chevron, including ordering the Ecuadorian government to prevent any steps to enforce the Ecuadorian judgment pending resolution of the merits of the investment tribunal claim. An Ecuadorian court has rejected the tribunal's orders as inconsistent with domestic Ecuadorian law. Sala Unica de la Corte Provincial de Justicia de Sucumbíos [Sole Division of the Provincial Court of Justice of Sucumbíos] 17 febrero 2012, *Aguinda v. Chevron*, Causa No. 21101-2011-0106, Juicio Verbal, available at <http://www.funcionjudicial-sucumbios.gob.ec/index.php/consulta-de-causas> (select 2011 under "Año" and enter "Maria Aguinda" under "Actor/Ofendido" and "Chevron" under "Demandado/Imputado"). According to press reports, the plaintiffs' attorneys have initiated enforcement proceedings against Chevron in Argentina, Brazil, and Canada, with the Argentine courts going so far as to order attachment of assets belonging to a Chevron subsidiary. Guido Nejamkis, *Argentine Court Upholds Freeze on Chevron Assets*, Reuters (Jan. 30, 2013, 4:18 PM), <http://www.reuters.com/article/2013/01/30/us-chevron-argentina-idUSBRE90T1AI20130130>. A Canadian court threw out the enforcement suit on the grounds that Chevron had no assets in that country. *Yaiguaje v. Chevron Corp.* (2013), 2013 ONSC 2527, para. 110 (Can. Ont. Sup. Ct. J.).

<sup>160</sup> *Republic of Ecuador v. Chevron Corp.*, Nos. 09 Civ. 9958(LBS) & 10 Civ. 316(LBS), 2010 WL 1028349, at \*1-2 (S.D.N.Y. Mar. 16, 2010), *aff'd*, 638 F.3d 384 (2d Cir. 2011).

<sup>161</sup> *Chevron Corp. v. Donziger*, 768 F. Supp. 2d at 624. It also noted that the order did not bind the private Ecuadorian parties to its case. *Id.* at 625.

Circuit did not reject any of these conclusions, but rather disposed of the case on procedural grounds.<sup>162</sup>

Contract theory explains why courts alternate between engagement with foreign courts and indifference to arbitral tribunals. Enforcement suits are the mirror of cases involving the legal characterization of foreign transactions. The location of assets in the home jurisdiction reflects a choice not to expose them to the vagaries of another state's legal system. Enforcement of the foreign judgment pierces this partition. As we have seen generally with asset partition, piercing is possible but far from automatic. The argument for allowing it with respect to foreign judicial judgments is that the home court, by taking account of what happened in the earlier litigation, saves itself and the parties the cost of repetitive proceedings. The counterargument, however, is that the home court still needs some assurances that the foreign proceeding did not offend the fundamental commitments of the home jurisdiction. This explains the reserved right of the home court to refuse to give effect to the foreign judgment whenever the foreign procedures fall below the minimum standards required by the home jurisdiction, or where the outcome of the foreign proceeding offends important policies of the home jurisdiction.<sup>163</sup>

What makes arbitration under the New York and Washington Conventions different from foreign judgments are the terms and context of those treaties. To be sure, they invite the enforcing court to consider whether procedural irregularities occurred and allow non-enforcement in cases where the arbitral award conflicts with local public policy. Yet

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<sup>162</sup> *Chevron Corp. v. Naranjo*, 667 F.3d at 238–39. This Article's focus is on civil litigation. It is worth noting, however, that the judgments of international tribunals regarding criminal matters also are not subject to automatic enforcement by U.S. courts. *Medellín v. Texas*, 552 U.S. 491, 508–11 (2008); *Breard v. Greene*, 523 U.S. 371, 375–76 (1998). Instead, even in a case involving the same persons, facts and legal arguments as a matter already addressed by the ICJ, a U.S. court will give only "respectful consideration" to the international tribunal's decision. *Medellín*, 552 U.S. at 513 n.9; *Breard*, 523 U.S. at 375. There is no evidence that any nation regards judgments of the ICJ as presumptively binding in national law, although the quality of deference exhibited by national courts to the ICJ's interpretations of international law may vary. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 19, 2006, 60 *Neue Juristische Wochenschrift* [NJW] 499, 502 (Ger.); Jana Gogolin, *Avena and Sanchez-Llamas Come to Germany — The German Constitutional Court Upholds Rights Under the Vienna Convention on Consular Relations*, 8 *Ger. L.J.* 261, 262–63 (2007). For my previous discussion of these cases, see generally Paul B. Stephan, *Open Doors*, 13 *Lewis & Clark L. Rev.* 11 (2009).

<sup>163</sup> See, e.g., Ronald A. Brand, *Recognition and Enforcement of Foreign Judgments* 13–24 (2012).

many jurisdictions, the United States foremost among them, regard these treaties as mandating a more deferential approach to arbitral awards. And, as noted above, in cases where arbitral awards conflict with foreign judicial orders, the courts usually go with the arbitral tribunal.

Contract theory supports the difference in treatment of arbitral awards and foreign judicial judgments. The New York and Washington Conventions, as treaties, are contracts that direct local courts to recognize and enforce awards if certain conditions are meant. In interpreting and applying those conditions, courts properly can take into account the purpose of those contracts as informative of the parties' intent. The New York and Washington Conventions were negotiated against a background of weak enforcement of foreign judgments, and their framers clearly intended arbitration to substitute for, rather than complement, local judicial proceedings. The inference that scrutiny of these awards should entail something less than the review applicable to foreign judicial judgments seems reasonable, if not unavoidable. Finally, contract theory fully explains the one instance where courts are completely indifferent to each other, namely the enforcement of domestic-relations judgments within the EU. An express contract, in the form of EU legislation resting on the EU treaties, demands this outcome.

The dialogue theory does less well. It does provide an explanation for the existence of some amount of enforcement of the decisions of foreign tribunals, as well as for the engaged approach that enforcing courts take toward foreign judicial awards. But it does not explain why arbiters enjoy greater deference than do foreign judges. Arbiters are private contractors rather than state officials, but one could say the same of judges who sit on international courts. If Alter's trustee paradigm has any salience, surely it would apply to the arbiters as much as to the international courts.

To be sure, the *ad hoc* nature of arbitral tribunals might diminish the independence of arbiters.<sup>164</sup> But the roster of arbiters available for international disputes, especially those where a state is a party, comprises mostly persons of the highest professional reputation, many of whom also serve on permanent international tribunals. They, as much as anyone,

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<sup>164</sup> Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 Va. J. Int'l L. 647, 658–62 (1999); Posner & Yoo, *supra* note 11, at 30–34. Professor Born notes that Professors Posner and Yoo overlook the existence of permanent bodies that hear appeals from some *ad hoc* arbitral tribunals, thus reducing the scope of party influence over arbiter independence. Born, *supra* note 11, at 870.

have internalized altruistic professional values, a fact that must be known to the parties who select them. It would seem, then, that the dialogue model should predict that arbitral tribunals ought to come within the global judicial community network. Accordingly, the difference in treatment of the judgments of arbitral tribunals and foreign courts becomes, within the terms of dialogue theory, inexplicable.

*C. Prospective Encounters—Choosing a Forum and Defining  
Prescriptive Jurisdiction*

A plaintiff may bring a suit in any forum where jurisdiction over the defendant exists, but courts do not necessarily have to accede to the plaintiff's choice. A few jurisdictions, to be sure, deny courts the discretion to refuse to hear a case over which it has jurisdiction.<sup>165</sup> The federal courts of the United States as well as most common-law jurisdictions, however, do invoke the doctrine of *forum non conveniens* in international as well as domestic cases.<sup>166</sup> This approach balances two sets of factors, those involving the specifics of the case, such as location of evidence and the significance of foreign law, and the availability and quality of the alternative forum.<sup>167</sup>

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<sup>165</sup> The principle example is the European Community, whose legislation bars such dismissals except when the person against whom a claim is asserted is not domiciled in any of the member states. Council Regulation 44/2001, *supra* note 144, at art. 4; Case C-281/02, *Owusu v. N.B. Jackson*, 2005 E.C.R. I-1445. Where the Council Regulation does not apply, British courts may dismiss a claim on the ground of *forum non conveniens* and base the decision whether to do so on the location of the transactions in dispute. E.g., *Faraday Reinsurance Co. v. Howden N. Am. Inc. & Anor*, [2011] EWHC (Comm) 2837, [75], [2011] 2 C.L.C. 897, 918–20 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/980.html> (holding that a British court will not dismiss contract dispute involving insurance contract issued by British insurer and governed by British law, even though risk of liability arises in U.S. litigation and U.S. court might reject conclusions of British court), *aff'd*, [2012] EWCA (Civ) 980, [2012] 2 C.L.C. 956 (C.A.) (Eng.).

<sup>166</sup> *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 435–36 (2007); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257–61 (1981).

