IS TRANSNATIONAL LITIGATION DIFFERENT?

SAMUEL P. BAUMGARTNER*

ABSTRACT

During the last fifteen years, there has been a growing interest in litigation transcending national borders. Yet, both in the United States and in Europe, where this interest is much older, a comprehensive intellectual framework to deal with this type of litigation is hard to find. In fact, courts and procedural law reformers still approach transnational cases in the same fashion as purely domestic ones, adjusting the concepts of domestic law where they believe it necessary. This has created significant problems both for litigants seeking justice in transnational cases and for lawmakers fashioning policy specifically for the transnational setting.

In light of recent developments in international trade law and in the European Union, this Article argues that, as a normative matter, we should begin to treat transnational litigation as a distinct field. It suggests that in-depth procedural comparison and international relations theory would have much to contribute to such a field. It uses a case study on judicial cooperation in Germany for litigation in the United States to demonstrate various ways in which lawmaking for transnational litigation is interconnected beyond national borders. The Article concludes that procedural law reformers who continue to disregard insights from both international politics and comparative procedure are apt to lose control over their lawmaking efforts to savvy groups, to international trade regimes such as the WTO and NAFTA, and to lawmakers abroad.

* Associate Professor, University of Akron School of Law. LL.B. 1990, University of Bern, Switzerland; M.L.I. 1993, LL.M. 1995, University of Wisconsin, Madison; J.S.D. 2002, University of Bern, Switzerland. I am indebted to Ron Brand, Steve Burbank, Kevin Clermont, Annelise Riles, Tom Rowe, Gerhard Walter, and to the participants of a faculty workshop at Cornell Law School for valuable comments on earlier drafts of this Article and to Louise Teitz and Fridolin Walther for insightful discussions. Unless otherwise indicated, translations are mine.

1297
OVERVIEW

1. Introduction 1298
2. The Traditional Model 1307
3. The Case Study: German Judicial Cooperation for Litigation in the United States 1312
   3.1. The German Developments 1314
      3.1.1. Initial Stages 1317
      3.1.2. The "Judicial Conflict" Emerges 1327
      3.1.3. The Second Stage: Recognition and Enforcement of U.S. Judgments 1338
   3.2. Lessons From the German Experience 1344
4. A Suggested Framework 1353
   4.1. Insights From International Relations Theory 1353
   4.2. Applying Liberal International Relations Theory to Transnational Litigation 1361
   4.3. Refining the Suggested Framework 1371
   4.4. What Makes Transnational Litigation Different? 1378
5. The Basis of the Field: Comparative Procedure and International Relations Theory 1384
6. Conclusion 1390

1. INTRODUCTION

Judicial procedure plays a powerful role in the making and application of law. Despite prominent attempts to relegate "adjective law" to the status of a "handmaid of justice," students of procedure have long since realized, and empirical studies have con-

---


3 See, e.g., Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. Rev.
firmed,4 that no matter what its features, procedural law affects the rights and the behavior of groups and individuals—including those involved in the administration of justice. It is therefore important that those in charge of applying and devising procedural rules continuously reflect upon the values that those rules serve or ought to serve.5 Equally important, procedural lawmakers must


regularly assess the effectiveness of our approaches to civil litigation in furthering the chosen process values. Such an assessment is particularly urgent with regard to the quickly growing class of civil cases that transcend national borders. In this Article, I want to pursue the question whether our approaches to civil litigation are adequate to deal with this expanding class of transnational cases. Closely related, I want to know whether the presence of a transnational element, such as a foreign party or evidence located abroad, does more than add an interesting twist to an otherwise fairly typical domestic case.

These are important queries. Both the demise of the Cold War and the revolution in communications technology have heightened our awareness of the limits of national borders and of the concomitant importance for our own law-making enterprises of social, economic, and legal developments elsewhere. This awareness has led to a sense among some that our traditional methods of dealing with litigation transcending national borders are inadequate. It is a sense that has culminated in two new projects undertaken by the American Law Institute ("ALI")—an effort to draft Transnational Rules of Civil Procedure and a project to improve international cooperation and understanding in transnational insolvency procedures—and in an international attempt to create a worldwide convention on jurisdiction and enforcement of foreign judgments.

6 See infra note 24 and accompanying text.


which in turn has spawned another ALI project. Moreover, international trade regimes, such as the World Trade Organization ("WTO") and North American Free Trade Agreement ("NAFTA"), and supranational organizations, of which the European Union ("EU") is the most prominent example, have begun significantly to affect the content of the law of transnational litigation. Within the European Community ("EC"), this has occurred so swiftly and so frequently during the last few years that some scholars have advocated caution, flagging an urgent need for scholarship to assess the larger implications of these transnational reform efforts.


11 See infra text accompanying notes 283-308.

Unfortunately, the foundations of this area of law have largely remained untouched by systematic scholarship. This is not for lack of scholarly attention. In fact, the distinct issues raised by transnational cases have inspired a growing number of casebooks and treatises that capably map the terrain, suggest textual analyses, and identify recurrent patterns of response. Correspondingly, within the last decade, a new course of study named transnational (or international civil) litigation has emerged in the curriculum of U.S. law schools. In other countries, particularly in German-speaking Europe, both the course and textbooks accompanying it have been around much longer. However, both in the United States and


14 In a review of the on-line course schedules for the top 30 U.S. law schools as identified by the latest U.S. News & World Report ranking (for lack of a better method to circumscribe my research), I was able to locate a specific course on transnational or international civil litigation at fifteen schools. Eight out of those fifteen are among the top ten schools (last visited Nov. 5, 2004).

15 See, e.g., F. MEILL, DAS INTERNATIONALE CIVILPROZESSRECHT (1906) (Switzerland) (treatise of international civil procedure); ERWIN RIEZLER, INTERNATIONALES ZIVILPROZESSRECHT (1949) (Germany) (providing German materials for the study
elsewhere suggestions of a comprehensive intellectual framework that would provide definition to the cases and materials thus covered are hard to find. Equally rare are studies on any distinct factors that might affect lawmaking for transnational litigation.

Under these circumstances, one may wonder whether transnational litigation is "a distinct field."16 Until relatively recently, the prevailing view seems to have been that it is not—at least not in a functional sense.17 As Professor Burbank put it over a decade ago, transnational litigation should instead be understood,

as part of a process of cross-fertilization in which (1) doctrine and techniques developed in the context of domestic cases are brought to bear on problems presented in international litigation, and (2) the increasingly international dimensions of litigation in our courts prompt changes in doctrine and techniques, which are then applied in domestic cases.18

---


17 While Professor Burbank was persuaded that transnational litigation is a nominal field, one that "'can ... be justified by the heuristic needs of the profession,'" Burbank, World, supra note 16, at 1457-58 (citing to Michael S. Moore, A Theory of Criminal Law Theories, in 10 Tel Aviv Stud. in Law 115, 131 (Daniel Friedmann ed., 1991)), he did not consider it a field of a functional kind, one that tries "'to realize some underlying kind of justice.'" Id. at 1459; see also Heinrich Nagel & Peter Gottwald, Internationales Zivilprozessrecht 2 (5th ed. 2002) (suggesting that the term "international civil procedure" does not identify a cohesive body of rules, but rather refers to a host of different issues that may arise in litigation that for one reason or another transcends national borders).

18 Burbank, World, supra note 16, at 1458. Professor Burbank there responded to a claim by the authors of the first casebook/treatise on the market in the United States that what they called "international civil litigation" was about to be a distinct field of law. See Born & Westin, supra note 16, at 3. In making that claim, Mr. Born and Mr. Westin suggested their own framework for analysis by identify-
This analytical model nicely captures what courts and lawmakers have been doing both in the United States and in Europe. In practice, however, this approach has created serious difficulties both for litigants seeking justice in transnational cases and for lawmakers fashioning policy for transnational procedure. It is therefore time that we develop an analytical framework for transnational litigation that takes sufficient cognizance of the international interconnectedness of these cases, both factual and legal, and of the way this interconnectedness affects the process of making law for transnational proceedings. In this sense, I submit, we need to view and treat transnational litigation as a distinct field.

Fortunately, the last decade has witnessed the emergence of interdisciplinary cooperation between scholars of international law and international political scientists. The fruits of this coopera-

19 With respect to the United States, Professor Burbank has elsewhere explained this phenomenon as a motive or psychological "disposition to assimilate international to domestic interjurisdictional cases," which derives from "a complex of structural, historical, and cultural factors," one of which consists of "a history of accommodating the perceived needs of [state] sovereignty under constitutional language long on aspiration but short on details," and which is "reinforced by the very powerful impulse of modern American procedural law, including for these purposes choice of law, to apply the same rules to all cases." Stephen B. Burbank, Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law, 49 AM. J. COMP. L. 203, 208-09 (2001) [hereinafter Burbank, Equilibration]. Notice, however, that as a matter of fact, transnational cases may be treated differently from domestic cases to some extent. See, e.g., Kevin M. Clermont & Theodore Eisenberg, Xenophobia in American Courts, 109 HARV. L. REV. 1120 (1996) (finding that foreigners, both as plaintiffs and as defendants, fare significantly better than Americans in U.S. federal courts); Kimberly A. Moore, Xenophobia in American Courts, 97 NW. U. L. REV. 1497 (2003) (finding anti-foreigner bias in U.S. patent litigation).

20 See, e.g., infra Section 3.


https://scholarship.law.upenn.edu/jil/vol25/iss4/3
tion are highly valuable for the purpose of developing a better understanding of the factors that affect the process of making law for transnational procedure. Thus, I will use some of this recent international law and international relations scholarship to shed some light on the complex interplay among lawmaking for transnational litigation, transnational actors, and lawmaking abroad.

My central claim is this: the law applicable to transnational litigation affects the behavior of transnational actors—groups and individuals who are both subject to the laws of more than one sovereign and have access to more than one sovereign to have their interests counted.22 Those actors, in turn, may affect the international as well as domestic law of transnational litigation both


22 For many of us, this is increasingly true to some extent some of the time. My concept of transnational actors is thus a fluid one. It may be most interesting to study those transnational actors with a particular transnational purpose, such as multinational organizations, certain non-governmental organizations, advocacy networks, and epistemic communities (networks of experts and scientists pursuing policy goals based on profound knowledge in a particular issue or area), because they are the ones with the most measurable impact. See, e.g., Thomas Risse, Transnational Actors and World Politics, in HANDBOOK OF INTERNATIONAL RELATIONS, supra note 21, at 255, 255-56 [hereinafter Risse, Transnational Actors]. As the case study in Section 3 of this Article demonstrates, however, it would be a mistake to exclude from the analysis transnational actors that do not self-consciously pursue a transnational purpose.
abroad and at home in the future. If those in charge of making and applying the law of transnational litigation want to be in control of their efforts, they need to be aware of this interplay between lawmaking and transnational actors and of how particular procedural choices may influence it in the long run. They also need to reflect on the values they want to and can usefully promote within this scheme, realizing that simply advancing their domestic procedural preferences in the short run may implicate their own values of transnational justice in the future.

Once we appreciate this need, it becomes evident that, although courts and lawmakers have occasionally considered one or the other of these factors in making their decisions on transnational litigation, they have not paid much attention to the big picture just described, largely overestimating the power of unilateral lawmaking. What is even more striking from this view is the lack of any in-depth procedural comparison guiding their work. After all, as we shall see, one of the most pervasive difficulties with understanding the forces that affect the law relating to transnational litigation lies in the complexity of procedural law and its strong control by local ideational values and the concomitant lack of information on foreign approaches to transnational cases. Thus, I contend that, together with international relations theory, comparative procedural analysis is perhaps the most important building block in the construction of a distinct field of transnational litigation.

After setting out briefly the traditional model of lawmaking for transnational litigation in Section 2 of this Article, I will proceed, in Section 3, to a case study to pinpoint important factors that the traditional model has largely ignored. As a distinct example of what can happen if we merely approach our subject from domestic doctrines without paying systematic attention to transnational litigation as a field, I will trace the development of judicial cooperation in Germany for litigation in the United States. This German-U.S. example supplies ample material with which to examine my claim that transnational litigation in one country may affect that in another and vice versa. In Section 4, I will then suggest a larger analytical framework. The case of Germany also provides abundant evidence that decision-making based on ignorance about other procedural systems is apt to yield unpleasant surprises and that, in the long run, it may hurt rather than advance the distinct values we have chosen to pursue in transnational litigation. Thus, in Sec-
tion 5, I will return to comparative procedural analysis and explore its potential to serve, together with further research in international relations, as the basis of a discrete field of transnational litigation.

2. THE TRADITIONAL MODEL

According to the traditional view, transnational litigation, as civil procedure, is primarily controlled by domestic law. At least this is what European textbooks like to point out in order to clarify for students of “international civil procedure,” as the subject is known in continental Europe,\(^{23}\) that the “international” label does not necessarily refer to the source of the principles and rules that those students are about to explore, but to the fact that these principles and rules apply to cases with an international element—a foreign party, a foreign proceeding, or evidence located abroad.\(^{24}\) This view serves students as a helpful rule of thumb to gain a first conceptual orientation to transnational litigation. As such it is likely to be shared in the United States, where treaties have long been neglected as a source for lawmaking in private international law\(^{25}\) and where customary international law is not generally credited with playing much of a role in this area.\(^{26}\)

But what exactly does it mean to say that domestic law primarily controls transnational litigation? Unfortunately, practitioners and law reformers have largely been left to their own devices in answering this question. Without profound analysis of larger issues of transnational litigation, they have mostly proceeded from the assumption that it means just what it says, namely that, absent controlling treaty provisions, “a sovereign state may fashion domestic law as it deems fit.”\(^{27}\)

---

\(^{23}\) See authorities cited supra note 15.

\(^{24}\) See, e.g., ANDREAS BUCHER, I/1 DROIT INTERNATIONAL PRIVÉ SUISSE 17 (1998); GIUSEPPE CAMPEIS & ARRIGO DE PAULI, IL PROCESSO CIVILE ITALIANO E LO STRANIERO 1 (1996); REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT 4-5 (4th ed. 2001); HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT 1 (3d ed. 2002); GERHARD WALTER, INTERNATIONALES ZIVILPROZESSRECHT DER SCHWEIZ 47 (3d ed. 2002).


\(^{26}\) See, e.g., Burbank, World, supra note 16, at 1464-65, 1496-97 (doubting whether customary international law ever played a role or even should play a role in U.S. courts).

\(^{27}\) MAX GULDENER, DAS INTERNATIONALE UND INTERKANTONALE
is often based on positivist,\textsuperscript{28} and primarily in Europe, formalist\textsuperscript{29} assumptions as well as by the further traditional belief that there is

\textsc{Zivilprozessrecht der Schweiz} 1 (1951).

\textsuperscript{28} Positivism emerged in response to the natural law theories that for centuries had assumed that law is shaped and determined by metaphysical powers such as deity or human reason. In much-cited passages, John Austin (1790-1859) described the basic tenets of positivism thus:

Every positive law (or every law simply and strictly so called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme. In other words, it is set, directly or circuitously, by a monarch or sovereign number, to a person or persons in a state of subjection to its author.


The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.


\textsuperscript{29} \textit{See, e.g.}, infra notes 78, 85, 229 and accompanying text for examples of formalism in German jurisprudence. Formalist theories are theories about adjudication, that is, theories about how law is and how it should be applied to decide cases. They hold that law is reasonably determinate, so that a court or other agency applying the law to a particular case can engage in a relatively mechanical syllogistic exercise guided by the logic of legal rules. Thus, the law applier has little, if any discretion, and may not have recourse to reasoning extant to law. \textit{See, e.g.}, Leiter, supra note 28, at 1144-46. In the United States, formalism was utterly discredited by the anti-formalists and legal realists in the early part of the last century and has never fully recovered. \textit{See, e.g.}, Neil Duxbury, \textit{Patterns of American Jurisprudence} 32-299 (1995).
a clear line dividing domestic and international law.\textsuperscript{30} In addition, traditional international law doctrine, with its strong state-centric outlook, has envisioned for international law a role only on the state-to-state level.\textsuperscript{31}

In the United States, these assumptions have increasingly been interpreted to mean that, on the one hand, international law can have domestic effect only to the extent that it has been implemented by domestic legislation\textsuperscript{32}—whereby Senate advice and con-

\textsuperscript{30} See, e.g., I/1 GEORG DAHM ET AL., VÖLKRECHT 102-03 (1989) (suggesting that, today, not even the monists generally claim that international law renders inapplicable, inconsistent domestic law within the domestic legal sphere); Harold G. Maier, The Authoritative Sources of Customary International Law in the United States, 10 Mich. J. Int’l L. 450 (1989). At least for non-Americans, Professor Maier’s piece, id., is particularly interesting because it mixes a strongly antiformalist, partly antipositivist, McDougal-inspired process view of international law with a strict positivist-based distinction between lawmaking authority for domestic and international law.

\textsuperscript{31} See, e.g., S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (“International law governs relations between independent States.”); Vienna Convention on the Law of Treaties, May 23, 1969, art. 1, 1155 U.N.T.S. 331 (mentioning only nation states as legal subjects capable of entering into international treaties); 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 21-22 (2d ed. 1912) (“[T]he Law of Nations is based on the common consent of individual States, and not of individual human beings. States solely and exclusively are the subjects of international law.”); DAHM ET AL., supra note 30, at 23, 102-03 (noting that states are the subjects of international law).

\textsuperscript{32} Contrary to traditional view (see, e.g., RESOLUTION (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 cmt. d, 115 cmt. e (1987) [hereinafter RESTATION (THIRD)] (stating that customary international law is federal law); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 238-39 (2d ed. 1996) (claiming that customary international law is federal common law)), a number of scholars have recently argued that customary international law is not automatically the law of the United States. The arguments differ. Professor Maier, for example, has suggested that even where a U.S. court “applies” customary law, the source of authority is its decision and thus U.S. law rather than international law because its decision to interpret the international law rule in a particular fashion represents the “will of the United States body politic.” Maier, supra note 30, at 455. Others have argued that customary international law cannot be federal common law and thus cannot be applied by U.S. courts unless authorized to do so by the federal political branches. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 816 (1997); Curtis A. Bradley & Jack L. Goldsmith, Federal Courts and the Incorporation of International Law, 111 Harv. L. Rev. 2260 (1998) (responding to critiques of their work). But see Harold Hongju Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824 (1998) (critiquing Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, supra); Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371 (1997); Beth Stephens, The Law of Our Land: Customary International Law as
sent under Article II, Section 2(2) of the U.S. Constitution may not be sufficient—while, on the other hand, there is little in international law that prevents domestic law, including procedural law, from being applied transnationally. While the former view has been under attack within the area of human rights, the latter has


33 This is due to the concept of the “non-self-executing” treaty—that is, the treaty provisions which cannot be invoked by individuals before U.S. courts because either the treaty itself or the circumstances surrounding U.S. ratification indicate that the Executive or Congress considered prior implementing legislation necessary. See, e.g., RESTATEMENT (THIRD), supra note 32, § 111(4). Indeed, some have recently suggested that, as originally understood, the Constitution of the United States requires all treaties to be implemented by Congress before they can regulate the conduct of private parties. See John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 COLUM. L. REV. 1955 (1999). But see Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,” 99 COLUM. L. REV. 2095 (1999) (responding to Yoo, Globalism and the Constitution, supra); Carlos Manuel Vazquez, Laughing at Treaties, 99 COLUM. L. REV. 2154 (1999) (refuting claims in Yoo, supra).

34 See, e.g., infra Section 3.2 and text accompanying notes 200-209.

35 See, e.g., Burbank, World, supra note 16, at 1459-66; Maier, supra note 30, at 465-68. The contrary aspiration of the Restatement’s drafters, see RESTATEMENT (THIRD), supra note 32, § 403 cmt. a (claiming that the Restatement’s mandate of a reasonableness inquiry “has emerged as a principle of international law”), was dealt a severe blow by the U.S. Supreme Court in Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

had considerable staying power, most recently through theories of globalization and transnationalism that in effect claim that the time for countries to invoke national sovereignty against the unilateral actions of other nations\(^3\) is over.\(^4\)

In the United States and elsewhere, the respective views and assumptions have operated to focus the attention of courts, commentators, and lawmakers on domestic law and policy in transnational litigation. Not surprisingly, the result has often been a distinct preference for domestic solutions, including in the interpretation and application of international law.\(^5\) All of this has spawned a long list of false starts and misconceived policies.\(^6\) The resulting differences among lawmakers and courts of various

\(^3\) Traditionally, liberals in the United States have been concerned primarily about what they consider to be unwarranted claims of national sovereignty against the ability of U.S. courts to do justice, whereas conservatives have primarily fought suggestions that the President and Congress should be so limited in the exercise of their constitutional powers. Cf. Paul B. Stephan, *A Becoming Modesty - U.S. Litigation in the Mirror of International Law*, 52 DePaul L. Rev. 627, 628 (2002) ("Commentators who wish U.S. judges to take on a broader role in addressing international injustice often deplore U.S. unilateralism by the Executive or Congress. The reverse is also true: skeptics of collective security, typically jealous of national sovereignty, express alarm at bold judicial action affecting foreign affairs.").

\(^4\) See, e.g., *infra* notes 349-355; cf. *In Re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 304 (3d Cir. 2004) (alleging that "there is no reason to assume that discovery under the Federal Rules would inevitably offend Germany's sovereign interest because presumably Germany, like the United States, would prohibit the alleged price-fixing conspiracy and would welcome investigation of such antitrust violation to the fullest extent"); Ugo Mattei, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law*, 50 Am. J. Comp. L. 87, 96 (Supp. 2002) (noting that American "legal parochialism... can easily be explained within the Globalization = Americanization equation").

\(^5\) See, e.g., Burbank, *Reluctant Partner*, *supra* note 25, at 123 (citing the concern of some members of the Advisory Committee on Civil Rules regarding a proposed amendment to FED. R. CIV. P. 26 in 1990 that deference be expressed in the rule to "diplomatic efforts that are undertaken and accomplished by other branches of government," and "[a]fter expressing that deference - I don't mean as a complete ritual, but after expressing that deference, then proceed with what we need to do to do justice"); see also Patrick M. McFadden, *Provincialism in United States Courts*, 81 Cornell L. Rev. 4 (1995) (exploring the reasons for the marginal role played by international law in U.S. courts).

\(^6\) See, e.g., *infra* Section 3.
countries go deeper than many of them realize. Not surprisingly, the negotiations for a multilateral treaty on jurisdiction and judgments at the Hague have been stalled.\(^41\) The reason for all this, as a fresh look at the subject reveals, is that the traditional view fails to capture the richness and complexity of interrelations between the international and the domestic levels of lawmaking and among groups, individuals and governments acting transnationally. As it turns out, there is a closer connection between the foreign elements that characterize a certain type of case as “transnational”\(^42\) and the law applicable to it than one might at first assume.

3. THE CASE STUDY: GERMAN JUDICIAL COOPERATION FOR LITIGATION IN THE UNITED STATES

To see why this is so, I present a case study concentrating on the ways in which the conduct of transnational litigation in one country, through various channels, affects the conduct of transnational litigation in another and vice versa. In what follows, I analyze the way in which transnational litigation in the United States affected judicial cooperation for litigation in the United States (including judgment recognition) in Germany from the 1950s to the mid-1990s. Judicial cooperation is the performance of a judicial act by one court on its territory upon the request and for the benefit of another.\(^43\) The need for such cooperation is based on the notion that the power of national courts is limited, among other things by national sovereignty.\(^44\) What makes judicial cooperation especially interesting for our purposes are the considerable disagreements between the United States and a number of civil law countries on the extent to which national sovereignty limits the power of domestic courts and on how to properly grant judicial cooperation. These


\(^{42}\) See supra text accompanying note 24.


\(^{44}\) On the historical origins of this notion, see BAUMGARTNER, HAGUE CONVENTION, supra note 9, at 48-53.
disagreements are based largely on differences in domestic procedural concepts and on disparate views on how best to approach transnational cases.\(^{45}\)

The case of Germany is particularly interesting because the relevant actors were steeped in the traditional approaches to transnational litigation sketched above.\(^{46}\) The concentration on Germany within continental Europe is also apt because in that country, one finds a well documented record of the relevant events, influences, and legal views during what Germans have termed the *Justizkonflikt* (judicial conflict)\(^{47}\) with the United States.

The analysis that follows is based on mostly published materials as well as on personal conversations with some of the individuals involved in what has become known in Germany as the "judicial conflict" with the United States.\(^{48}\) One caveat remains, however. For various reasons, the minutes of legislative committee meetings and much of the materials of administrative decision making are either shrouded in confidentiality or have otherwise become unavailable.\(^{49}\) It may well be that knowledge gained from

---

\(^{45}\) See, e.g., id. §§ 2-3.

\(^{46}\) See supra Section 2.


\(^{48}\) See supra note 47 and accompanying text.

\(^{49}\) For example, the central authorities in Germany do not keep any copies of materials supporting requests for judicial cooperation. Thus, finding out what happened in a particular case is all but impossible to discover after the fact. See, e.g., Harald Koch, *Zur Praxis der Rechtshilfe im amerikanisch-deutschen Prozeßrecht* -
such materials would change the analysis to some degree.

3.1. The German Developments

Disagreements about the proper method of judicial cooperation between Germany and the United States are nothing new. There was a lengthy diplomatic exchange as early as 1874 when imperial Germany saw itself forced to defend its newly obtained sovereignty against perceived U.S. intrusions.\textsuperscript{50} While post-World War II West Germany was relatively forthcoming to unilateral U.S. interests in its approach to judicial cooperation,\textsuperscript{51} the country quickly reverted to its prewar position after U.S. occupation ended in 1955.\textsuperscript{52} The position, similar to that of other civil law countries,\textsuperscript{53} briefly stated, is: that the performance of judicial acts by foreign officials, such as the service of process and the taking of evidence, are not permitted on German territory without the previous permission of German authorities; that the proper way to obtain such judicial acts on German territory is to request a German court, through diplomatic channels, to perform them; and that, in executing such a request, usually called a letter rogatory or letter of request,\textsuperscript{54} a German court will generally apply German law, including limitations on the collection of evidence that are considerably tighter than in the United States.\textsuperscript{55} This position and its various ramifications had been developed through transnational cases that


\textsuperscript{50} See BORN, supra note 13, at 849 (describing German diplomatic protests against attempts of a U.S. Vice-Consul and an Assistant U.S. Attorney to take sworn testimony on German territory).