<sup>167</sup> U.S. cases in which I have provided expert opinions regarding the adequacy of the Russian legal system, on which district courts have relied in ordering dismissal on *forum non conveniens* grounds, include *Norex Petroleum Ltd. v. Access Indus., Inc.*, 304 F. Supp. 2d 570, 577–79, 584 (S.D.N.Y. 2004), vacated, 416 F.3d 146 (2d Cir. 2005), remanded on other grounds, 540 F. Supp. 2d 438 (S.D.N.Y. 2007), *aff'd*, 631 F.3d 29 (2d Cir. 2010); *Base Metal Trading S.A. v. Russian Aluminum*, 253 F. Supp. 2d 681, 698–701, 713 (S.D.N.Y. 2003), *aff'd*, 98 Fed. App'x 47 (2d Cir. 2004); *Pavlov v. Bank of N.Y., Inc.*, 135 F. Supp. 2d 426, 433–35, 438 (S.D.N.Y. 2001), vacated on other grounds, 25 Fed. App'x 70 (2d Cir. 2002), *reaff'd* on other grounds, 2002 WL 31324097 (S.D.N.Y. Oct. 16, 2002).

Given the fact-specific nature of *forum non conveniens* cases as well as the inherent flexibility of a multi-factor “totality of circumstances” standard, one cannot describe the results as clearly confirming any prediction. Two considerations, however, appear to play an important role in determining outcomes. First, the residence of the plaintiff who picked the home court matters significantly. If the real party in interest is a U.S. resident, the courts strongly disfavor deferring to an alternative forum.<sup>168</sup> If the plaintiff is a nonresident foreign national, or a U.S. legal entity beneficially owned by a foreign national, the courts show greater willingness to discount its choice of forum.<sup>169</sup> Second, the location of the assets and transactions at the core of the dispute has a major impact on the outcome. A court faced with foreign transactions may determine that “the plaintiffs should not have expected that any of their disputes would be litigated in the United States.”<sup>170</sup> The absence of such an expectation leads naturally if not inevitably to a *forum non conveniens* dismissal.

When assessing the quality of the alternative forum, U.S. courts typically look at specific questions such as the availability of a particular legal remedy, and not the overall competence and integrity of the foreign judiciary.<sup>171</sup> Some courts have gone so far as to state “it would be inap-

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<sup>168</sup> E.g., *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146–47 (2d Cir. 2000) (favoring choice of U.S. nationals to litigate in a U.S. forum different from their residence); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101–02 (2d Cir. 2000) (favoring choice of non-national U.S. residents). In *Piper Aircraft Co. v. Reyno*, the Court stated that “a foreign plaintiff’s choice deserves less deference.” 454 U.S. at 256. For a study of judicial practice that confirms that, in accordance with these directions, foreign plaintiffs receive a *forum non conveniens* dismissal far more often than do U.S. plaintiffs, see Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481, 527 (2011).

<sup>169</sup> E.g., *Base Metal Trading*, 253 F. Supp. 2d at 694–96 (noting that none of the U.S. corporate plaintiffs appeared to be beneficially owned by U.S. persons and characterizing plaintiffs as forum shoppers).

<sup>170</sup> *Id.* at 696–97.

<sup>171</sup> E.g., *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 390–92 (2d Cir. 2011) (requiring suit for enforcement of arbitral award against foreign governmental body to be brought in that country’s courts because of local law issue about limits on payments toward award); *Jiali Tang v. Synutra Int’l, Inc.*, 656 F.3d 242, 250–51 (4th Cir. 2011) (discounting inadequacies of Chinese judiciary); *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 616 F.3d 568, 575–76 (D.C. Cir. 2010) (discounting inadequacies of Cameroon courts); *Saqui v. Pride Cent. Am., LLC*, 595 F.3d 206, 212–13 (5th Cir. 2010) (discounting inadequacies of Mexican courts); *Stroitelstvo Bulg. Ltd. v. Bulgarian-American Enter. Fund*, 589 F.3d 417, 421–22 (7th Cir. 2009) (discounting inadequacies of Bulgarian courts); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1290–91 (11th Cir. 2009) (discounting inadequacies of Guatemalan courts); *In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 499 (2d Cir. 2002) (discounting inadequacies of Ukrainian courts). *Contra Cariajano v. Occidental Petroleum*

propriate . . . to pass judgment” on a foreign legal system in the face of nothing but general allegations of corruption and incompetence.<sup>172</sup> Instead, a forum normally is considered inadequate only if its courts do not have the authority to entertain the plaintiff’s claim, or if specific evidence of collusion between defendants and the forum government exists.<sup>173</sup>

A completely different inquiry ensues if the parties previously had agreed to a forum for any disputes arising between them. Where an agreement provides for arbitration, various treaties and statutes apply and strongly favor deference to the chosen forum.<sup>174</sup> If the parties chose

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Corp., 626 F.3d 1137, 1147–48 (9th Cir. 2010) (district court should have given more weight to evidence of corruption and discrimination in Peruvian judicial system), superseded by 643 F.3d 1216 (9th Cir. 2011) (evidence did not establish that Peruvian system was so inadequate as to provide no remedy at all, but district court failed to defer to California plaintiff’s choice of home forum). Slaughter offers as contrary evidence dicta in a district court decision ordering the dismissal of a suit against a Chilean entity during the period of that country’s junta. Slaughter, *New World Order*, supra note 4, at 93 & 290 n.128 (citing *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1342–43 (S.D.N.Y. 1982)). On appeal, the Second Circuit affirmed the dismissal without commenting on the trial judge’s unnecessary, if well founded, attack on the Chilean judiciary. *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277–78 (2d Cir. 1984).

<sup>172</sup> *Base Metal Trading*, 253 F. Supp. 2d at 707 (quoting *Pavlov*, 135 F. Supp. 2d at 434). See also *Blanco v. Banco Indus. de Venez., S.A.*, 997 F.2d 974, 982 (2d Cir. 1993) (asserting that it is not “the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation” (quoting *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir. 1991)); *Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d 415, 423 (S.D.N.Y. 2000)).

<sup>173</sup> E.g., *Parex Bank*, 116 F. Supp. 2d at 426 (suit for contract enforcement could not have been brought in Russia because Russian law treated futures contracts as against public policy); *Cherney v. Deripaska*, [2008] EWHC (Comm) 1530, [238]–[265], [2009] 1 All E.R. (Comm) 333 (Eng.) (plaintiff could not get fair hearing in Russian courts because of outstanding murder charges), aff’d, [2009] EWCA (Civ) 849, [2009] 2 C.L.C. 408 (Eng.). In *Cherney*, I filed an expert report in connection with a motion for *forum non conveniens* dismissal, but I did not address the issues relating to the plaintiff’s criminal liability. The limiting case of an inadequate forum is *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983) (holding alternative forum inadequate because plaintiffs would not “obtain justice at the hands of the courts administered by Iranian mullahs” and “would probably be shot” if they returned to Iran), aff’d without opinion, 767 F.2d 908 (2d Cir. 1985).

<sup>174</sup> *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537–39 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518–20 (1974); *JSC Surgutneftegaz v. President and Fellows of Harvard Coll.*, 2005 WL 1863676, at \*6 (S.D.N.Y. Aug. 3, 2005) (holding that the question of arbitrability is to be decided by the arbiter, not the court), aff’d, 167 Fed. App’x 266 (2d Cir. 2006). But see *Republic of Arg. v. BG Grp. PLC*, 665 F.3d 1363, 1365–66 (D.C. Cir. 2012) (vacating arbitral award because arbiters ignored limits on their jurisdic-

another court instead, the law of contracts applies.<sup>175</sup> The United States once declined to enforce such contracts as against public policy, but, at least where federal law applies, a strong presumption in favor of enforcement now exists.<sup>176</sup>

In sum, when applying the *forum non conveniens* doctrine, courts tend to focus more on the choices made before the dispute arose by the person seeking redress. Somewhat indifferently, they do not undertake much of an assessment of the alternative judiciary, other than to determine whether, as a formal matter, the plaintiff can seek redress there. When a contractual choice of forum exists, the modern trend has been in the direction of respecting such choices. Courts do not attach much significance to the underlying legal authority for that choice, namely treaties and statutes versus contract law.

On the whole, judicial practice regarding forum selection confirms contract theory and departs from dialogue theory. First, courts enforce forum-selection contracts on the same terms as other contracts. Second, when applying *forum non conveniens* doctrine in the absence of a forum-selection contract, courts focus on objective factors that do not include the behavior of foreign judges. The residence of the plaintiff and the location of transactions and assets associated with the claim largely determine whether a court will honor the plaintiff's choice of forum. The reliance on plaintiff residence in particular reflects national interest rather than a desire to match litigation with the best court for hearing the

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tion), cert. granted, 133 S. Ct. 2795 (2013). In *Surgutneftegaz*, I submitted an opinion on the adequacy of the Russian courts as an alternative forum for the dispute, but not on the arbitrability issues on which the court based its decision.

<sup>175</sup> There also exists a Hague Convention on Choice of Court Agreements, opened on June 20, 2005, to which at present only Mexico is a party. See *supra* note 12.

<sup>176</sup> *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8–10 (1972). The exception involves situations where a deep breach in relations between the states, bolstered by economic sanctions that forbid normal business transactions, renders the selected forum unavailable. See, e.g., *Rockwell Int'l Sys., Inc. v. Citibank, N.A.*, 719 F.2d 583, 586–88 (2d Cir. 1983) (post-revolutionary Iranian legal system); *Cont'l Grain Exp. Corp. v. Ministry of War–Etko Co.*, 603 F. Supp. 724, 729 (S.D.N.Y. 1984) (same). But see *Thermal Material Sys., Inc. v. Valmiera Glass Fibre Plant*, 1997 WL 351094, at \*1 (N.D. Cal. June 17, 1997) (holding a clause choosing Latvian forum enforceable in spite of regime change affecting legal system). Surprisingly, *Slaughter* cites *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir. 1985), as an instance of one court condemning another country's judicial system. *Slaughter*, *New World Order*, *supra* note 4, at 93 & 290 n.129. Although the court did indicate that it doubted whether a U.S. party could obtain a fair trial before an Iranian court, it held that the forum selection clause in question was not mandatory and therefore did not bar a suit in the United States. *McDonnell Douglas Corp.*, 758 F.2d at 346.

dispute. The quality of the alternative forum, and especially its history of good or bad behavior, has virtually no bearing on outcomes. Rather than using dismissal as a carrot to encourage foreign courts to acquire a reputation for professionalism, probity and integrity, courts generally manifest indifference to the quality of the foreign court. Instead, they focus ultimately on territorial sovereignty, consistently with international law's fundamental bargain upholding this system.

The one prominent example where courts depart from this practice also reflects contract theory. European courts have interpreted EU legislation as barring *forum non conveniens* dismissals in cases where the defendant is domiciled in an EU state.<sup>177</sup> The EU states have contracted among themselves for this outcome, and their courts accept the result.

Courts can defer to foreign tribunals not only by disclaiming jurisdiction over a dispute, but also by disclaiming their sovereign's intent to regulate the transaction at hand. Without a substantive rule to apply, the disclaiming court typically loses its jurisdiction to consider the case.<sup>178</sup> Restricting the prescriptive scope of domestic law thus increases the likelihood that a home court will surrender a matter to foreign courts.

Traditionally, most national courts relied heavily on the concept of territorial sovereignty to limit the scope of domestic legislation. After the country's triumph in World War II, however, the U.S. Congress as well as U.S. courts increasingly gave national law extraterritorial scope.<sup>179</sup> Other countries pushed back, but the lower courts in particular interpreted a host of laws as extending to foreign transactions. In general, these courts developed multi-factored tests that allowed them great

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<sup>177</sup> See supra note 165. One might question whether the contract among the European states is explicit on this point. The gap-filling strategy used to interpret the legislation may not have conformed to an information-forcing model. The effect of the interpretation, however, was to restrict court-on-court encounters by precluding the possibility of an alternative forum.

<sup>178</sup> In the United States, for example, the absence of a federal claim in a case normally forces a federal court to fall back on diversity jurisdiction, which will not exist in disputes between nonresidents. See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809). U.S. states face distinct constitutional barriers to applying their laws to foreign transactions. *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930) (holding the Due Process Clause limits the power of states to regulate foreign contracts).

<sup>179</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443–45 (2d Cir. 1945) (endorsing application of U.S. antitrust law to foreign transactions with a direct, substantial, and intended effect on the United States) (case referred to the court of appeals because Supreme Court lacked quorum). The Supreme Court ultimately, but narrowly, endorsed this holding in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993).



flexibility in deciding when and how to give extraterritorial effect to particular laws.<sup>180</sup> Over the last two decades, the Supreme Court has discouraged this approach to extraterritoriality. It uses a strong presumption against extraterritoriality, and not multi-factor balancing, to rein in the scope of these laws.<sup>181</sup>

The hard presumption against extraterritoriality that the Court now imposes illustrates a particular kind of gap-filling rule that resonates with contract theory. In many cases, legislation does not instruct courts clearly as to the territorial scope of the enactment. Courts might fill in these gaps with rules that reflect their views as to the right balance between domestic and foreign tribunals. They could justify the imposition of their choices as reflecting an implied instruction to do their best in the absence of clear statutory guidance. The Supreme Court's decisions, however, instead place the burden on lawmakers to fill in the gaps themselves. This approach rests on a judgment that courts lack either the empirical knowledge or the policymaking expertise to design optimal modification in the foundation contract of territorial sovereignty.<sup>182</sup> As with the *forum non conveniens* cases, contract theory provides a much better explanation of the outcomes than does dialogue theory.

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<sup>180</sup> In at least some cases, the decision whether to apply U.S. law or to defer to a foreign forum turned on the court's assessment of the quality of the forum. Compare *Drexel Burnham Lambert Grp., Inc. v. A.W. Galadari*, 777 F.2d 877, 880 (2d Cir. 1985) (applying U.S. bankruptcy law to Dubai transaction), and *Am. Rice, Inc. v. Ark. Rice Growers Coop. Ass'n*, 701 F.2d 408, 414 (5th Cir. 1983) (applying U.S. trademark legislation to Saudi transaction), with *Clarkson Co. v. Shaheen*, 544 F.2d 624, 632 (2d Cir. 1976) (withholding application of U.S. bankruptcy law to Canadian transaction), and *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 643 (2d Cir. 1956) (withholding application of U.S. trademark legislation to Canadian transaction).

<sup>181</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (limiting federal claims implied by Alien Tort Statute to violations of international law occurring within United States); *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) (limiting private suits under Securities Exchange Act to fraud in domestic sales of securities); *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 169 (2004) (limiting 1982 statute governing international antitrust claims to cartels that produce domestic injury); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 253, 259 (1991) (limiting employment discrimination laws to domestic employees). For my discussion of these cases, see Paul B. Stephan, *The Political Economy of Extraterritoriality*, 1 *Pol. & Governance* 92 (2013).

<sup>182</sup> See authorities cited in note 54 *supra*.

*D. Ongoing Encounters—Assisting or Obstructing Foreign Civil Proceedings*

A court in one state can aid litigation in another by gathering and protecting evidence and assets for the use of the foreign tribunal. Dialogue theory asserts that they do so in an interactive and engaged way that rewards good courts and chastises bad ones. A survey of the practice of judicial assistance, however, suggests that the rules do not derive from any general desire to engage, but rather from more precise considerations that resonate more with contract theory. Moreover, courts also obstruct foreign litigation, most prominently through issuing antisuit injunctions that order parties before the court to forego resort to foreign tribunals. Such obstruction does not fit well with dialogue theory but is consistent with contract theory.

*1. Assisting Foreign Litigation*

In the United States, judicial assistance in obtaining evidence for foreign litigation rests on both treaties and statute. Multilateral treaties establish the letters-rogatory mechanism, which involves intergovernmental contacts with courts at each end.<sup>183</sup> Whether international commitments exist or not, Section 1782 makes U.S. courts available to gather evidence on behalf of international or foreign tribunals.<sup>184</sup> This authority does not depend on reciprocity or the admissibility of the evidence in the forum seeking assistance.<sup>185</sup>

When addressing a Section 1782 request, a U.S. court normally will decide the matter as if managing discovery in a domestic lawsuit. In theory, a court may refuse to cooperate with the foreign proceeding, if it entertains serious doubts about the fairness or capability of that proceeding. In dicta, the Supreme Court observed:

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<sup>183</sup> Hague Letters Rogatory Convention, *supra* note 12, at ch. 1; Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. No. 98-27 (1984), 1438 U.N.T.S. 287.

<sup>184</sup> 28 U.S.C. § 1782 (2006).

<sup>185</sup> *In re Asta Medica, S.A.*, 981 F.2d 1, 6–7 (1st Cir. 1992); *Malev Hungarian Airlines v. United Techs. Int'l Inc.* (*In re Malev Hungarian Airlines*), 964 F.2d 97, 101 (2d Cir. 1992); see also *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004) (finding the term “tribunal” in § 1782 encompasses the European Commission, a supranational administrative decisionmaker). See generally Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 Va. J. Int'l L. 127, 133–39 (2012).

[A] court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. . . . Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.<sup>186</sup>

In practice, however, U.S. courts normally pay little attention to the attributes of the requesting tribunal, if the discovery request does not exceed the limits that would apply to U.S. litigation.<sup>187</sup>

*In re Malev Hungarian Airlines*<sup>188</sup> illustrates the limits of interjudicial appraisal when applying Section 1782. Pratt & Whitney sued Malev, the state-owned Hungarian airline, in Budapest for breach of contract. Malev sought U.S. judicial assistance to depose Pratt & Whitney employees and to obtain various documents. The district court refused to cooperate because Malev had not first sought the assistance of the Hungarian court. The Second Circuit held that the lower court had abused its discretion, because the statute did not contain an exhaustion requirement.<sup>189</sup> A later Second Circuit decision forbade courts from distinguishing between civil-law jurisdictions, where the judge rather than the parties conducts discovery, and common-law judiciaries. The opinion proclaimed, “We do not believe that an extensive examination of foreign law regarding the existence and extent of discovery in the forum country is desirable in order to ascertain the attitudes of foreign nations to outside discovery assistance.”<sup>190</sup>

An extensive review of Section 1782 practice indicates that courts rarely assess the competence and probity of foreign proceedings or tri-

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<sup>186</sup> *Intel Corp.*, 542 U.S. at 264–65.