\textsuperscript{51} In judging how voluntarily Germany really cooperated with U.S. authorities, one needs to be aware not only of the function of the United States as an occupying force but also of the fact that several of the cases at issue concerned German suits to reclaim property from the U.S. Alien Property Custodian under the Trading with the Enemy Act. For an example of such a case, see Jones, supra note 43, at 532.


\textsuperscript{53} See, e.g., BORN, supra note 13, at 774-77, 847-49 (discussing civil law views).


\textsuperscript{55} See, e.g., BORN, supra note 13, at 774-77, 847-49; JUNKER, supra note 52, at 218-22 (discussing the German approach).
mostly involved other countries of the European continent, countries with which Germany shares a good deal of legal history and procedural approaches as well as traditions regarding the territorial limits of state action in private international law.® Countries, moreover, with which Germany had concluded a staggering number of treaties on judicial cooperation,° thus further harmonizing approaches.®

How this historically grown German position should be applied in detail to cases involving the United States with its entirely different litigation system and different views on judicial cooperation is a question that began to vex governmental authorities, courts, and, after a while, academics beginning in the late 1970s, when German companies, having invested heavily in the United States, increasingly became involved in U.S. litigation.® The response both under German domestic law and, since 1979, under the Hague Service and Hague Evidence Conventions, has been a steady and relatively rigid application of the traditional German position, thus leading to recurrent frictions with U.S. courts and litigants searching for ways to serve process on, and receive evidence from, German nationals without having to go through the time-consuming and often unproductive letter-of-request proce-

56 See, e.g., BAUMGARTNER, HAGUE CONVENTION, supra note 9, at 47-67.
57 See, e.g., NAGEL & GOTTVOLD, supra note 17, at 7-8 (listing sixteen treaties). See also Jones, supra note 43, at 516 (noting that civil law countries “have covered the globe with a network of treaties to assure judicial assistance” among them).

59 See infra Section 3.1.1.
61 Hague Service Convention, supra note 60.
62 Hague Evidence Convention, supra note 60.
dure insisted on by Germany. In addition, starting in the late 1980s, German courts began to decide more or less difficult questions of recognition law against U.S. judgment creditors.

While a certain liberalization has taken place since,63 these German developments are as striking for what did not happen as for what did. To this day, the regular German exposure to transnational litigation in U.S. courts has not led to an alteration of the traditional German position on judicial cooperation that would even come close, if perhaps only under certain circumstances, to providing litigants in U.S. courts with the evidence they need. It also has not led German authorities to abandon a seemingly outdated interpretation of national sovereignty regarding the service of process and the taking of evidence on and from German territory or at least to modify that interpretation so as not to require the costly, and time-consuming, letter-of-request procedure in most cases.64 And finally, the exposure to U.S. litigation has not led to a recognition practice that would oppose the recognition of U.S. judgments only in the most exceptional of cases.

The reasons for these German developments are manifold, including prominently the behavior of transnational litigants and the actions of U.S. courts and governmental authorities in cases involving German nationals and their reactions to the German position just described. A closer analysis suggests that, on the most basic level, the following factors were important: (1) a sustained effort by German industry to achieve protection from mushrooming U.S. litigation that threatened to inflict costs of a magnitude these industries could hardly imagine from their experience with domestic German litigation; (2) a distinct, historically grown view of law and procedure in general and of the mandates of international law and of appropriate approaches to transnational litigation in particular; (3) a lack of understanding of the very different views and approaches in the United States on those subjects; and (4) a perceived need to protect German law and sovereignty from unwarranted intrusions by U.S. courts and litigants. As the following analysis shows, these factors interacted in specific ways to cause what is generally known in Germany as the Justizkonflikt,65 suggesting a number of assumptions about the way the lawmaking process in

63 See infra text accompanying notes 156-167.
64 See infra Section 3.1.2.
65 See supra note 47 and accompanying text.
transnational litigation works.

3.1.1. Initial Stages

From 1955 to 1970, judicial cooperation for litigation in the United States was not much of an issue in Germany. There were few U.S. cases that required the procurement of service or evidence on or from German territory, and in such cases as did occur, acceptable solutions were often available. Not that the German approach was satisfactory from a U.S. point of view. Far from it, not only was it usually necessary to file a letter rogatory with the appropriate German authorities, who would then apply their own law to execute the request, but also those authorities who nevertheless refused (and still refuse in the absence of an applicable treaty today) to apply any measures of compulsion. On the basis of an exchange of diplomatic notes from 1955-56, never published in Germany, U.S. consular officers were allowed to question persons residing in Germany. Although the consular officers, too, were prevented from applying any means of compulsion, they could at least make needed evidence available in a form that could be used in U.S. court.

Obviously, this arrangement was both fragile and complicated and therefore could not be expected to work for more frequent or

---

66 See supra note 55 and accompanying text.

67 The two most important treaties containing an obligation of the requested state to apply compulsion, where necessary, to serve process or to take evidence are the Hague Service and Evidence Conventions. See infra note 112 (discussing improvements brought about by the Conventions).

68 ZRHO, supra note 52, §§ 70(2), 83(1). This is based on the theory that any application of compulsion by the state requires a basis in parliamentary legislation. The ZRHO, which regulates judicial assistance, is, however, merely a regulation issued by the executives of the federal and state governments. See, e.g., Rolf Stürner, Die Gerichte und Behörden der U.S.A. und die Beweisaufnahme in Deutschland, 81 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 159, 202 (1982) [hereinafter Stürner, Beweisaufnahme].


70 The Notes provided that U.S. consular officers could question West German and other non-U.S. nationals, without compulsion of any kind, with an opportunity for the person questioned to be accompanied by counsel, at the consular premises or (upon the express request or express consent of the person to be questioned) at the home or place of business of the person to be questioned. Id.

larger litigation. Not surprisingly, then, even this time period did not remain without frictions. The attempt by the U.S. Justice Department ("DoJ") to break up a cartel in the international shipping industry and the DoJ's concomitant order to German and other companies to produce a large number of documents in the United States, for example, elicited a sharp diplomatic protest from Germany in 196072 and resulted in a German blocking statute applicable to high seas shipping enterprises.73 However, at the time, this was considered primarily a political incident based on opposing views on economic policy rather than as an elementary issue of judicial cooperation. Thus, it did not interrupt the period in which judicial cooperation for litigation in U.S. courts was a relatively rare, calm, and low-key operation of little interest to courts, government officials, and academics.

This changed in the 1970s, when U.S. product liability, private antitrust, and securities litigation came into full swing, engulfing German,74 as well as U.S. companies.75 Grasping the extent of their vulnerability under U.S. procedural rules as applied to foreign defendants, German companies quickly began to ask the German governmental agencies for help while presenting the traditional German approach on judicial cooperation to U.S. courts.76 Yet, their efforts, however determined, largely failed to produce the

72 In re Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298, 318 (D.D.C. 1960) (discussing the objections of several nations, including Germany, regarding the production of documents).


74 Apparently, an extraordinarily favorable currency-exchange rate had unleashed a wave of German investment in the United States in the early 1970s, thus further increasing German exposure to U.S. litigation. See Abbo Junker, Der lange Arm amerikanischer Gerichte: Gerichtsgewalt, Zustellung und Jurisdictional Discovery, 6 IPRAX 197, 198 (1986).

75 U.S. companies also perceived (or at least found it convenient to assert) that the new onslaught of litigation had taken on crisis proportions and thus began to push strongly for tort and procedure reform, initiating the first tort reform movement that was carried by prominent judges, justices, and practicing attorneys as well as by corporations themselves. See, e.g., Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 6-11 (1983) (exploring perceptions that the United States was overly litigious in the 1970s and 1980s).

76 See, e.g., Hermann H. Hollmann, Diskussion, in JUSTIZKONFLIKT, supra note 47, at 138, 140.
governmental support they had hoped for. While the German government did intervene diplomatically or file aide-memoires in support of German litigants in those cases in which a violation of German sovereignty, and thus of international law was clearly impending under the traditional German view. However, it was not until the early 1980s that concern for German industry began to affect German judicial cooperation for litigation in U.S. courts in the large number of cases in which things were less clear.

Why did it take so long for those interests to make a difference? Essentially, we can identify two factors. First, there is a formalist view of the process of law-application by courts and governmental authorities. This view prevented the German government from diplomatically intervening in U.S. litigation simply to support its domestic industry without clear evidence of a violation of international law or German national sovereignty, actual or impending. Second, German authorities lacked any information on U.S. civil procedure and on U.S. approaches to transnational litigation. Initially, this led to the assumption that, however different U.S. procedure may be from its German counterpart, U.S. courts would generally recognize international law and German sovereignty as seen from the point of view of the traditional German approach. Accordingly, German authorities were willing to give the benefit of the doubt to the U.S. legal system, rather than to a German industry that had an apparent interest in protecting itself from exposure to liability litigation in the United States. As time wore on, how-

77 See, e.g., Volkswagenwerk AG v. Superior Court, 33 Cal. App. 3d, 503 (1973). In this case, the Superior Court for the County of Sacramento had ordered the deposition of various Volkswagen employees and ordered Volkswagen to permit inspection of its plant in Wolfsburg, Germany, on consecutive working days, both clear violations of the traditional rule that any taking of evidence on German territory without prior assent of the German government violates German judicial sovereignty. See supra text accompanying notes 53-55; see also Ernst C. Stiefel, “Discovery”: Probleme und Erfahrungen im Deutsch-Amerikanischen Rechts- hilfeverkehr, 25 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 509, 515 (1979) (citing two unpublished cases in which similar orders of federal courts to permit discovery on German territory led to diplomatic interventions by the German government); Diplomatic Note Dated September 27, 1979, from the Embassy of the Federal Republic of Germany to the U.S. Department of State, reprinted in BORN, supra note 13, at 777 (protesting the use of direct mail to serve process on German defendants).

78 See, e.g., Hollmann, supra note 76, at 139 (complaining that the industry’s requests for help and information on how to proceed in U.S. litigation was often met with “lack of knowledge, lack of interest, or even a playing down of the problems”).
however, and as incidents of both U.S. court orders and individual attorney behavior in violation of the traditional German view became more frequent, this lack of information allowed German industry representatives, a number of whom had a good grasp of the relevant U.S. law, to put their spin on how U.S. procedure was perceived in Germany.

The latter development was aided by information gained from newly published decisions and their subsequent scholarly discussion. While German activity in the early U.S. cases against German corporations, including those few that had led to diplomatic interventions, had occurred largely within the confines of the Foreign Office and the justice ministries of the individual Länder governments, the published reports of three cases between 1978 and 1981 brought home to a larger audience of German lawyers the perceived realities of some aspects of U.S. law that in-house counsel of German companies had long lamented: large, from German standards virtually inconceivable, damage awards handed down by unpredictable juries, expensive, party-driven discovery with comparatively immense scope and scant protection of trade and business secrets, and a willingness of at least some U.S. courts to

79 Some had acquired LL.M. degrees from U.S. law schools.


81 This aspect was brought home by a brief student note, based on an article in the Wall Street Journal, reporting on a domestic U.S. case in which a California jury had handed down a $128.5 million verdict against Ford Motor Co., including, at $125 million, one of the largest punitive awards in a product liability case at the time. See Peter C. Heesch, Amerikanisches Gericht verhängt 125 Mio. $ Strafschadensersatz, 33 Juristenzeitung [JZ] 247 (1978). On remittitur, the trial judge reduced the award to $3.5 million, and this was upheld by the Court of Appeals (both of which remained unreported in Germany). See Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757 (Ct. App. 1981).

82 Germany follows the loser-pays rule for apportioning attorneys' fees. § 91(1) (ZPO) provides in pertinent part, "The losing party has to bear the costs of the litigation, including indemnifying the opponent for his costs, as far as they were necessary for the effective prosecution or defense of the claim."

83 The first published case exemplifying these aspects of U.S. discovery to the
enforce their procedural rules transnationally in the face of sovereignty objections by the foreign governments involved.\textsuperscript{84} These aspects of U.S. litigation appeared both crude and threatening.