<sup>187</sup> E.g., *In re Chevron Corp.*, 650 F.3d 276, 288–90 (3d Cir. 2011) (gathering evidence for arbitration and Ecuadorian proceedings); *Chevron Corp. v. Berlinger*, 629 F.3d 297, 309–11 (2d Cir. 2011) (same).

<sup>188</sup> 964 F.2d 97 (2d Cir. 1992).

<sup>189</sup> *Id.* at 100.

<sup>190</sup> *In re Bayer AG*, 146 F.3d 188, 191–93 (3d Cir. 1998) (granting a Section 1782 order does not depend on whether the host forum could order similar discovery); *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995); see *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985) (“To require that a district court undertake a more extensive inquiry into the laws of the foreign jurisdiction would seem to exceed the proper scope of section 1782.”).

bunals. Rather, assisting courts seem largely indifferent to the nature of the requester, as long as the request does not violate any local evidentiary privileges or other limits on discovery.<sup>191</sup> Evidentiary assistance seems to play no role in encouraging cooperation among courts. Rather, it functions autonomously and indifferently.

More broadly, the enactment of Section 1782 represents an initial bid in a kind of contractual bargaining between the United States and the rest of the world. Responding to the refusal of many other countries to assist U.S. civil litigation involving foreign defendants, Congress adopted the statute to induce greater cooperation.<sup>192</sup> Generous and nondiscriminatory assistance represents its opening bid, with an implied threat to withhold aid downstream bolstering the ploy. For this strategy to work, U.S. courts must act passively, rather than deciding on their own which of their peer tribunals deserve help.<sup>193</sup>

Section 1782 does make the United States something of an outlier. Most other jurisdictions have not unilaterally opened their courts to judicial assistance. Rather, they rely on treaties, such as the Hague Letters Rogatory Convention, which presuppose that the requesting state has reciprocally made its courts available.<sup>194</sup> Under that Convention, the assisting state may rely on local public policy, as well as local privilege law, to withhold assistance.<sup>195</sup> The treaties do not, however, direct the assisting court to consider the overall quality and probity of the requesting court, and no evidence of such consideration exists.

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<sup>191</sup> E.g., *Shin v. United States* (In re Request for Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea), 555 F.2d 720, 723–24 (9th Cir. 1977) (assisting authoritarian regime in criminal investigation for currency law violations; absence of tax treaty irrelevant).

<sup>192</sup> *Intel Corp.*, 542 U.S. at 247–48; *In re Malev Hungarian Airlines*, 964 F.2d at 99–100.

<sup>193</sup> Although the focus of this Article is on civil litigation, U.S. courts also receive requests for assistance with regard to foreign criminal cases. Often a mutual legal assistance treaty will apply. Where it does, the court will comply with the terms of the treaty, an approach that does not permit an inquiry into the quality of each state's courts. E.g., *In re 840 140th Ave.*, 634 F.3d 557, 572–73 (9th Cir. 2011) (holding the court must comply with Russian request for assistance; no constitutional objection to request and quality of Russian courts is irrelevant). Other cases establish that mutual legal assistance treaties can bar a court from refusing assistance, but that a court can render assistance under Section 1782 even when an applicable treaty does not require doing so. *Weber v. Finker*, 554 F.3d 1379, 1382–84 (11th Cir. 2009).

<sup>194</sup> For the treaties, see *supra* note 183.

<sup>195</sup> E.g., *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] A.C. 547 (H.L.) 612 (giving conclusive effect to governmental intervention opposing U.S. antitrust proceeding as contrary to national interests of United Kingdom).

Requests for judicial assistance to foreign proceedings can go beyond evidence and extend to local assets. For example, a bankruptcy proceeding may involve a debtor with worldwide holdings, including liquid assets such as bank accounts. Ordinarily the debtor (or its representative) must open a proceeding in every jurisdiction where the bankrupt has property. The home court then must decide whether to hold on to the assets and distribute them according to local law, or instead to transfer them to another jurisdiction for distribution pursuant to different rules. Hypothetically, the decision could rest on the home court's assessment of the quality of the potential transferee court and thus open another opportunity for interjudicial dialogue. Actual practice, however, differs. Courts focus much more on the location of the putative debtor's business as a whole, and not on the quality of the court to which transfer is proposed.

Normally, U.S. courts look only at objective choice-of-law factors when deciding whether to transfer assets.<sup>196</sup> Although courts will allow surrender only if they believe that the foreign proceeding will be "fundamentally fair," they do not look into the general capacity of the foreign legal system, but rather the particulars of the proceeding at hand.<sup>197</sup> The approach is nearly identical to that taken when courts apply the "adequate alternative forum" prong of *forum non conveniens* doctrine.

The one case that might suggest otherwise is *In re Maxwell Communication Corporation*.<sup>198</sup> There the debtor opposed the transfer of U.S. assets to a British bankruptcy proceeding because of British avoidance rules that would produce a different outcome from U.S. law. The U.S. court first applied a conventional choice-of-law analysis that looked at the "center of gravity" of the bankruptcy (Great Britain) and the public policies underlying avoidance rules (finding that the facts-and-circumstances British avoidance rule did not violate U.S. policy even

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<sup>196</sup> *Stonington Partners v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 130–31 (3d Cir. 2002) (applying the center of gravity and public policy tests); *Bank of N.Y. v. Treco* (In re Treco), 240 F.3d 148, 158–61 (2d Cir. 2001) (applying tests and raising question of public policy); *H.K. & Shanghai Banking Corp. v. Simon* (In re Simon), 153 F.3d 991, 997–99 (9th Cir. 1998) (holding creditor subject to U.S. discharge order when it submits to U.S. jurisdiction and does not reserve foreign claims).

<sup>197</sup> *J.P. Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) (examining Mexican bankruptcy procedures); *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 249–50 (2d Cir. 1999) (finding the deficiencies in Brazilian bankruptcy procedures irrelevant to creditor who has actual notice of process).

<sup>198</sup> *Maxwell Commc'n Corp. v. Société Générale* (In re Maxwell Commc'n Corp.), 93 F.3d 1036, 1053 (2d Cir. 1996).

though it differed from the U.S. bright-line rule). The court then supplemented its analysis by discussing the systemic interest in cooperation and harmonization in judicial proceedings. Transferring the assets to the foreign forum would reward that tribunal for its good behavior.<sup>199</sup> Implicitly, uncooperative courts could be punished by withholding assets.

One should not make too much out of the *Maxwell* court's dicta. The court first applied a traditional center-of-gravity analysis. Only after establishing the appropriate result did it discuss the value of cooperation and systemic management of global litigation. Absent some evidence that this discussion had any impact on the outcome of the case, one is entitled to dismiss it as legally irrelevant.<sup>200</sup>

Outside of bankruptcy, courts face requests from foreign tribunals to freeze local assets pending resolution of the foreign proceeding. A freeze order does not transfer ownership, but it does constrain the owner's power to dispose of its property. If the home court complies, the foreign claimant's likelihood of collecting on a subsequent judgment increases, but the owner meanwhile loses control over its assets even though no court has reached a decision on the merits of the claims.

A stark contrast distinguishes U.S. and Commonwealth practice regarding freeze orders. Since 1975, British courts have asserted the authority to freeze assets in advance of adversary proceedings upon a finding of a risk of dissipation.<sup>201</sup> They do this not only to protect their own

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<sup>199</sup> After describing the net effect of the two bankruptcy proceedings as successful preservation of going concern value in spite of differences in substantive law, the court observed:

Taken together, these accomplishments—which, we think, are attributable in large measure to the cooperation between the two courts overseeing the dual proceedings—are well worth preserving and advancing. This collaborative effort exemplifies the “spirit of cooperation” with which tribunals, guided by comity, should approach cases touching the laws and interests of more than one country. Where a dispute involving conflicting avoidance laws arises in the context of parallel bankruptcy proceedings that have already achieved substantial reconciliation between the two sets of laws, comity argues decidedly against the risk of derailing that cooperation by the selfish application of our law to circumstances touching more directly upon the interests of another forum.

*Id.* at 1053 (citation omitted).

<sup>200</sup> Slaughter makes much of this discussion in illustrating her dialogue theory. Slaughter, *New World Order*, *supra* note 4, at 95–96. For the reasons indicated in text, I believe she is mistaken.