German legal community involved an antitrust counterclaim, in support of which the claimant sought to discover numerous documents from two alleged German co-conspirators as well as the deposition of some of the latters' current and former executives. The District Court for the Western District of Virginia ordered that the discovery proceed through the letter-of-request procedure of the Hague Evidence Convention, then newly ratified by Germany. It thus generated the first (and so far last) published German decisions on whether, and to what extent, a U.S. letter of request should be executed under that Convention in Germany. Corning Glass Works v. Int'l Telephone & Telegraph Corp., OLG München, 36 JZ 540 (1981), reprinted in 20 I.L.M. 1025, 1025 (1981); Int'l Telephone & Telegraph Corp. v. Bavarian Ministry of Justice, OLG München, 36 JZ 538 (1981), reprinted in 20 I.L.M. 1025, 1049 (1981). While the U.S. court in that case appears to have made every effort to narrow the discovery order so as to meet a high standard of materiality, including a narrowing of the lines of questioning upon informal request by the Munich district court, see Schlosser, Rechtshilfe, supra note 80, at 373-74 (reproducing the narrowed request in English), the request still went far beyond what is permissible under German law. Id. at 383. In the Bavarian Ministry of Justice decision, supra, the Munich court refused to order the production of various documents from German territory under Article 23 of the Convention without deciding whether and to what extent the document request would otherwise violate German law. 20 I.L.M. at 1055. In the Corning Glass Works decision, it let the depositions of the witnesses proceed under questioning of a German judge and in application of most of the limitations that the German Code of Civil Procedure sets for the scope of discovery—including a limitation on the questioning to the subject matter contained in the requested documents—but in the presence of a U.S. magistrate judge and in accordance with the U.S. court's request to administer oaths and to produce a verbatim transcript. 20 I.L.M. at 1032-39. In a sequel to the second decision, the Munich courts later decided that the witnesses to be heard in executing the letter of request were prevented by German procedural law from divulging any trade or business secrets. AG München, 27 RIW 850 (1981); LG München, 27 RIW 851 (1981). In a more disturbing case, from a German point of view and also published in Germany, see Stürmer, Beweisaufnahme, supra note 68, at 161-64. A California court had ordered Volkswagen to permit "claimant's representatives to have access to the VWAG facilities at Wolfsburg... on five consecutive days to inspect and photograph the premises" and to inspect and copy any writings "which plaintiffs shall designate as bearing upon [their claims]." Volkswagenwerk AG v. Superior Court, 123 Cal. App. 3d 840, 847 (Ct. App. 1981). The California Court of Appeal later granted a petition for mandamus and reversed and ordered the discovery order to proceed under the Hague Evidence Convention. Id. at 848.

\textsuperscript{84} In Volkswagenwerk, the trial court had not thought it necessary to proceed under the Hague Evidence Convention, although VWAG had produced an aide memoire issued by the German government describing the traditional German position on sovereignty (although admittedly under the legal regime controlling before entry into force of the Hague Evidence Convention) to a California court in an earlier case in which a similar discovery order had been at stake. See Volkswagenwerk AG, 123 Cal. App. 3d at 855.
They seemed crude from the point of view of a legal culture that has spent centuries fine-tuning the balance of interests at stake in private law and procedure through the promulgation of intricate rules of decision to be applied by judges well schooled in those rules. They appeared threatening because of the apparent willingness of U.S. courts to value federal and state procedural rules above than German sovereignty concerns in a political and economic environment in which the U.S. courts have had the upper hand and in an equity tradition that provides them with judicial powers and discretion unparalleled in Germany.

Aided by a change of the controlling law from a dusty administrative regulation to more interesting international conventions, these published cases elevated the arcane of judicial cooperation from the monotonous routines of governmental agencies to a topic of primary legal concern, resulting in a sudden onset of scholarly discussion. This early academic discussion, in turn, was instrumental in setting the parameters of the debate both for a larger legal public and for future decisions by courts and governmental agencies in a culture in which the published works of scholars are more influential than in the United States. Although primarily

---


86 See, e.g., supra text accompanying note 77 (discussing the Volkswagenwerk case).

87 See supra note 52.

88 See Hague Service Convention, supra note 60; Hague Evidence Convention, supra note 60.


90 See, e.g., Rudolf B. Schlesinger et al., Comparative Law 715 (6th ed. 1998) (noting that “courts in civil-law countries show more respect for the scholar’s view than is customary in the common-law world” and that “[w]hen a lawyer in a ‘civil law’ country has a legal problem which is not definitely settled by statute he
engaging in German-style, deductive doctrinal reasoning, these early scholarly articles betray three major concerns in dealing with judicial cooperation under the Hague Service and Evidence Conventions: (1) a felt need to protect German businesses from these disfavored U.S. practices on German territory; (2) closely related, a felt need to protect German law from imports deriving from U.S. legal culture; and (3) a felt need to protect German sovereignty from incursion by U.S. court orders.

Not surprisingly, the doctrinal conclusions of these articles, particularly those on the execution in Germany of U.S. letters of request under the Hague Evidence Convention, were less than heartening from the point of view of U.S. litigants. While generally deploiring the German government’s decision to enter a reservation under Article 23 of the convention, which allows a member state to declare “that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries,” scholars simply noted that such was now the law. Moreover, they did not veer far from German requirements in interpreting the convention’s provisions regarding the execution of requests to depose witnesses. Most importantly, they concluded that such depositions would have to be conducted by the judge, as is usual in Germany, respect the privileges

may be satisfied to solve it without reference to decisions, but never without the literature” (quoting Fritz Moses, *International Legal Practice*, 4 *Fordham L. Rev.* 244, 266 (1935)).

91 The German legislation implementing the Hague Evidence Convention provides that the executive may pass a regulation allowing for the execution of letters requesting the discovery of documents under circumstances to be specified by that regulation. *Ausführungsgesetz zum Haager Beweisaufnahmetübereinkommen § 14, v. 1980 (BGBl. II S.1297).* Until now, no such regulation has been enacted. See infra text accompanying note 164.


93 While some scholars concluded that a request for a U.S.-style examination of the witnesses by the parties’ attorneys could be granted under Article 9(2) of the Convention, as long as the examination was conducted in German, under the supervision of a German judge, and with the further limitations noted in the text, see Schlosser, *Rechtshilfe*, supra note 80, at 386-90, others thought that such a request could arguably be refused as “impossible . . . by reason of practical difficulties” under Article 9(2). See, e.g., Stürner, *Rechtshilfe*, supra note 89, at 524. On the primary role of the judge in taking evidence, including questioning witnesses in Germany, see, for example, David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 *Am. J. Comp. L.* 745, 753-55 (1986); John H. Langbein, *The German Advantage in Civil Procedure*, 52 *U. Chi. L.*
granted by the German code of civil procedure, 94 particularly its far-reaching protection of trade and business secrets, 95 and that execution could be refused when the letter of request did not specify lines of questioning sufficiently narrow or sufficiently substantiated as to clearly indicate that the proponent was not merely fishing for evidence. 96

REV. 823, 826-30 (1985) [hereinafter Langbein, German Advantage]. While the availability of U.S.-style depositions was thus controversial, however, those commentators had no objection to German courts administering oaths and creating verbatim transcripts when requested by the U.S. court under Article 9(2) of the Convention. See, e.g., Schlosser, Rechtshilfe, supra note 80, at 394-95.

94 Article 11 of the Convention provides: "In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege to give evidence — (a) under the law of the State of execution." Hague Evidence Convention, supra note 60, at 243; see, e.g., Stürner, Rechtshilfe, supra note 89, at 524.

95 See, e.g., Schlosser, Rechtshilfe, supra note 80, at 402-05; Stürner, Rechtshilfe, supra note 89, at 523-24. This view is based on Article 9(1) of the Convention, which provides that "[t]he judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed." Hague Evidence Convention, supra note 60, at 243. On the scope of the protection of trade and business secrets in German procedure, see Gerber, supra note 93, at 764-67.

96 See, e.g., Mann, supra note 89, at 840; Schlosser, Rechtshilfe, supra note 80, at 384-90; Stürner, Rechtshilfe, supra note 89, at 521-22. This conclusion is based on Article 3 of the Convention, the German translation of which is clearly more amenable to such an interpretation than its English original. While Article 3(c) requires that a Letter of Request specify "the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto," Hague Evidence Convention, supra note 62, at 2558, the German equivalent says "die Art und den Gegenstand der Rechtssache sowie eine gedrängte Darstellung des Sachverhalts" ["the nature and the subject matter of the dispute and a brief exposition of the facts"] (emphasis added). And while Article 3 further requires that "where appropriate, the Letter shall specify . . . (f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are about to be examined," id., the German translation states "[d]as Rechtshilfeersuchen enthält ausserdem, je nach Sachlage: . . . (f) die Fragen, welche an die einzuvornehmende Personen gerichtet werden sollen, oder die Tatsachen, über die sie einvernommen werden sollen" ["the letter of request shall further contain, depending on the specific situation . . . the questions to be directed at the persons examined or the facts about which they are to be interrogated"] (emphasis added). The reason for these differences is largely attributable to sloppy drafting at The Hague. Although the German text is not an authentic text, the French version of the Convention is, and the German represents a fairly good translation. In any case, some commentators even suggested that substantial attempts at fishing might violate German public policy under Article 12(b) of the Convention—see, for example, Schlosser, Rechtshilfe, supra note 80, at 380-84—and most of them chided the Munich court, supra text accompanying note 83, for executing a letter of request that, in their view, clearly represented a violation of Article 3 of the Convention. (Remember that
Available data indicates that the relevant German decision-makers largely shared these views. A 1985 survey conducted by Professor Koch among German Central Authorities\(^97\) revealed that of the seventy-five letters of request from the United States that had been received under the Hague Evidence Convention between 1979 and 1984, the majority were considered defective under Articles 3\(^98\) or 12(b)\(^99\) or inadmissible under Article 23.\(^100\) Of those, twelve were refused execution while the rest were executed in a more limited fashion than requested or were executed to the extent that the witness in question participated voluntarily.\(^101\) With regard to the Hague Service Convention, the survey showed that the German Central Authorities had received 1,628 requests to effect service of process, of which, about one fifth were refused execution.\(^102\) Refusals occurred primarily because requests failed to provide adequate translations of the documents to be served under Article 5(2),\(^103\) or because, it was argued, a U.S. attorney was not an "authority or judicial officer" for purposes of requesting service under Article 3(1) of the convention.\(^104\) Some of the rejected re-

---

from an American point of view, the requests before the Munich court were considerably narrower than what is usual in an antitrust case. Supra note 83.) For more on the German rule against "fishing," in its attempting to weed out unjustified intrusions into privacy by requiring the court to be satisfied, either from evidence already available or from a sufficiently specific allegation by the proponent that a particular line of questioning is likely to produce relevant evidence, see Gerber, supra note 93, at 762-63, explaining the German standard of relevancy, and see generally, ROLF STÜRNER, DIE AUFLÄRUNGSPFlicht DER PARTEIEN DES ZIVILPROZESSES (1976).

97 Koch, supra note 49.
98 See supra note 96 and accompanying text.
99 See id.
100 Koch, supra note 49, at 247-48. One Central Authority responded that 90% of requests would have been refused execution under Article 12 had the witnesses in question not participated voluntarily. Id. at 248.
101 Id. at 247-48.
102 Id. at 245-46.
103 The German Declaration to the Hague Service Convention requires such a translation. See Declaration of the Federal Republic of Germany to the Convention on the Service of Process in Civil and Commercial Matters, Oct. 3, 1990 [hereinafter German Declaration on Service Convention] ("Formal service...shall be permissible only if the document...is written in, or translated into, the German language.").
104 This ground for refusing service is puzzling since discussions among the member states of the Convention in 1977 had acknowledged the fact that, in the United States, service is often initiated by attorneys and thus had agreed that U.S.
quests involved claims by U.S. federal agencies that represented, as the German Central Authorities reasoned, administrative rather than "civil or commercial matters" within the meaning of the Hague Service Convention.\(^{105}\) In addition, much to the displeasure of U.S. courts and litigants, some of the German Central Authorities turned out to be exceedingly formalistic in handling requests for service.\(^{106}\) Finally, at about the same time, the German government took the opportunity of a diplomatic protest against a Michigan court's order in violation of the 1955-56 exchange of diplomatic notes\(^{107}\) in order to press hard for a discontinuation of the practice of deposing German individuals before U.S. consular officials under that exchange.\(^{108}\) Subsequently, the U.S. State Depart-

counsel were permitted to complete letters of request under Article 3 of the Convention. See Report of the United States Delegation, 17 I.L.M. 316 (1978) (reporting that "attorneys are proper 'Applicants' under the Convention, and should be so regarded by foreign Central Authorities").

\(^{105}\) Koch, supra note 49, at 246. A number of requests were further rejected because they attempted to have the Central Authority serve interrogatories or other discovery requests, and thus, in the view of the German Authorities, represented an attempt to circumvent the more exacting requirements of the Hague Evidence Convention. Id.

\(^{106}\) See, e.g., Rivers v. Stihl, Inc., 434 So. 2d 766, 769 (Ala. 1983) (expressing exasperation with the Justice Ministry of Baden-Württemberg, which had refused service twice within one-and-one-half years; the first time because the plaintiff's attorney had failed both to use the official form referred to in Article 3(1) of the Convention and to provide the German translation on separate sheets of paper and the second time because the attorney failed to send the documents to be served in duplicate as Article 3(2) of the Convention requires).

\(^{107}\) See supra text accompanying notes 69-71. The Michigan court had violated the terms of the agreement because it had ordered depositions before a U.S. consular official in Germany on pain of sanctions. See Brief of the United States as Amicus Curiae at 8, Volkswagenwerk AG v. Falzon, 461 U.S. 1303 (1983) (No. 82-1888), reprinted in 23 I.L.M. 412, 416-17 (1984).

\(^{108}\) See id. at 417 n.5 (documenting the exchange of notes). The basic argument of the German government was that the legislation implementing the Hague Evidence Convention, in its refusal to accept any taking of evidence by diplomatic and consular personnel against German nationals under Articles 15 and 16 of that Convention, superseded any prior or subsequent declaration to the contrary by the Foreign Office, or any other arm of the executive. See id. at 420, 421 (reproducing the German Note Verbale of April 28, 1983 to the American Embassy, Bonn). While legally correct, see JUNKER, supra note 52, at 349-50, this argument came as somewhat of a surprise after the Foreign Office had specifically declared to the U.S. government in 1979 that the understanding from the 1955-56 exchange of notes was still considered valid after the entry into force of the Hague Evidence Convention between the United States and Germany. See Judicial Assistance, Taking of Evidence, Agreements effected by exchange of notes (Oct. 17, 1979) T.I.A.S. 9938 (documenting the understanding).
ment apparently advised its consular agents to no longer to depose German nationals.109

3.1.2. The "Judicial Conflict" Emerges

To the extent that these developments were the result of a conscious effort to limit the effects of disfavored U.S. procedure on German businesses and on German law and to preserve German sovereignty,110 they turned out to be based on a deficient strategy. Again, German governmental authorities and scholars had made assumptions about U.S. practice on the basis of their own procedural and jurisprudential approaches. Although some scholars had engaged the mechanics of (federal) U.S. procedure,111 their comparative enterprise was relatively limited and thus left them unaware of essential tenets of U.S. procedure as well as of the pragmatism and ingenuity with which U.S. courts and counsel approach new problems. They had also underestimated the willingness of U.S. courts unilaterally to enforce their procedural views in transnational cases, if necessary in the face of diplomatic protests and based on questionable treaty interpretations.

This lack of information was crucial for further developments. For from the U.S. perspective, the Hague Service and Hague Evidence Conventions may have brought some improvements over the previous regime governing judicial cooperation in Germany;112 yet, the described German developments imposed severe limitations on the usefulness of the letter-of-request procedure. This was particularly problematic because, following its traditional posi-

109 See JUNKER, supra note 52, at 349.
110 See supra text accompanying note 90.
111 See Schlosser, Rechtshilfe, supra note 80; Stürner, Rechtshilfe, supra note 89; Stürner, Beweisaufnahme, supra note 68.
112 The most important improvements were the introduction of the central-authority mechanism, thus shortening the lengthy diplomatic channels through which letters rogatory need to travel, see, for example, BORN, supra note 13, at 798-99, 897-98 (giving an overview of the Central-Authority mechanism under the Hague Service and Evidence Conventions); increasing the availability of formal service, compare supra note 68 and accompanying text with Hague Service Convention, supra note 61, arts. 5 & 13; and improving the availability of compelled testimony under oath, compare supra note 70 with Hague Evidence Convention, art. 10. Note, however, that German law does not allow for the compulsion of testimony from parties, thus limiting the usefulness of Article 10 for American litigants. See, e.g., Schlosser, Rechtshilfe, supra note 80, at 380.
tion. Germany had objected to virtually all forms of serving process and taking evidence in its territory other than by letter of request under the two conventions. The effect was most pronounced in the evidence area, where documents would, thus, largely be undiscoverable and both the access to, and the scope of, witness testimony would remain severely restricted. Together with exasperation over the perceived formalism of German Central Authorities and with impatience over the expense and delay imposed by the letter-of-request procedure, these German limitations—and related limitations imposed by other civil law countries—led U.S. courts to endorse new interpretations of the two conventions. Most importantly, U.S. courts gradually changed from requiring, as a matter of comity, that first resort be the procedures of the Hague Evidence Convention, to routinely ordering

113 See supra text accompanying notes 53-55.
114 In its declaration to the Hague Service Convention, Germany has objected to the use of the alternative methods of service in Articles 8 (service through diplomatic or consular agents) and 10 (service by mail and direct service through judicial officers, officials or other competent persons in the state of destination) of that Convention. German Declaration on Service Convention, supra note 103. In its Declaration to the Hague Evidence Convention, Germany has allowed the taking of evidence on its territory by commissioners and consular officers under Articles 15-17 of the Convention only upon prior permission and possibly with restrictions, unless the person from whom evidence is to be taken is a national of the requesting state. Declaration of the Federal Republic of Germany to the Convention on Taking Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970 [hereinafter after German Declaration on Evidence Convention]. Note also, that even in the latter case, the Convention does not permit the use of any measures of compulsion. In any case, in implementing the Hague Evidence Convention, the German legislature, upon suggestion by the German government, further mandated that "[t]he taking of evidence by diplomatic or consular representatives is impermissible if it concerns German nationals." Gesetz zur Ausführung des Haager Übereinkommens (Ausführungsgesetz), v. 22.12.1977 (BGBI. I S.3105, 3106).

115 See, e.g., supra note 106 and accompanying text (noting German refusal of service on technical grounds).

116 As one federal district court remarked, for example: "[T]he [procedure under the Hague Evidence Convention] does not appear to be trouble free. Perhaps its most glaring fault... is that Germany has exercised its right not to execute letters of request 'issued for the purpose of obtaining pre-trial discovery of documents as known in Common law countries.'" Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 361 (D. Vt. 1984).

foreign individuals under the court's jurisdiction to produce evidence located abroad for inspection in the United States without considering the Convention as helpful or even necessary. Some courts concluded that the Convention did not even apply "to the production of evidence in this country by a party subject to the jurisdiction of a district court." Similarly, attempts by U.S. plaintiffs to avoid serving foreign defendants abroad by serving their domestic subsidiary as their involuntary agent, although unsuccessful throughout the 1970s and early 1980s, were soon held to be acceptable under the Hague Service Convention.

The Germans reacted with considerable despair. It seemed as if U.S. courts were on a collision course, doing whatever it took to avoid limitations set by international treaty obligations and German sovereignty. To some degree, this was indeed true. In interpreting the Hague Conventions, U.S. courts, particularly federal courts, did not see why an international treaty, without specifically stating so, should limit their jurisdiction and thus their powers un-

---


119 In re Anscheutz, 745 F.2d at 615, vacated by 483 U.S. 1002 (1987).


121 See, e.g., Zisman v. Sieger, 106 F.R.D. 194 (N.D. Ill. 1985); Lamb v. Volkswagen of Am., Inc., 104 F.R.D. 95 (S.D. Fla. 1985); Ex parte Volkswagenwerk AG, 443 So. 2d 880 (Ala. 1983). On the surface, to be sure, the change was not primarily one of interpreting the Service Convention. Rather, plaintiffs mysteriously overcame difficulties in proving that the U.S. subsidiaries of certain German corporations were in fact alter egos of their parents.
der the Federal Rules (or even state rules) of Civil Procedure ("Federal Rules"), thus providing foreign litigants with significant advantages over domestic litigants.\textsuperscript{122} This attitude, as Professor Burbank's historical analysis shows, was the result both of decades of neglecting foreign concerns in the federal rulemaking process,\textsuperscript{123} and of U.S. negotiators at the Hague, who, in their effort to secure the advice and consent of the Senate, represented to the American public that the two conventions "ma[d]e no changes in U.S. procedure necessary and require[d] no major changes of U.S. legislation or rules,"\textsuperscript{124} while other countries would have to change their ways significantly.\textsuperscript{125} Nonetheless, this concern with preserving domestic jurisdiction and power under the Federal Rules did not become outcome-determinative until cases from Germany and other civil law countries had revealed how fickle the convention procedures were and, particularly, how seriously limited the access to evidence was under the Hague Evidence Convention's letter-of-request procedure.\textsuperscript{126}

Lacking the necessary information on U.S. law to foresee these developments, German observers were taken by surprise and con-

\textsuperscript{122} See, e.g., In re Anschuetz, 754 F.2d at 606, 611; Laker Airways, Ltd., 103 F.R.D. at 48; Graco, 101 F.R.D. at 519, 522. Interestingly, one of the legal arguments suggested by German scholars in favor of limiting available discovery on German territory through the Hague Evidence Convention's letter-of-request procedure to German standards was just the converse: parties involved in litigation abroad who seek to obtain evidence in Germany must not be given an advantage over parties who seek to obtain the same evidence when litigating in German courts. See Stürmer, Rechtshilfe, supra note 89, at 525.

\textsuperscript{123} Burbank, Reluctant Partner, supra note 25, at 111-24.


\textsuperscript{125} Burbank, Reluctant Partner, supra note 25, at 129-33. Note, however, that while this ratification history in the United States may explain the argument that the Hague Evidence Convention did not mean to limit the operation of the Federal Rules or any other U.S. laws, it does not help in countering the German argument that the taking of evidence on or from German territory violates German sovereignty as protected by customary international law anedating the Hague Conventions. See infra text accompanying notes 223-227.

\textsuperscript{126} See supra text accompanying notes 91-109 (illustrating problems with the Hague Evidence Convention's letter-of-request procedure from American perspective). In earlier cases involving the Hague Evidence Convention, U.S. courts had already expressed doubt as to whether that Convention could ever preempt the Federal Rules or state rules of procedure. But they mandated that, as a matter of comity, a first use of the Convention procedures be attempted to obtain the requested evidence. See supra note 117 (requiring first attempts to be made through Convention procedures).
cluded that Germany was now locked in a judicial conflict with the United States. A conflict that also seemed to involve other European countries as evidenced by such high-profile cases as the \textit{Laker}\textsuperscript{127} saga and the \textit{Uranium Antitrust Litigation}.\textsuperscript{128} Understanding that the new U.S. interpretations seriously jeopardized their efforts to protect German law, sovereignty, and businesses from U.S. procedure, these individuals quickly realized that the German approach needed to be modified. Invited by the Fifth Circuit Court of Appeals to express its positions on the Hague Evidence Convention in In re \textit{Anschuetz},\textsuperscript{129} the German government was the first to react. In its amicus brief, it stated, as it would again two years later in \textit{Société Nationale Industrielle Aérospatiale v. U.S. District Court}\textsuperscript{130} ("Aérospatiale"), any order directing a party or non-party to produce evidence located in Germany for inspection in the United States without using the Convention's procedures violated both German sovereignty and the Hague Evidence Convention.\textsuperscript{131} German scholars, on the other hand, thought that this statement went too far insofar as parties were concerned. They pointed out that German courts, also, occasionally order foreign parties to send specific documents to Germany for inspection or entered injunctions ordering defendants to perform certain acts abroad.\textsuperscript{132} Some of those scholars had thus previously indicated that similar orders by U.S. courts, if directed at German parties,\textsuperscript{133} neither implicated the text and purpose of the Hague Evidence Convention nor vio-

\textsuperscript{127} See, e.g., Dieter G. Lange, \textit{Der Justizkonflikt zwischen den USA und Europa dargestellt am Beispiel des Falles "Laker,"} in \textit{JUSTIZKONFLIKT, supra} note 47, at 65; Schlosser, \textit{Rechtshilfe, supra} note 80, at 370-72. For a concise presentation of the various cases and the back-and-forth between U.K. and U.S. courts in the \textit{Laker} litigation, see LOWENFELD, \textit{INTERNATIONAL LITIGATION, supra} note 13, at 118-34, 144-46.

\textsuperscript{128} For background information and excerpts of the relevant parts of the decisions involved in the \textit{Uranium} litigation, see LOWENFELD, \textit{INTERNATIONAL LITIGATION, supra} note 13, at 780.

\textsuperscript{129} \textit{In re Anschuetz}, 754 F.2d at 602, 605.

\textsuperscript{130} \textit{Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522 (1987)}; see infra note 140 and accompanying text.

\textsuperscript{131} Brief for the Federal Republic of Germany as Amicus Curiae, \textit{In re Anschuetz}, 754 F.2d 602.

\textsuperscript{132} See, e.g., SCHLOSSER, \textit{JUSTIZKONFLIKT, supra} note 47, at 17-22; Rolf Stürner, \textit{Der Justizkonflikt zwischen U.S.A. und Europa}, in \textit{JUSTIZKONFLIKT, supra} note 47, at 3, 25-26 [hereinafter Stürner, \textit{Justizkonflikt}].

\textsuperscript{133} \textit{But see} Stürner, \textit{Rechtshilfe, supra} note 89, at 524 (arguing that even orders directed at non-party witnesses do not violate German sovereignty).
lated German sovereignty.\textsuperscript{134} Now, however, these academics concluded that U.S.
discovery orders directed at German parties properly before them could nevertheless violate German sovereignty by their sheer intensity; it would thus trigger the country's sovereign right to protect its citizens from unreasonable demands by foreign states.\textsuperscript{135} When that intensity would be attained was (and still is) a matter of some controversy. Essentially, the required intensity would arise from the scope of the discovery order\textsuperscript{136} or from its impending enforcement through (from a German view) draconian contempt sanctions,\textsuperscript{137} thus triggering German sovereignty concerns whenever an order veers too far from German standards.\textsuperscript{138}

In short, both government and scholars adapted their positions to the new U.S. challenge, yet the scholars' position was more tempered. Indeed, some academics unsuccessfully urged the government to adopt their more moderate and thus more credible stance in representations to the U.S. Supreme Court in \textit{Aérospatiale}.\textsuperscript{139} The German government not only stood by its strict stance in its amicus brief in \textit{Aérospatiale},\textsuperscript{140} it went on to suggest to the Supreme Court

\textsuperscript{134} Schlosser, \textit{Rechtshilfe}, supra note 80, at 394; Stürner, \textit{Rechtshilfe}, supra note 89, at 523.


\textsuperscript{136} Stürner, \textit{Justizkonflikt}, supra note 132, at 26.