<sup>201</sup> *Nippon Yusen Kaisha v. G. & J. Karageorgis*, [1975] 1 W.L.R. 1093 at 1095 (C.A.) (Eng.); *Mareva Compania Naviera, S.A. v. Int'l Bulkcarriers, S.A.*, [1980] 1 All E.R. 213 at 215 (C.A.) (Eng.). For a general survey of Commonwealth practice, see Peter Biscoe, *Freezing and Search Orders: Mareva and Anton Piller Orders* (2d ed. 2008).

jurisdiction, but also to assist foreign tribunals, both judicial and arbitral.<sup>202</sup> Commonwealth courts have gone even further in ordering freezes in aid of foreign tribunals.<sup>203</sup> In essence, these courts may issue a freeze order if they have jurisdiction over either the assets or the owner. None explicitly has made the quality of the tribunal with primary jurisdiction a factor in the exercise of this discretion, but several imply rather strongly that this consideration gets folded into a more general assessment of equitable factors.<sup>204</sup>

In the United States, the courts have no general power to provide such assistance. A few lower courts aspired to follow the British model, but the Supreme Court cut short these attempts in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*<sup>205</sup> As a result, a U.S. court will freeze assets in advance of judicial proceedings only if the party seeking a freeze has a lien or an equitable interest in those assets.<sup>206</sup> A good chance of prevailing in foreign litigation, in and of itself, will not suffice to trigger a protective asset freeze, no matter what the risk of asset dissipation.

Taken together, the judicial assistance cases provide strong evidence for contract theory and undercut dialogue theory. With respect to evidence, U.S. courts lean heavily in the direction of rendering assistance. They rarely take account of the characteristics of the foreign court, even

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<sup>202</sup> See *Mobil Cerro Negro Ltd. v. Petróleos de Venezuela, S.A.*, [2008] EWHC (Comm) 532, [18]–[19] (Eng.); *Crédit Suisse Fides Trust, S.A. v. Cuoghi*, [1998] Q.B. 818 at 824 (C.A.) (Eng.); *X v. Y*, [1990] 1 Q.B. 220 at 231–32 (Comm) (Eng.); *Republic of Haiti v. Duvalier*, [1990] 1 Q.B. 202 at 212, 216–17 (C.A.) (Eng.).

<sup>203</sup> See *Davis v. Turning Props. Pty Ltd.* [2005] NSWSC 742, 222 ALR 676, 687 (Austl.); cf. *Swift-Fortune Ltd. v. Magnifica Marine, S.A.*, [2007] 1 SLR 629 ¶¶ 86–93 (Sing. Ct. App.) (Sing.) (stating that court may issue a Mareva injunction in support of foreign judicial proceeding if the cause of action could have been brought in that court).

<sup>204</sup> E.g., *Banco Nacional de Comercio Exterior SNC v. Empresa de Telecomunicaciones de Cuba, S.A.*, [2007] EWCA (Civ) 662, [29]–[30], [2008] 1 W.L.R. 1936 at 1944–45 (C.A.) (Eng.) (withholding worldwide freeze order because court of defendant's domicile would not issue such a decree); *BAS Capital Funding Corp. v. Medfinco Ltd.*, [2003] EWHC (Ch) 1798, [201], [2004] 1 Lloyd's Rep. 652 [201] (Eng.) (refusing order because of possible conflict with foreign court).

<sup>205</sup> 527 U.S. 308, 330–33 (1999). *Grupo Mexicano* understood the absence of general authority to freeze assets in advance of judgment to apply whether a court was rendering assistance to another tribunal or protecting its own jurisdiction. As a result, a litigant cannot circumvent the ban on pre-judgment freezes by initiating a parallel suit in the United States.

<sup>206</sup> *Iantosca v. Step Plan Servs., Inc.*, 604 F.3d 24, 33–34 (1st Cir. 2010); see also *Chevron Corp. v. Naranjo*, 667 F.3d 232, 240 (2d Cir. 2012) (holding that the Uniform Foreign Country Money-Judgments Recognition Act does not authorize suits enjoining enforcement of foreign money judgments).

though the relevant statute authorizes them to do so. Other jurisdictions adhere to a treaty regime that makes those characteristics irrelevant. With respect to assets, courts do not demonstrate much interest in whether the destination court will reach an optimal outcome or not. If the assets' owner is subject to a legitimate bankruptcy proceeding in a jurisdiction where it has concentrated its operations, a U.S. court normally will assist the proceeding. If the question instead is an asset freeze, U.S. courts take a strictly indifferent approach by refusing to assist in all instances. Commonwealth courts instead use roughly the same analytical apparatus that they apply to enforcement of a foreign judgment. This combines respect for asset partitioning through territorial location with a willingness to override partitioning in the interest of judicial economy, taking into account the integrity of the foreign judicial proceeding.

Contract theory fits all of these outcomes. One might object that no single theory can reconcile the obviously divergent practices of U.S. and Commonwealth courts as to freeze orders, much less the difference in the U.S. approach to evidentiary assistance (presumptively available) and asset freezes (never available). But two responses, one doctrinal and the other conceptual, meet this objection.

On the doctrinal level, one must recall that both U.S. and Commonwealth courts operate within a legislative context that limits their freedom to maneuver. U.S. courts have a clear legislative mandate to extend evidentiary assistance unilaterally. No similar authority exists for asset freezes.<sup>207</sup> British and Commonwealth judges confront somewhat open-ended legislation as to freeze orders, but no clear authorization of evidentiary assistance aside from that extended by treaties. As a result, Commonwealth courts believe they have something like a mandate partially to override asset partitioning in assistance of foreign suits, but, as to evidentiary assistance, follow the more explicit and narrow instruc-

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<sup>207</sup> This was the holding of *Grupo Mexicano*. 527 U.S. at 333. In bankruptcy, U.S. courts have a clearer delegation of authority to administer local assets, which encompasses discretion to turn assets over to foreign courts. A critic might respond that the *Grupo Mexicano* Court supplied the restraint on freeze orders through its interpretation of a murky statute, while the British courts moved in the opposite direction when faced with equivalently unclear legislation. In effect, the U.S. and Commonwealth courts applied different default rules, something contract theory does not predict. To the extent that this response is well founded, one must instead rely on the conceptual argument in text to explain why contract theory explains both outcomes.



tions imposed by the international contract that is the Hague Letters Rogatory Convention.

If doctrinal arguments are not conclusive, one still can maintain that both U.S. and Commonwealth practices are broadly consistent with contract theory. Both take as their baseline territorial sovereignty and asset partitioning based on location. With respect to asset freezes, the United States stops there, rather than exploring opportunities for judicial economies through sequestering assets that might disappear before judgment.<sup>208</sup> As a result, no engagement with foreign courts is needed. In the Commonwealth, the courts pursue these economies, which in turn require a case-by-case, engaged inquiry to override asset partitioning. Either approach is plausible, once one accepts territorial sovereignty and locational asset partitioning as the starting point.

Dialogue theory, by contrast, cannot explain these outcomes. U.S. practice under Section 1782 is not dialogic, but rather remarkably tone-deaf as to the character of the requesting tribunal.<sup>209</sup> Symmetrically, U.S. courts refuse to help out foreign tribunals by freezing assets in advance of an enforceable judgment. Were engagement and mutual assistance part of the program of U.S. courts, one would think that asset freezes would be an easy place to start. Nor can dialogue theory explain international practice under treaties such as the Hague Letters Rogatory Convention. Here as well there is no judicial reciprocity or other effort to sort out judicial goats from sheep. Rather, the tendering of judicial assistance turns only on whether a state is a treaty party, no matter what the quality of its judicial system, plus domestic privileges and policy.

## *2. Seeking Foreign Assistance*

When one looks at judicial assistance from the perspective of the sender, rather than the recipient, the pattern remains pretty much the same. When a court seeks evidence abroad, normally it will rely on its

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<sup>208</sup> Absent asset freezes, a judgment will not end the matter, because the successful plaintiff still will have to track down attachable assets to satisfy its claim. A freeze avoids these costs, albeit at the expense of interfering with the defendant's ownership rights for the duration of the freeze.

<sup>209</sup> Roger Alford describes § 1782 as promoting the comity of courts. Alford, *supra* note 185, at 147–49. As this assertion indicates, comity remains a slippery term devoid of specific content. See sources cited *supra* note 10. The absence of any reciprocity in that statute robs it of the potential to induce cooperation and exchange. As Alford acknowledges, U.S. courts make no effort to determine if the foreign tribunal approves of the request for assistance, which comes from a party, not the tribunal. Alford, *supra* note 185, at 149.

power over persons within its reach, rather than engaging with foreign courts. If a court limits discovery of overseas evidence, it will rely on foreign secrecy law rather than any reciprocal relationship with foreign courts. When a home court wants a foreign court to get out of the way of a case with which it is seized, it will impose its will on persons within its jurisdiction rather than seek to persuade the foreign court to cooperate. These antisuit injunctions turn not on reciprocity, but on coercion.

Consider first extraterritorial discovery, which might involve depositions of people located abroad or access to documents stored abroad. The Hague Letters Rogatory Convention and related treaties provide one route for carrying out this mission. The Convention maximizes international (but not interjudicial) cooperation by channeling requests for evidence through the source country's government.<sup>210</sup> But, as the Supreme Court has made clear, requesting courts face no presumption in favor of this mechanism.<sup>211</sup> Courts seeking evidence abroad instead apply normal discovery rules to persons over whom they have jurisdiction, with orders backed up by sanctions. They may or may not respect the secrecy and privilege laws of the target jurisdiction, depending mostly on their assessment of the good faith of the person from whom discovery is ordered.<sup>212</sup> A U.S. court typically will use a letter rogatory only when it has no other way of obtaining the evidence.<sup>213</sup>

An even greater intrusion on a foreign legal system occurs when a court enjoins litigation in that jurisdiction. Rather than relying on the other tribunal to do the right thing, the order compels litigants not to avail themselves of the alternative forum. For persons amenable to the enjoining court's contempt powers, the injunction effectively ends all contact with the foreign legal system.

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<sup>210</sup> Born & Rutledge, *supra* note 114, at 1026–28.

<sup>211</sup> *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 543–44 (1987).

<sup>212</sup> Compare *In re Sealed Case*, 825 F.2d 494, 498–99 (D.C. Cir. 1987) (limiting discovery), and *Ings v. Ferguson*, 282 F.2d 149, 152–53 (2d Cir. 1960) (same), with *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474–79 (9th Cir. 1992) (imposing contempt sanctions for noncompliance with discovery order), and *United States v. Bank of N.S. (In re Grand Jury Proceedings Bank of N.S.)*, 740 F.2d 817, 826–28 (11th Cir. 1984) (same).

<sup>213</sup> In *Rio Tinto*, [1978] A.C. at 548, the U.S. court sought evidence from foreign firms who were not parties to the case before it or otherwise subject to its jurisdiction. It thus had no alternative to the letter-rogatory mechanism, which in the event proved unavailing. *Id.* at 549.

Because these injunctions sound in equity, the cases do not reveal clear rules or unambiguous criteria.<sup>214</sup> Patterns do exist, however. On the one hand, the weaker the alternative forum's claim to jurisdiction over the dispute, the less likely is an injunction. Courts assert that they need not worry about a foreign proceeding, the outcome of which will have no impact internationally. Thus, the Fifth Circuit reversed a lower-court injunction because the defects in the enjoined court's jurisdiction were so manifest that the aggrieved party faced no material risk from any judgment imposed by that court.<sup>215</sup> Conversely, courts have enjoined suits in foreign courts that clearly had jurisdiction to proceed. In *Alledale Mutual Insurance Co. v. Bull Data Systems*, for example, the Seventh Circuit barred a French insured from bringing its claim for coverage in a French tribunal that, under French law, had exclusive jurisdiction over the dispute.<sup>216</sup> The court justified the injunction on the ground that the French body, which clearly had the authority to issue a judgment that other jurisdictions would respect, might reach an incorrect outcome. Particular impediments to its capacity to reach the right result, in the eyes of the U.S. court, were the tribunal's use of lay judges, reliance on written submissions rather than oral testimony, and its limited capacity to consider the insurer's arson defense.<sup>217</sup>

Slaughter has suggested that antisuit injunctions, although on their face unfriendly and uncooperative, actually illustrate a deep pattern of interjudicial comity and solidarity. She construes language in the *Allen-*

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<sup>214</sup> Under a treaty, since superseded and largely ratified by European legislation, see Council Regulation 44/2001, *supra* note 144, the courts of EU member states may not enjoin litigation in any other EU member state. Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565, ¶ 18. One might score this as evidence in support of contract theory, in the sense that a treaty produced the result. But the court's interpretation of the treaty rested on a teleological approach that resonates more with dialogue theory. In particular, the Luxembourg Court rested its treaty interpretation on a default rule of upholding trust in the legal institutions of the member states. *Id.* ¶ 24.

<sup>215</sup> *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366–70 (5th Cir. 2003). Subsequently, the Indonesia Supreme Court threw out the lower court decision that had triggered the request for an antisuit injunction. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 (2d Cir. 2007). Later still, the Second Circuit enjoined further efforts by the Indonesian company to challenge a Swiss arbitral award, which U.S. courts had confirmed, in the Cayman Islands. The court based the injunction on the ground that, due to a treaty, no foreign jurisdiction had power to annul or modify the award. *Id.* at 125. The Cayman Islands court apparently misbehaved, in the eyes of the U.S. court, by not immediately dismissing the suit.

<sup>216</sup> 10 F.3d 425, 432–33 (7th Cir. 1993).

<sup>217</sup> *Id.* at 429–30.

*dale* decision as embracing reciprocity in foreign review of U.S. proceedings and of the basic commonality in the judicial enterprise.<sup>218</sup> But Slaughter wrests these comments out of context and attaches greater weight to them than they can bear.<sup>219</sup> More importantly, she ignores the established U.S. practice of issuing anti-antisuit injunctions. Through these devices, U.S. courts forbid persons subject to their jurisdiction from enlisting a foreign court to assert its evident interest in the controversy.

The prototypical anti-antisuit injunction case arose out of the Laker Airways transnational bankruptcy. Laker claimed that a conspiracy among national transatlantic air carriers and various financial institutions destroyed its business, to the detriment of transatlantic air passengers who benefited from its lower rates and general cartel-busting strategies. London was the seat of Laker's bankruptcy proceeding, and a British court enjoined the bankruptcy trustee from suing several British entities under U.S. antitrust law. The court justified the injunction, which reduced the bankrupt estate's potential assets, on the ground that the United States had no legitimate regulatory interest in the transaction.<sup>220</sup> In response, a U.S. court ordered other potential defendants, all of which were non-British national air carriers, not to follow in the footsteps of their British counterparts. Exactly because the U.S. claim might violate the public policy of other states, the court ruled, these defendants could not be allowed access to other courts that might vindicate those national interests.<sup>221</sup>

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<sup>218</sup> Slaughter, *New World Order*, supra note 4, at 91–92 (citing *Allendale*, 10 F.3d at 430).

<sup>219</sup> The dispute involved a French company claiming under an insurance contract that stipulated French law as governing the instrument. Almost all the relevant evidence was in France, and French law, which the insurer had agreed to adopt, might have required that all disputes come to the French tribunal. The case wound up in the United States only because the U.S. insurer won the race to the courthouse, bringing an action for a declaratory judgment before the insured had sued to enforce the contract. The *Allendale* court ignored all of these factors pointing toward the greater French interest in the matter and ruled instead that a U.S. court had the right to protect its jurisdiction in the face of possibly duplicative suits. *Allendale*, 10 F.3d at 430–32. The court in particular appeared not to appreciate that civil litigation in civil-law jurisdictions mostly involves written depositions and other documentary evidence, rather than live testimony by witnesses.

<sup>220</sup> *Midland Bank PLC v. Laker Airways Ltd.*, [1986] Q.B. 689 at 714–15 (C.A.) (Eng.); *British Airways Bd. v. Laker Airways Ltd.*, [1984] Q.B. 142 at 200–02 (C.A.) (Eng.).

<sup>221</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 929–33 (D.C. Cir. 1984). After the U.S. court enjoined the non-British airlines from seeking an antisuit injunction, the House of Lords lifted the British injunction that had barred Laker from suing British airlines. *British Airways Bd. v. Laker Airways Ltd.*, [1984] 3 W.L.R. 413 at 414

Finally, one should contrast the approach courts take to parallel litigation and to clawback claims. Antisuit and anti-antisuit injunctions require that parties litigate in only one place at a time. Once the first suit reaches final judgment and the losing side satisfies its obligation, however, the slate is clean. If another jurisdiction authorizes clawback, a suit for damages based on the theory that the first litigation violated a protected legal interest, then courts responsible for the first judgment stay out of the way.<sup>222</sup> Presumably a party must concern itself with clawback only if it has assets in the jurisdiction that authorizes this remedy. The party assumes this risk when it chooses where to locate its activity.

On balance, contract theory supplies a clearly superior explanation for current judicial practice as to demanding judicial assistance. When seeking evidence located abroad, courts use what leverage they have with regard to persons over whom they have jurisdiction, rather than asking for the help of other courts. This leverage rests ultimately on the location of people and assets and respects the core international bargain of territorial sovereignty. When courts do seek judicial assistance, they do so because they lack this leverage. They then rely on international agreements in the form of the Hague Letters Rogatory Convention and its counterparts.

Much the same is true when courts confront the risk of duplicative proceedings. If a foreign proceeding presents no realistic threat to a party's assets, because the foreign defendant has no assets in that jurisdiction and those places where it does have assets are not likely to respect that foreign judgment, a home court will not interfere with the proceeding. If the foreign case could deprive the home court of jurisdiction, as in the *Laker* litigation, the home court will use its leverage over persons within its power to block the litigation. Rather than enquiring as to which tribunal might do the best job of pursuing justice and the global

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(H.L.) (Eng.) (reversing *British Airways Bd. v. Laker Airways Ltd.*, [1984] Q.B. 142 (C.A.) (Eng.)).