\textsuperscript{137} Schlosser, \textit{Justizkonflikt}, supra note 47, at 25; Stürner, \textit{Justizkonflikt}, supra note 132, at 49. Professor Leipold would later argue that the impending imposition of criminal sanctions, including criminal contempt, was the only relevant factor distinguishing permissible from impermissible extraterritorial discovery requests against parties under international law. See \textit{Dieter Leipold, Lex Fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozessrechts} 64-66 (1989).

\textsuperscript{138} Schlosser, \textit{Justizkonflikt}, supra note 47, at 25; Stürner, \textit{Justizkonflikt}, supra note 132, at 49.

\textsuperscript{139} See, e.g., Stürner, \textit{Justizkonflikt}, supra note 132, at 49-50. Academics particularly urged that the notion that the Hague Evidence Convention itself (rather than German sovereignty) prevented courts of member states from ordering the taking of evidence from (rather than on) foreign territory was untenable given both the language and the history of the treaty. See, e.g., Ulrich Drobnig, \textit{Diskussion, in Justizkonflikt}, supra note 47, at 114; Peter Schlosser, \textit{Diskussion, in Justizkonflikt}, supra note 47, at 111-12.

in Volkswagen AG v. Schlunk141 a year later that allowing service on a foreign corporation by serving its wholly owned domestic subsidiary under state law violated the letter and spirit of the Hague Service Convention.142 This interpretation of the Hague Service Convention was as unpersuasive,143 if perhaps not as unacceptable from a U.S. point of view,144 as the German position in Aérospatiale. After all, the same German government had represented to its own legislature ten years earlier that the negotiators at the Hague had left the question whether, in fact, there was “occasion to transmit a judicial or extrajudicial document for service abroad”145 for the domestic law of the requesting state to determine.146


142 Brief for the Federal Republic of Germany as Amicus Curiae at 2, id. (No. 86-1052).

143 The lack of persuasiveness of the German government’s stance opened the door for the argument that assertions of judicial sovereignty “often have an abstract quality and [that they] do little, in and of themselves, to elucidate the substantive foreign interests at stake” and thus that “assertions of ‘judicial sovereignty’ may simply illustrate a foreign nation’s desire to protect its nationals from liability, or reflect a preference for its own mode of dispute resolution instead of ours.” Brief for the United States and the Securities and Exchange Commission as Amici Curiae, at 22, 23, Société Nationale Industrielle Aérospatiale, 482 U.S. 522 (No. 85-1695). This pushed into the background the legitimate concern that “assertions of ‘judicial sovereignty’ may reflect an understandable reluctance to forfeit the moderating effects of judicial supervision and to expose one’s citizens to unpredictable and potentially abusive evidentiary demands.” Id.

144 Unlike the German position in Aérospatiale regarding the taking of evidence located on German territory, this posture did not imply that service on the U.S. subsidiaries of German corporations was impossible, but merely that it had to proceed through the channels identified by the Hague Service Convention and as circumscribed by the German Declaration to that Convention.

145 Hague Service Convention, supra note 60, art. 1.

146 Denkschrift der Bundesrepublik Deutschland zum Haager Zustellungs- und Beweisaufnahmetübereinkommen, Bundestagsdrucksache 7/4892 (1977) reprinted in ROLF A. SCHÜTZE, INTERNATIONALES Zivilprozessrecht 697, 703 (1980) [hereinafter Denkschrift]. In fact, as the government explained in its report, the German delegation at The Hague had tried since 1905 to preempt “notification au parquet” as practiced by France and other countries influenced by its law by requiring, as a matter of treaty law, that defendants located abroad be served there, but that these attempts had been strongly resisted by the states practicing “notification au parquet,” for they believed—and this is interesting for our purposes—that although their system may unduly favor the plaintiff, the German suggestion unduly favored the defendant, imposing a lengthy waiting period until it was proven that process had been served through treaty channels. Id. at 700. As the German government’s report continues, these two views were resolved by a compromise in the Hague Service Convention, under which France and other countries could continue to use “remise au parquet,” but with the limitations imposed.
Why, then, did the German government continue to present its more aggressive position regarding the Hague Evidence Convention to the U.S. Supreme Court in the face of warnings by academics that this could prove counterproductive, and why did it follow up with an equally aggressive position regarding the Hague Service Convention? To some extent, this was a matter of power. While law professors were interested in suggesting a workable line of argument, the German government saw its sovereign power to control the taking of evidence from German territory and the serving of process on German domiciliaries (through the Länder governments) threatened with the new interpretations given the Hague Conventions by lower U.S. courts. More importantly, there was a well-meaning attempt to maximize the by now well-known interests of the German industry. However, by the mid-1980s, scholars had enough comparative knowledge of U.S. procedure and of U.S. approaches to transnational cases to realize that "the chances that the Supreme Court will . . . [adopt the German government's position] are equal to zero."147 The government, however, lacked some of that knowledge and chose to ignore the advice. In addition, in the case of the Hague Service Convention, little had been written in Germany on the new U.S. interpretation. This left the German government without a full appreciation of how little sense its position made from a U.S. point of view given the treaty's history and language as the German government had itself represented it to its own Parliament.148 The fact that other civil law governments presented similar positions to the U.S. Supreme Court in Aérospatiale149 may have created a false sense of security, thus preventing these governments from adopting a better-informed stance.

by Articles 15 and 16 of the Convention. Id. at 700-01; see also Hans Arnold, Die Ergebnisse der Zehnten Tagung der Haager Konferenz für internationales Privatrecht auf dem Gebiete des internationalen Zivilprozefsrechts, 11 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 205, 205-06 (1965) (reporting by the German delegate to the Hague Conference recounting same).

147 Stürner, Justizkonflikt, supra note 132, at 49.

148 See supra note 146 and accompanying text.

Given this lack of information, the U.S. Supreme Court’s decisions in Aérospatiale and Schlunk created another round of consternation. Even those German academics who had earlier cautioned their government to moderate its stance were surprised at the extent of the U.S. Supreme Court’s adulation of the Federal Rules within the framework of an international treaty in Aérospatiale and at the majority’s unwillingness in that case to articulate principles setting the outer limits on unilateral U.S. discovery in light of both foreign sovereignty concerns and the purpose of the treaty enterprise. In regard to Schlunk, reactions were more mixed. Those knowledgeable about the Service Convention’s negotiating history and the German government’s earlier statements were more sympathetic to the majority’s holding in Schlunk than were others. Yet, here too, there was concern about an interpretation of the Service Convention that would allow a member state to bypass Convention procedures in most cases by allowing for all sorts of domestic service on foreigners.

In short, it seemed that the judicial conflict was alive and well, and there was need for a renewed adaptation of the German approach to protect German law, sovereignty, and businesses. In the area of service, several German Central Authorities reacted by refusing to execute requests for serving punitive-damage claims under the Hague Service Convention, arguing that such claims were not “civil and commercial matters.” The courts to which these decisions were appealed, however, including ultimately the Ger-

---


151 See, e.g., Junker, supra note 150, at 1752-53; Stürner, supra note 150, at 988-89.


153 See, e.g., Koch, Zustellungsdurchgriff, supra note 150.


155 The scope of application of the Convention is limited to “civil and commercial matters.” See Hague Service Convention, supra note 145, art. 1(1).
man Constitutional Court,\textsuperscript{156} all reversed.\textsuperscript{157} Whatever their legal reasoning, the German judges by now knew enough about U.S. procedure to assume that this approach would merely lead U.S. courts to accelerate their use of all kinds of Pennoyer-era statutes to allow service on foreign defendants by serving a domestic agent, thus further undermining both the Convention’s usefulness and German control over service on its domiciliaries.\textsuperscript{158} The refusal of these German courts to set up a new hurdle to service in Germany under the Hague Service Convention has given U.S. courts less reason to support means of avoiding the Convention; the refusal is thus likely to have been at least partly responsible for the recent cases in which U.S. courts have held, contrary to earlier post-

\textit{Schlunk} decisions,\textsuperscript{159} that where state law requires that summons and complaint be transmitted to the defendant’s foreign domicile for service on a domestic agent to be complete, the Convention’s procedures must be used.\textsuperscript{160}


\textsuperscript{157} See, \textit{e.g.}, OLG München, 39 RIW 70 (1993) (holding that the service of a claim for punitive damages relates to a “civil or commercial matter” under the Convention); OLG Düsseldorf, 38 RIW 846 (1992) (same); OLG Frankfurt, 37 RIW 417 (1991) (same); OLG München, 42 RIW 3102 (1989), \textit{translated in 29 I.L.M. 1571} (same).

\textsuperscript{158} Pennoyer v. Neff, 95 U.S. 714 (1878); \textit{see, e.g.}, Constitutional Court, \textit{supra} note 156, at 651. There are also more direct ways in which U.S. courts have frustrated the attempts of German Central Authorities to avoid service of punitive damage claims on their nationals. \textit{See, e.g.}, Marschhauser v. Travelers Indem. Co., 145 F.R.D. 605 (S.D. Fla. 1992) (holding that Article 15 of the Service Convention allowed a U.S. court to enter a default judgment after the German Central Authority had refused to execute the plaintiff’s letter of request on a basis that, in the court’s view, was ill-founded under the Convention’s language).

\textsuperscript{159} \textit{See, e.g.}, Melia v. Les Grands Chais de France, 135 F.R.D. 28 (D.R.I. 1991) (holding that service of process was effective where made on Secretary of State); \textit{see also} Pittsburgh Nat’l Bank v. Kassir, 153 F.R.D. 580 (W.D. Pa. 1994) (upholding service on German corporation via contractually appointed local agent under Pennsylvania law).

In regard to the Hague Evidence Convention, efforts to bring U.S. courts to re-adopt a rule of first resort to the Convention along the lines of Justice Blackmun's concurrence and dissent in *Aérospatiale* centered on partly lifting Germany's Article 23 objection to the discovery of documents.\(^{161}\) This was to be accomplished by promulgating a regulation under Section 14(2) of the German Act implementing the Hague Evidence Convention, in which the German legislature delegated to the executive the power to "define the circumstances under which, having due regard to essential principles of German procedure and to the interests of those affected, letters of request for the purpose of discovering documents could nevertheless be executed."\(^{162}\) However, the adoption of such a regulation, which the German government had already promised to the U.S. Supreme Court in its amicus brief in *Aérospatiale*,\(^ {163}\) proved impossible, however. The most powerful industrial association resisted any regulation that would allow the discovery of documents from German territory under rules plainly more liberal than those of the German Code of Civil Procedure.\(^ {164}\) Moreover, several important industry representatives as well as various scholars did not think that Germany should unilaterally make concessions to the United States in the area of judicial cooperation at this time. As a result, the regulation was never adopted.

In any case, the suggested liberalization of the Article 23 declaration would have been too little, too late. Most post-*Aérospatiale*
decisions of lower U.S. courts\textsuperscript{165} had put the burden on the party opposing unilateral U.S. discovery to show that proceeding under the Hague Evidence Convention would produce the evidence as effectively as under the Federal Rules or state rules of procedure.\textsuperscript{166} The German government’s draft of the regulation with its limitations and escape clauses, although a bit more liberal than German procedure,\textsuperscript{167} presumably would not have sufficed to meet that burden.

\subsection*{3.1.3. The Second Stage: Recognition and Enforcement of U.S. Judgments}

By the time the liberalization of the Article 23 declaration was discussed, the focus had already turned to an area where the United States would not usually have the upper hand—the recognition and enforcement of U.S. judgments. Again, industry representatives and their lawyers had much earlier attempted to convince the legal public that there were various reasons why U.S.


\textsuperscript{167} See Referentenentwurf des Justizministeriums zu einer Urkundenvorlageverordnung, reprinted in VORSCHLÄGE ZUM ERLASS EINER URKUNDENVORLAGEVERORDNUNG NACH DEM HBEWÜBK (Claus-Dieter Brandt ed., 1987).
judgments, particularly those in the product liability area, should face difficulties when enforcement is attempted in Germany.\textsuperscript{168} This time, their suggestions contravened a published opinion by the Max Planck Institute on Private International Law that had failed to find any reason why U.S. product liability judgments should be refused enforcement,\textsuperscript{169} a view that was later reiterated in the Institute's standard volume on judgments recognition.\textsuperscript{170}

Under these circumstances, the industry's suggestions were of questionable persuasiveness in future recognition disputes before German courts. German defendants in U.S. litigation thus preferred to settle rather than to risk a default judgment that might be enforced against them in Germany.

This situation changed, however, as a number of academics began to revisit the issue in the late 1980s, thus reframing the debate for the 1990s. Departing from the earlier liberal academic stance, these scholars, in careful analysis, suggested various reasons for refusing to enforce U.S. judgments on public policy grounds, including: discovery in violation of German sovereignty, imposition of seemingly absolute liability in product liability cases, low threshold levels for a finding of causation, "disproportionately high" damages for pain and suffering, and punitive damages (except to the extent that they compensated for damages not already included in the compensatory portion of the award).\textsuperscript{171} In 1992, the


\textsuperscript{169} Eike von Hippel, Schadenersatzklagen gegen deutsche Produzenten in den Vereinigten Staaten, 17 AWD 61, 64-65 (1971).