<sup>222</sup> See *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 364–68 (8th Cir. 2007). A perhaps aggressive reading of the opinion might suggest that the U.S. court also knew that its damages award, for which Japanese law allowed clawback, may have violated international law. The World Trade Organization Dispute Settlement Board had condemned the statute on which the award was based, leading Congress to repeal it prospectively. Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, § 2006, 118 Stat. 2434, 2597 (repealing 15 U.S.C. § 72); Appellate Body Report, United States—Anti-Dumping Act of 1916, ¶ 155, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000).

public interest, courts focus on national interest and enjoin foreign suits that encroach on local policy.

Dialogue theory fails to account for these cases. Slaughter tries to get around this difficulty by wresting dicta out of context from cases that, in their outcomes, undermine her position.<sup>223</sup> The decisions, however, speak for themselves. Courts rely on coercion rather than diplomacy to resolve the problems thrown up by transnational litigation. They advance national interest, not those of the international system as a whole. Where an international agreement mandates international cooperation, they do their job. But in the absence of such authoritative instructions, they do not seize the initiative. They act, in sum, like agents, not trustees.

### *E. The Future of Judicial Encounters*

The preceding Sections of this Part demonstrate that contract theory, and not dialogue theory, does a better job of explaining contemporary court-on-court encounters. Perhaps, however, the future promises change. Greater economic, political and social interdependence may lead to fuller cooperation, more dialogue, and the emergence of a genuine transnational community of courts. States may yet substitute a global system of justice, nurtured and maintained by courts worldwide, for the current system of parceled out jurisdiction and capacity. If dialogue theory has greater normative appeal, it may yet prevail.

In this light, the claims of dialogue theory might not be wrong, but merely premature. Slaughter, Alter, and their followers may not offer an accurate account of contemporary practice, but perhaps they may have detected patterns that today are imminent and will become evident. History may yet vindicate those who envision a growing cadre of judges, national and international, banding together in an engaged and cooperative fashion to promote the global rule of law.

Yet the arc of history has an annoying tendency to move. Slaughter developed most of the elements of dialogue theory during the long decade of the 1990s.<sup>224</sup> That period augured well for a vision of the world

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<sup>223</sup> See supra notes 143, 151, 171, 176, 200 and accompanying text.

<sup>224</sup> I borrow here from Eric Hobsbawm, who opposed the long nineteenth century (1789–1914) to the short twentieth. Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914–1991* (1994). Here I understand the long 1990s as running from the collapse of the Berlin Wall in the fall of 1989 to the attack on the Twin Towers on September 11, 2001.

increasingly defined by cooperation among international actors motivated by common goals. It was easy to believe that liberalism was ascendant universally. The collapse of the Soviet Empire ushered in a transformation of Europe as well as the unraveling of South African apartheid and many other authoritarian regimes in the developing world. The seeming triumph of liberalism domestically in turn inspired a reinvigorated liberal internationalism, focused especially on the expansion of supranational adjudication in Europe.<sup>225</sup> Liberalizing regions elsewhere sought to emulate the Europeans.<sup>226</sup> The inference seemed unavoidable: If much of the world would comprise liberal states, due to powerful, if not inevitable, progressive historical forces, then judicial interactions increasingly would be among liberal, independent and esteemed judges. These organs might behave in the manner that Slaughter predicted.<sup>227</sup>

But the last decade has compromised any sure conviction about the liberal turn in national development and international relations. In the present century, authoritarian regimes have reappeared in Russia, Bolivia, Ecuador, Venezuela, and Nicaragua, among others, while China's prosperity continues to demonstrate that economic and political reform need not go hand in hand. Security measures taken by the United States and some European countries since the 9/11 attacks seem to some observers evidence of a creeping authoritarianism even in the liberal democracies. The 2008 financial crisis and the subsequent unraveling of

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<sup>225</sup> The Luxembourg Court took on greater responsibilities due to the 1992 Maastricht Agreement (which entered into force in 1994), and the Strasbourg Court due to the 1994 Protocol No. 11 (which entered into force in 1998).

<sup>226</sup> The 1996 Protocol of Cochabamba expanded the competences of the Andean Community Tribunal of Justice, and the 1991 Treaty of Asunción created the Permanent Tribunal of Review of the MERCOSUR system. NAFTA dispute resolution, which embraces Mexico, went into effect in 1993. The African Court on Human and People's Rights was created by a 1998 protocol, although it did not begin operations until 2004.

International criminal tribunals are not truly relevant to our inquiry here, as noted *supra* note 5. It is still worth noting the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the International Criminal Court during the decade.

<sup>227</sup> Especially salient is Burley, *supra* note 112, one of Slaughter's earliest articles. There she argued that judicial practice toward the acts of foreign states (judicial and nonjudicial alike) depends largely on the character of the foreign state: Liberal courts, she asserted, see illiberal regimes as exerting naked authority, while liberal ones are respected as sources of arguments. *Id.* at 1909–13. Liberal courts thus engage with other liberal courts, while responding indifferently to the acts of illiberal states. If the world of liberal states were growing, and the realm of authoritarianism shrinking, then the model for liberal interactions should become universal.

the Eurozone further undermined both the Washington consensus of the nineties and the great expectations of international lawyers and political scientists for the European model.<sup>228</sup> Events largely have dashed the hopes raised more recently by the Arab Spring. With the passage of time, liberalism's successes, and indeed the relevance of liberalism itself as a lens for understanding international relations, seem far more contingent and fragile than they may have appeared at the time that Slaughter developed her model.

The resurgence of authoritarian and illiberal politics has had its impact on courts. Both the Chevron-Ecuador battle and the Yukos dispute have at their heart accusations about the integrity and independence of national courts. In each case, foreign courts and international investment tribunals, but not the Strasbourg Court, have endorsed the accusations.<sup>229</sup> It has become harder to trust some national courts, and perhaps even some international tribunals, to fight the good fight for the global rule of law, and easier to fear injustice at the hands of judges.<sup>230</sup>

Of course, the arc of history might shift yet again. But in at least one important respect, we can see the long 1990s as exceptional, and the present decade as closer to modern historical experience. During the 1990s,

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<sup>228</sup> Recent decisions of the Strasbourg Court, for example, have diminished checks on national administrative discretion even when those acts target specific persons and seem driven by expropriative rather than regulatory impulses. In addition to its *Yukos* and *Khodorkovsky* decisions discussed in supra notes 135–37, a panel ruled in *Soros v. France*, App. No. 50425/06, Eur. Ct. H.R. 1, 17–23 (2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106659>, that an insider-trading prohibition, concededly so vague that the regulatory authorities themselves did not understand it, did not violate the Convention. These cases can be seen as anticipating and tolerating significant adjustments to property rights in the wake of the economic crisis. For a more general analysis of the dependency of international law theorists, such as Slaughter, on an unrealistic assumption of unremitting European integration, see Matthew C. Turk, *Implications of European Disintegration for International Law*, 17 *Colum. J. Eur. L.* 395, 397–99 (2011).

<sup>229</sup> See supra notes 134–36 and accompanying text.

<sup>230</sup> Other instances of subservient courts aiding authoritarian regimes, even cloaking their decisions in claims about international law, include *Gramara (Private) Ltd. v. Gov't of the Republic of Zim.*, HH 169-2009, HC 33/09 (Zim. High Ct. 2010) (refusing to recognize discriminatory expropriation as illegal in the face of treaty obligations); *Sentencia No. 504*, of Oct. 19, 2009, Constitutional Chamber of the Supreme Court of Nicaragua, at 22, <http://www.friendericvolz.com/storage/20091022-SENTENCIA-504-2009.pdf> (invoking human rights law to overturn constitutional term limits so as to allow President Daniel Ortega to retain power). For earlier research of court subjugation in authoritarian regimes, see Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *Rule By Law: The Politics of Courts in Authoritarian Regimes* 14–21 (Tom Ginsburg & Tamir Moustafa eds., 2008).



optimism about the triumph of liberal values based on the rule of law blossomed to the point of irrational exuberance: One prominent scholar even purported to see the end of history in the Hegelian sense, as rational debate about fundamental political commitments seemingly had become pointless.<sup>231</sup> The new century has retaught us that liberal values cannot exist without liberal institutions, and that these institutions do not arise naturally or organically. Rather, they depend on a great reservoir of social understanding and trust. In particular, events have forced us to recognize that judges, rather than the inevitable defenders of ordered liberty, can become instruments of injustice. What divides judges around the world now seems important again, and what they share in common seems less significant.

Faced with the challenge that corrupt and servile courts pose to a system of global litigation, dialogue theory comes up short. At its heart, it relies heavily on normative commitments, first and foremost on the good will of the trustee courts committed to a cosmopolitan project.<sup>232</sup> In a world where judges do not all share these capabilities or values, dialogue theory does not work.

In such a world, contract theory provides guidance to confused judges. It accepts that people seeking to live and transact in a global society make choices and assume risks. It instructs courts to respect those choices. It also recognizes that states can address these risks and create international mechanisms to manage them. Contract theory gives judges good reasons to honor the choices that those states make. Where an international agreement (either conventional or customary) assigns a role to a court or tribunal, contract theory justifies a judge's willingness to assume that role. Where no role is clearly given, contract theory justifies a court's decision to stand aside and await further instructions.