\textsuperscript{170} DIETER MARTINY, HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS, BAND III/1, at 471 (1984). In this book, Professor Martiny did, however, tentatively express his view that, depending on the circumstances, punitive damages might be considered criminal rather than civil in character and thus be unenforceable. Yet, he also noted that product safety was a legitimate goal to pursue in civil litigation, implying that the use of punitive damages for that purpose should not automatically lead to nonrecognition. Id. at 236.

country's highest civil court, the Bundesgerichtshof, adopted the major-
ity of these limitations on the enforcement of U.S. judgments in some form or another in its landmark decision on the recognition of U.S. judgments.172

How did this change come about? There were essentially two factors at play—business interests and information. First, as exposure of German companies to U.S. liability litigation increased, and as it became clear that efforts to protect German businesses from U.S. litigation within the process of judicial cooperation would lead nowhere, the industry's suggestions for protection in the recognition area began to carry more weight. Second, the available judgments appeared outright moderate when compared to some of the proposi-
tions that had been made earlier. See, e.g., Schütze, supra note 168, at 1175-76 (suggesting that the mere use of discovery and of contingent fees renders a U.S. judgment unenforceable in Germany).

172 BGHZ 118, 312 (F.R.G.). For a comment on that case in English, see Peter Hay, The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court, 40 AM. J. COMP. L. 729 (1992). At least the Bundesgerichtshof rendered the opinion as one would a landmark decision, carefully weighing all aspects of possible public policy violations by a U.S. tort judgment. However, the U.S. judgment to be recognized in the case was hardly typical of U.S. tort judgments against German nationals. It involved a $750,260 award for battery against a U.S.-German dual citizen who had lived most of his life in California, where he had sexually abused a 14-year-old boy in California, then fled to Germany after being convicted for the crime in California, but before the civil case based on the same facts had been adjudicated. Thus, the case not only lacked many of the characteristics that industry representatives and scholars had criticized about U.S. tort law and procedure but was also devoid of a strong connection to Germany, leading the Court to recognize both the compensatory portion of the award, even though not necessarily justified in its full amount from the point of view of German law, and the $200,000 portion for pain and suffering. The court made it clear, however, that similarly lenient standards were unlikely to prevail in a case involving a U.S. product liability award against a German producer. BGHZ 118, 312 (349) (F.R.G.). Moreover, there had been no discovery in violation of German sovereignty because the evidence in the case had been taken from the criminal case, discovery for which had taken place while the defendant lived in California. The Court nonetheless pointed out that discovery in violation of German sovereignty, perhaps even discovery involving extensive fishing, would violate German public policy. BGHZ 118, 312 (323-24) (F.R.G.). Even in this extraordinary case, however, the Court did refuse to recognize the $400,000 punitive award. In comparison, the district court of Berlin had refused, in an earlier case, to execute a $275,000 product liability award against a German manufacturer imposed by a Massachusetts state court in its entirety, finding that, since there was no written opinion that indicated whether the U.S. court had imposed absolute liability (the judgment was based on a jury verdict), the lack of clarity in this regard had to be charged against the judgment creditor. LG Berlin, RIW 38 (1989), 988 (F.R.G.), translated in LOWENFELD, INTERNATIONAL LITIGATION, supra note 13, at 440.
information on U.S. law changed over time and was significantly influenced by industry representatives. As long as the policies underlying U.S. product liability law were studied for purposes of potential emulation, these policies were largely portrayed in a neutral light and judgments based on them could hardly be argued to violate a German public policy that was slowly moving in the direction of U.S. law.\textsuperscript{173} With increased exposure of German companies to U.S. litigation, however, the scholarly articles of industry representatives and their lawyers began to control the debate. Their accounts bristled with cases exemplifying the uncontrolled imposition of liability by runaway juries and with references to numerous tort-reform efforts in the United States.\textsuperscript{174} This created the impression of a litigation system largely uncontrolled by the rule of law—a system that was apparently in such disarray that even its own most influential lawyers, including former Chief Justice Burger,\textsuperscript{175} had stepped up to criticize it.\textsuperscript{176} This impression was further corroborated by the academics’ earlier experience, during the “judicial conflict,” with U.S. courts unwilling to subject their procedure to limitations arising from foreign sovereignty concerns and international law. If, therefore, German businesses, German law, and German sovereignty needed to be protected from the importation of such untenable practices, the recognition and en-

\textsuperscript{173} See, e.g., von Hippel, supra note 169, at 64-65 (finding that U.S. products liability judgments would not ordinarily violate German public policy).

\textsuperscript{174} See, e.g., Heinz J. Dielmann, Produzentenhaftung für Lebensmittelprodukte in den USA, 32 RIW 949, 949 (1986) (speaking of “drastic increase of product liability cases . . . exorbitant awards, and the extremely high costs for legal defense,” all of which have led to a “crisis in the insurance and reinsurance business”); Hans-Viggo von Hülsen & Töns Grüning-Brinkman, Produkthaftung USA 1983/84, 31 RIW 187 (1985) (reporting on various seemingly outrageous multimillion dollar awards); Michael Magotsch, Excessive Entwicklung der Produkthaftung in den USA, 32 RIW 413, 414 (1986) (reporting on numerous efforts by members of Congress to introduce product liability reform legislation).

\textsuperscript{175} Chief Justice Burger’s efforts to bring about tort reform were frequently cited in German publications. See, e.g., Peter Heidenberger, Der amerikanische Juryprozess in Produkthaftungsfällen, 28 RIW 872, 873 (1982).

\textsuperscript{176} See, e.g., Stiefel & Stürner, supra note 171, at 835-36 (referring to several federal reform proposals, listing a considerable number of seemingly inconceivable multimillion-dollar awards, and referring to “the collapse of the U.S. liability and insurance system”). On the problems with such global characterizations, atrocity stories cited out of context, and assertions about aggregate patterns unsupported by empirical evidence within the United States, see, for example, Marc Galanter, An Oilslick in Hell: Contemporary Legends About the Civil Justice System, 40 ARIZ. L. REV. 717 (1998).
forcement of U.S. judgments was the place to exercise some leverage.

This view, by now widely shared by judges and scholars, also had more subtle effects on the interpretation of recognition requirements other than the public policy test, particularly on the requirement that the rendering U.S. court have had jurisdiction.177 In a 1988 case, the judgment creditor, with the help of an academic expert,178 succeeded in persuading the district court of Munich to hold that, with regard to judgments from nations having a federal form of government, the personal jurisdiction of the courts of the individual state in question rather than the jurisdiction of the courts of the entire nation must be established for the judgment to be recognized in Germany.179 Thus, the court refused to enforce the judgment of an Arizona state court for lack of jurisdiction, although the courts of California and, arguably, those of Virginia would have had personal jurisdiction over the defendant under German law.180 This interpretation, new at the time,181 developed a

---

177 On the requirement that there be no public policy violation and on the review of personal jurisdiction in European recognition practice respectively, see Walter & Baumgartner, Recognition, supra note 58, at 22-24, 28-31.

178 The expert, as all experts in German procedure, had been appointed by the court and was ultimately paid for by the losing party. He thus had no immediate interest in supporting one litigant over the other. On the way experts are used in German procedure, see, for example, Langbein, German Advantage, supra note 93, at 836-40. This does not mean, however, that the expert may not have had a certain sympathy for the plight of the judgment debtor, a large local investment bank, as well as an interest in protecting the integrity of German law. After all, the case appeared to be a prime example of American unreasonableness, in which a simple contract dispute over an investment loan had been turned into a major RICO case.


180 Id.

181 The reason for the reference to jurisdiction of "the courts of the rendering state" or "the rendering nation" rather than to jurisdiction of the rendering court derives from a distinction in the civil law between international jurisdiction, the jurisdiction of the courts of a particular country, and territorial jurisdiction, the personal jurisdiction of a court within a particular country. Only the former can be re-examined at the recognition stage to ensure fairness to the defendant, while territorial jurisdiction remains an issue of the internal organization of the rendering country and is thus beyond the purview of the recognition tribunal. See, e.g., Geimer, supra note 24, at 871. From this perspective, the Munich court's holding is difficult to fathom given that "[f]or local interests, the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." Chinese Exclusion Case, 130 U.S. 581, 606 (1889).
considerable following among academics, although the Bundesgerichtshof recently refused to follow it with regard to judgments emanating from U.S. federal courts.

Moreover, a 1993 case involving the judgment of a Washington state court in a dispute over an exclusive-distribution contract, the Bundesgerichtshof decided that if the only conceivable jurisdictional basis for a foreign default judgment under German law is the place where the alleged tort had been committed, then the question whether the tort had in fact been committed in the rendering state was a question that could be fully litigated before the German recognition court, in application of the regular standard of proof, thus allowing a partial re-opening of the foreign proceedings. In support of its holding, the Bundesgerichtshof argued that the only alternative would be to forgo any examination of the rendering court’s jurisdiction in default judgments based on an alleged tort—an option that would deny German defendants the right to refuse to appear before a foreign court whose assertion of jurisdiction they consider exorbitant and subsequently to test the propriety of that assertion by collaterally attacking the resulting judgment at home. Without this right to default, the court further reasoned, German law would support plaintiffs who sue German defendants in favorable fora on trumped-up charges in the hope the defendant would be unable to mount an effective defense. Combined with the court’s further indication that its holding allowed the defen-


184 On the locus delicti commissi, the place of the commission of the tort as a proper basis for jurisdiction under the law of Germany and other civil law countries, see SCHLESINGER ET AL., supra note 90, at 390-92.

185 On the usually higher civil standard of proof in civil law countries compared to that in the United States, see, for example, Kevin M. Clermont & Emily Sherwin, A Comparative View of Standards of Proof, 50 AM. J. COMP. L. 243 (2002).


187 Id. at 242-43.

188 Id. at 244.
dant in the present case to avoid the high costs of defending a lawsuit in the United States,\textsuperscript{189} its reasoning reflects a thinly veiled reference to prevalent views in Germany of a U.S. litigation system in which strike suits are rampant and in which defending such suits is an unreasonably expensive proposition.\textsuperscript{190} As a result, German defendants with few or no assets in the United States can effectively force U.S. tort claimants to litigate in Germany the issue of whether, in fact, a tort had been committed.

3.2. Lessons From the German Experience

These German developments demonstrate the extent to which the law of transnational litigation in one country is interconnected, via the behavior of groups and individuals, to the approaches to transnational cases in other nations and vice versa. In the German case, these interconnections have had serious and unexpected consequences. On the one hand, the German government and, to a lesser extent, German scholars, in their attempt to protect domestic business firms along with German law and German sovereignty from what they viewed as undue U.S. intrusions, helped set in motion legal developments in the United States that have frustrated those intentions to an extent that, I suspect, many Germans have not fully grasped to this day.\textsuperscript{191} While German recognition law now allows German nationals with no or few assets in the United States to force U.S. tort plaintiffs to pursue at least part of their claim in Germany,\textsuperscript{192} the majority of large and medium-sized German business enterprises cannot afford to take that risk. In fact, if

\textsuperscript{189} Id. at 246.

\textsuperscript{190} See also Harald Koch, Anmerkung, 108 ZZP 367, 372 (1995) (criticizing the Court for going beyond the requirement of the German recognition statute). The concern with strike suits reappears in a recent decision of the Bundesgerichtshof that is otherwise much more lenient in questions relating to the enforcement of U.S. judgments. See BGHZ 141, 286 (F.R.G.). In that decision, the Court sent the case back to the lower courts to determine, among other things, whether the defendant had committed fraud in his jurisdictional claims before the District Court for the Eastern District of Wisconsin. Id., reprinted in 52 NJW 3198, 3202-03 (1999).

\textsuperscript{191} See, e.g., Martin J. Reufels, Pre-trial discovery-Maßnahmen in Deutschland: Neuaufgabe des deutsch-amerikanischen Justizkonflikts?, 45 RIW 667, 667-68 (1999) (expressing surprise at the brevity and clarity with which the court in Fishel v. BASF Group, 175 F.R.D. 525 (S.D. Iowa 1997) held that discovery against the German defendants could proceed outside of the Hague Evidence Convention procedures).

\textsuperscript{192} See supra Section 3.1.3.
such enterprises do become involved in U.S. litigation, discovery of evidence in their control in German territory is now usually governed entirely by U.S. procedural law whether the case involves a relatively straightforward contract dispute,\textsuperscript{193} a large antitrust suit,\textsuperscript{194} or a complex human rights class action to recover for slave labor performed under the Nazi regime.\textsuperscript{195} This is because, since \textit{Aérospatiale}, U.S. courts have effectively relegated the use of the procedures of the Hague Evidence Convention and thus any control of German law over the taking of evidence from German territory to cases in which discovery is sought from German non-parties.\textsuperscript{196} Even the latter category has shrunk to the extent that U.S. courts have assumed that parties have control over evidence that under German law traditionally would have been assumed to be in control of a non-party.\textsuperscript{197} To this extent—and this is a large extent—German law has become irrelevant and the German government has entirely lost its sovereign control over U.S. orders to provide evidence from German territory, one of the main concerns of both the German government and German scholars.\textsuperscript{198}

The fact that German law and sovereignty have not become similarly irrelevant in the area of U.S. service on German defendants is largely due to a better understanding of the interconnections of transnational litigation law by German courts. Had they


\textsuperscript{194} See, e.g., Automotive Refinishing Paint Antitrust Litigation, 358 F.3d 288 (3d Cir. 2004) (concerning jurisdictional discovery).