Contract theory does more than provide general guidance. It validates particular solutions to problems judges face when managing international judicial encounters. It supports both respect for choice-of-law clauses in private contracts and limits on the kinds of evidence that parties can introduce to prove foreign law. It explains why states treat foreign court

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<sup>231</sup> Francis Fukuyama, *The End of History and the Last Man* passim (1992).

<sup>232</sup> For an instance of Slaughter invoking her model of judicial dialogue to attack U.S. Supreme Court practice rather than to explain it, see Anne-Marie Slaughter, *Court to Court*, 92 *Am. J. Int'l L.* 708, 712 (1998); see also Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 *Calif. L. Rev.* 957, 957 (2005) (characterizing Slaughter's work as making normative rather than empirical claims).

judgments with greater suspicion than they do treaty-based arbitral awards, and supports recent reform proposals to link enforcement to reciprocity. It reinforces the modern trend toward presumptive enforcement of choice-of-forum clauses in private contracts and focuses the *forum non conveniens* calculus on asset and transaction location, rather than the apparent capabilities of foreign courts. It counsels caution in the rendering of judicial assistance in the absence of an express and authoritative mandate, such as a statute or treaty, and supports the use of objective tests, such as the center-of-gravity rule in international bankruptcies, when assistance is given. It both defends the inclination of courts to enjoin some foreign litigation, absent an authoritative mandate against such practice, and bolsters the inclination of courts to base the decision whether to issue an injunction on the location of transactions and assets, rather than on a view as to the quality of the alternative court.<sup>233</sup>

#### CONCLUSION

A trope in international law scholarship is the discipline's embrace of trends in other legal academic fields only after they have become outdated at the point of origin.<sup>234</sup> Thus one might compare international law's move toward the centrality of the judge, which lies at the heart of dialogue theory and the concept of trustee courts, to the vision of judicial supremacy that dominated U.S. constitutional law scholarship from the 1960s to the 1980s.<sup>235</sup> U.S. constitutional theorists, encountering inspiring and transformational judicial acts (*Brown v. Board of Education*<sup>236</sup> first and foremost), sought to explain how and why courts could be the principal source of authority and legitimation in their field. So dialogue theory looks to global courts to supply and legitimate international law.

Yet U.S. constitutional theorists have experienced a bit of buyer's remorse. Since the 1980s, the courts, first and foremost the Supreme Court

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<sup>233</sup> E.g., *Airbus Industrie G.I.E. v. Patel*, [1998] 1 A.C. (H.L.) [119], [140]–[141] (appeal taken from Eng.) (refusing to enjoin U.S. tort suit because of the absence of any U.K. material interest in the litigation).

<sup>234</sup> Paul B. Stephan, U.S. Judges and International Courts, 100 *Am. Soc'y Int'l L. Proc.* 238, 242 (2006).

<sup>235</sup> Seminal works that focused constitutional theory on the role of the judge include Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

<sup>236</sup> 347 U.S. 483 (1954).

of the United States, have become problematic, as often disappointing leading academics as encouraging them. In response, theorists rediscovered the role of other actors, mostly prominently “the people” themselves, unmediated by republican institutions.<sup>237</sup> The debacle that was *Bush v. Gore*<sup>238</sup> put an exclamation point on the trend and put “popular constitutionalism” front and center in U.S. theory.<sup>239</sup>

Of course, the international judiciary and the federal courts of the United States are hardly one and the same. Disillusionment with the latter need not presage disenchantment with the former. U.S. constitutional theory reflects very much the concerns of a single community, while the role of the judiciary in international law interests the entire world.

But the trope exists because it seems to work. For the last half of the twentieth century, constitutional theory enjoyed unparalleled prestige in the U.S. legal academy, and the wealth and influence of U.S. law schools in turn affected international lawyers around the world. Under these conditions, a shift among international jurists from a strictly positivist approach to judging to something more teleological does not seem surprising. This does not mean, of course, that unseemly or disappointing decisions by U.S. courts will directly undermine the prestige of the judiciary globally. But, if prominent courts do let down the international legal community, the intellectual apparatus already exists for a theoretical shift.<sup>240</sup>

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<sup>237</sup> Bruce Ackerman, *We the People: Foundations* 309–14 (1991); Mark Tushnet, *Taking the Constitution Away from the Courts* 181–82 (1999).

<sup>238</sup> 531 U.S. 98 (2000).

<sup>239</sup> Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 231–33 (2004).

<sup>240</sup> Perhaps *Jurisdictional Immunities of States*, see *Germany v. Italy*, Judgment, 2012 I.C.J. 37, ¶ 91 (Feb. 3), might auger such disillusionment. The ICJ’s decision that the customary international law of sovereign immunity does not recognize any exception for grave violations of international human rights has provoked a storm of criticism. See, e.g., Kimberley N. Trapp & Alex Mills, *Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of Germany v Italy*, 1 *Cambridge J. Int’l & Comp. L.* 153, 168 (2012); cf. Markus Krejewski & Christopher Singer, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, 16 *Max Planck Y.B. United Nations L.*, 2012, at 31, 34 (arguing that the ICJ should have indicated that its findings were restricted to the particularities of *Germany v. Italy*); Stefan Talmon, *Jus Cogens After Germany v. Italy: Substantive and Procedural Rules Distinguished*, 25 *Leiden J. Int’l L.* 979, 995–1001 (2012) (arguing that substantive rules of *jus cogens* should not eliminate procedural rules, such as immunity, but can require the modification of procedural requirements). For my more sympathetic appraisal of the decision, see Paul B. Stephan, *Sovereign Immunity and the International Court of Justice: The State System Triumphant*, in *Foreign Affairs Litigation in United States Courts* 67, 82–86 (John N. Moore ed., 2013).

Yet contract theory has much to offer international law, perhaps much more than popular constitutionalism. To begin with, it reflects a foundational, if now somewhat beleaguered, principle of international law, namely that obligations arise out of state consent.<sup>241</sup> The principle in turn expresses both idealism and realism. Given agency, the principle implies, states will behave well. If they can seek gains from trade, states will find them. Without states, the principle also implies, one cannot expect much help. Rules without commitment invite cynicism and desuetude.

The turn toward contract law continues to do important work in other areas of international law. In both the United States and Europe, the responsible tribunals have used contract arguments to justify the extent of fundamental human rights. For the United States, the most significant instrument vindicating those rights is the Constitution. This compact, the Supreme Court has ruled, embodies a commitment among the American people, and extends as far as, but no further than, the extent of U.S. sovereignty.<sup>242</sup> In Europe, an international treaty provides the foundation for these rights, and the Strasbourg Court has read that instrument as constituting a pledge among the state parties to bind all their official acts, wherever their location.<sup>243</sup> Different contracts, different outcomes, but in both cases agreements among authoritative actors do the important work.

At the end of the day, what other alternative do courts have? They always will need to fill gaps and make inferences, thereby deciding questions that authoritative decisionmakers either did not contemplate, or recognized but did not wish to resolve. A simple admonition to try to do

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<sup>241</sup> On the move away from state consent in contemporary international practice, see Paul B. Stephan, *Privatizing International Law*, *supra* note 80, at 1594.

<sup>242</sup> *Boumediene v. Bush*, 553 U.S. 723, 755 (2008) (“[W]e take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.” (citation omitted)); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266, 275 (1990). For scholarly debate, compare Paul B. Stephan III, *International Law in the Supreme Court*, 1990 *Sup. Ct. Rev.* 133, 157–58 (1991) (defending decision of Supreme Court not to extend constitutional protections to overseas aliens), with Gerald L. Neuman, *Whose Constitution?*, 100 *Yale L.J.* 909, 984–87 (1991) (criticizing exclusion of overseas aliens from constitutional protections).

<sup>243</sup> *Al-Jedda v. United Kingdom*, 53 *Eur. H.R. Rep.* 23, 838–39 ¶¶ 84–86 (2011). For limits on extraterritoriality under the European Convention, see *Banković v. United Kingdom*, 2001-XII *Eur. Ct. H.R.* 333 ¶¶ 67–73. For advocacy of more extraterritoriality, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* 8–17 (2011).

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the best for the most, without baselines or clear guidance, gives scant comfort or help.

Judges face these challenges in many contexts, and increasingly when negotiating their relationship to the world community of judges. Faced with court-on-court encounters, judges get little comfort from dialogue theory. By exhorting them to act as diplomats, the theory thrusts them into a role for which they are poorly suited. Most judges lack the kind of regular, sustained and deep contacts with other courts that might allow them to tell when to engage and when to step aside. Nor does a trustee concept that privileges the judge's own conception of social welfare over authoritative instructions help all that much. Especially among national judges, but also among those who sit on international bodies, there exists too much variation among conceptions of social welfare to help in the resolution of hard questions.

Contract theory is no panacea either. But it does give judges the tools to determine when indifference is appropriate, and when they should look closely at the work of foreign courts. It provides the best blueprint for a world when court-on-court encounters occur more often and take on greater moment.