\textsuperscript{195} See, e.g., Fishel v. BASF Group, 175 F.R.D. 525 (S.D. Iowa 1997) (involving Holocaust survivors' claims against successors of companies alleged to have benefited from slave labor).

\textsuperscript{196} Most U.S. courts may have accepted the proposition by Germany and other civil law nations that, if discovery is to physically take place on the territory of a member state of the Convention, the Convention procedures must be used. See, e.g., McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956 (E.D. Pa. 1984); Graco, Inc., v. Kremlin, Inc., 101 F.R.D. 503, 524 (N.D. Ill. 1984). But few U.S. litigants will seek to take depositions in Germany if unilateral U.S. discovery, uncumbered by the procedures of the Hague Evidence Convention and thus with limitations set by German law, is so easily available. See supra notes 165-166 and accompanying text.

\textsuperscript{197} See, e.g., Addamax Corp. v. Open Software Found., Inc., 148 F.R.D. 462 (D. Mass. 1993) (holding that a non-party witness subsidiary had control over documents in possession of a German parent company and thus that the U.S. subsidiary could be compelled to produce such documents).

\textsuperscript{198} See supra note 135 and accompanying text.
not stopped German Central Authorities from refusing to serve U.S. punitive damage claims under the Hague Service Convention, post-Schlunk decisions in the United States would have likely become more aggressive in allowing U.S. plaintiffs to avoid the procedures of the Hague Service Convention by serving defendants from Germany and other member states of the Convention within the United States.\textsuperscript{199}

On the other side of the Atlantic Ocean, those who set out to amend the woefully inadequate\textsuperscript{200} provisions on serving process and on taking evidence abroad in the Federal Rules in the early 1960s were primarily concerned with providing practitioners with the choices necessary to obtain the best available judicial cooperation from any foreign jurisdiction.\textsuperscript{201} In their eagerness to avoid limiting those choices and in their concomitant disdain for what they viewed as outdated concepts of judicial sovereignty,\textsuperscript{202} the rulemakers took an approach that promoted attitudes toward foreign sovereignty concerns that ultimately helped evoke legal developments in Germany and elsewhere that have made it difficult for some U.S. litigants to receive access to needed evidence or to enforcement proceedings abroad in some cases. By,

---

\textsuperscript{199} See supra text accompanying notes 158-160.

\textsuperscript{200} See, e.g., Burbank, Reluctant Partner, supra note 25, at 112 ("Those concerned about the inadequacy of our mechanisms for seeking and providing assistance in aid of international civil litigation recognized that some provisions in the Federal Rules on such matters as service were an invitation to disaster for litigants using them abroad . . . .").


\textsuperscript{202} See, e.g., Kaplan, 1961-63 (I), supra note 201, at 637 (accusing those who objected "that there ought to be a statement invalidating any manner of service allowed by the rule but forbidden by the law of the country in which the service was attempted" of "[t]enderness to the sensibilities of foreign countries," and musing that "[i]t is not clear that any substantial number of countries are really concerned to outlaw service within their boundaries to effectuate litigation being conducted elsewhere . . ."); Hans Smit, International Litigation under the United States Code, 65 COLUM. L. REV. 1015, 1017-18 (1965) (opining that the attitude of some foreign nations that oppose the performance of procedural acts on their territory by foreigners "has been influenced by undue stress on abstract notions of sovereignty, by misconception of the nature of foreign procedural acts, and by lack of concern for the interests of litigants who wish to perform procedural acts in the most effective and efficient manner" and further suggesting that "nations that do raise objections have on the whole failed to advance satisfactory reasons for their positions.").
(1) permitting service (and, one may add, discovery abroad) in violation of foreign law (and, in the view of some countries of international law), (2) failing adequately to assist lawyers in making an informed choice among alternatives, and (3) neglecting to empower the courts to require resort to another alternative when that would benefit international relations.\textsuperscript{203}

the 1963 amendments to the Federal Rules (and by implication their state counterparts) fulfilled the drafters' additional wish to keep U.S. courts out of difficult issues of foreign law.\textsuperscript{204} But they also fostered a continuing lacking awareness of, and nonchalance about, foreign sovereignty concerns and possible international obligations of the United States among U.S. courts and litigants. Representations made by the U.S. negotiators of the Hague Service and Hague Evidence Conventions to the U.S. Senate for purposes of advice and consent failed to change this attitude with regard to these conventions.\textsuperscript{205} The resulting disregard for German concerns of sovereignty and proper treaty interpretation was an important factor in creating the German reactions during the "judicial conflict."\textsuperscript{206} Thus, a policy of refusing to "clog lawsuits with threshold questions about the foreign law that might prove extremely hard to decide,"\textsuperscript{207} the politics of advice and consent, and, ultimately, the federal courts' concern with preserving their power under the Federal Rules and the power of state courts to determine the adequacy of service under domestic law,\textsuperscript{208} have contributed to the emergence of attitudes and, German rules that severely disadvantage not only those U.S. litigants who seek to obtain evidence located in Germany if that evidence cannot be obtained through direct U.S.

\textsuperscript{203} Burbank, Reluctant Partner, supra note 25, at 113.

\textsuperscript{204} See Kaplan, 1961-63 (I), supra note 201 at 637; Kaplan, 1961-63 (II), supra note 201, at 813.

\textsuperscript{205} See Burbank, Reluctant Partner, supra note 25, at 129-33 (discussing statements made by U.S. negotiators during ratification of the two Conventions in the Senate).

\textsuperscript{206} See Volkswagenwerk AG v. Superior Court, 123 Cal. App. 3d 840 (1981) (describing the willingness of some U.S. courts to enforce procedural rules in the face of sovereignty objections by foreign governments); supra text accompanying notes 122-154 (depicting the German response to U.S. unilateralism).

\textsuperscript{207} Kaplan, 1961-63 (I), supra note 201 at 637.

\textsuperscript{208} See, e.g., supra text accompanying notes 122-126.
discovery, but also those who seek to enforce U.S. judgments in Germany. Thus, to the extent that the U.S. negotiators at the Hague now attempt to improve the lot of U.S. judgment creditors abroad,\(^{209}\) they are working on removing obstacles partly initiated or reinforced by the policies of those who made law for transnational litigation law in the United States in the 1960s.

More importantly, rather than generating the large-scale emulation of the liberal attitudes toward judicial cooperation that the drafters of both the 1963 amendments to the Federal Rules and the 1964 amendments to the Judicial Code\(^{210}\) had envisioned,\(^{211}\) their work product ultimately helped produce the "judicial conflict" with Germany and similar protective reactions in other civil law countries.\(^{212}\) Preoccupation with such protective action has prevented those nations from sincerely reconsidering their approach to notions of state sovereignty in regard to judicial cooperation in the face of today's interconnected world. This has left us with rigid approaches to judicial cooperation in a great number of countries—approaches that are clearly inadequate in a world in which it is technically feasible, through the internet, closed-circuit television, and similar means, to serve process and take evidence abroad instantly.\(^{213}\) It has also prevented any meaningful discussion of much-needed nontraditional forms of judicial cooperation, most importantly direct judicial interaction across borders.\(^{214}\)

\(^{209}\) See, e.g., von Mehren, Drafting, supra note 9, at 194-95 (discussing "a fundamental discordance" between the United States and the Europeans on the role of litigation, adjudicatory jurisdiction, and recognition of foreign judgments at the Hague).


\(^{211}\) See, e.g. Philip Amram, Public Law No. 88-619 of October 3, 1964—New Developments in International Judicial Assistance in the United States of America, 32 J. Bar Ass'n D.C. 24, 28, 33 (1965); Smit, supra note 202, at 1019 (stating that "the reforms are premised on the hope that their principle of liberality in rendering aid to foreign courts and litigants will find widespread acceptance abroad").

\(^{212}\) See supra Section 3.1.2. Cf., e.g., BORN, supra note 13, at 850-52 (noting foreign nondisclosure statutes passed in reaction to U.S. discovery).

\(^{213}\) Cf., e.g., Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002) (upholding service by email upon foreign corporation as acceptable mode of alternate service under the Federal Rules of Civil Procedure ["Federal Rules"]).

What went wrong? Both the Germans and the Americans set transnational litigation policies without (sufficient) awareness of the forces affecting those policies down the line. They acted as if they could control the law of transnational litigation unilaterally. However, the events that transpired demonstrate that such is not the case. They exemplify some of the pathways through which an array of public and private actors—domestic, foreign, and international—may affect the making and application of transnational litigation law in a particular country. First, there is the importance of groups and individuals as consequential actors in transnational lawmaking. The interest of German business firms in limiting their exposure to U.S. litigation from their transnational endeavors played an important role in adapting the traditional German approach to judicial cooperation to the perceived new threats arising from U.S. litigation. German industry representatives were influential in seeking protection from U.S. litigation, and in resisting a unilateral German liberalization of judicial cooperation for document discovery. With their superior knowledge of U.S. law, they were also able to influence emerging German perceptions of the U.S. litigation process and of U.S. tort law. Similarly, it was the ingenuity of U.S. attorneys that ultimately led U.S. courts to permit the use of methods of service and discovery that would avoid triggering the procedures of the Hague Service and Hague Evidence Conventions.

But the case of Germany also demonstrates that the role of groups and individuals in transnational lawmaking is not limited

---

215 See supra Section 3.1.2.
216 See supra text accompanying notes 161-164.
217 See supra Section 3.1.3.
218 See supra notes 115-121 and accompanying text.
to interest-group pressures for the purposes of advancing a particular self-interest as public-choice theory would have it.\textsuperscript{219} Industrial pressure did not really become influential in German approaches to judicial cooperation for litigation in the United States until individuals in the German government and in academia responsible for fashioning those approaches perceived a need to protect German law, sovereignty, and industry from U.S. decisions that threatened to undermine legitimate German control under traditional German views about transnational litigation, state sovereignty, and international law.\textsuperscript{220} Thus, policy changes may also result from perceived threats to important ideational values shared by the individuals in charge of fashioning transnational-litigation law in a particular country.

On one hand, these ideational values may derive from the values underlying domestic procedure. Thus, one of the major concerns of German academics and government officials with U.S. discovery orders regarding evidence located in Germany was the potential of those orders to debase traditional, constitutionally safeguarded German values of privacy protection in civil litigation.\textsuperscript{221} Conversely, U.S. courts quickly perceived the procedures of the Hague Evidence Convention, as interpreted by Germany, as a severe threat to the policy of open and equal access to evidence under the Federal Rules and similar state approaches.\textsuperscript{222}

On the other hand, the ideational values that the local legal community prefers to protect may arise out of notions of national sovereignty and proper approaches to transnational litigation as protected by international law. These latter values, in turn, tend to be strongly influenced by the procedural approaches and jurisprudential values prevailing in the country in question. In Germany,


\textsuperscript{220} See supra Section 3.1.1. The two were of course intertwined as are all the factors noted here. Thus, the perception of a threat from U.S. law was significantly influenced by industry representations. See supra text accompanying note 79. On the other hand, industry representatives, mostly lawyers in a legal environment in which attorneys primarily see themselves as professionals rather than as hired guns, acted not only in the self-interest of the industry they represented, but also expressed genuine concern about the protection of German law and sovereignty by participating in the scholarly debate.

\textsuperscript{221} See supra text accompanying notes 93-96.

\textsuperscript{222} See, e.g., supra text accompanying note 122.
where service and the taking of evidence are controlled by the court, those activities have been considered sovereign acts that foreign judicial officers or their surrogates may not perform on German territory without violating international law at least since the advent of European nationalism in the late eighteenth century. Thus, U.S. attorneys who attempted to serve process on German domiciliaries through direct mail or to depose German witnesses on German territory with the blessing of U.S. procedural law and, more importantly, U.S. courts that ordered discovery to take place on German territory quickly created the perception of a need to react among German academics and government officials.

The preferences relevant to lawmaking for transnational litigation are thus significantly shaped by the ideational values of the local legal establishment. Hence, the effectiveness of group and individual action in influencing lawmaking for transnational litigation may be determined to some degree by local jurisprudential views and shared norms of discourse. The interest of German business in achieving protection from increasing liability exposure in the United States was at first largely unsuccessful. Not only because the legal establishment did not yet perceive a threat to its preferred values, but also because the industry’s interest was not strong enough to influence the extent of judicial cooperation in a country with a formalist legal tradition, under which courts and administrative agencies are supposed to interpret and apply statutes according to preordained rules, while the consideration of the interests of groups and individuals is deemed to be relegated to the

223 See supra note 93 and accompanying text.
224 See supra notes 53-55 and accompanying text (describing traditional German position on judicial cooperation); BAUMGARTNER, HAGUE CONVENTION, supra note 9, at 48-53; JUNKER, supra note 52, at 368-70; SCHACK, supra note 24, at 310; Stürmer, Justizkonflikt, supra note 132, at 22.
225 See, e.g., Diplomatic Note from the Embassy of the Federal Republic of Germany to the U.S. Department of State (Sept. 27, 1979), reprinted in BORN, supra note 13 at 777 (protesting U.S. service on German addressees by direct mail as a violation of German sovereignty).
226 See, e.g., Böhmer, supra note 164, at 3054 (referring to a 1989 press report on U.S. attorney Lee Kreindler, who, without permission of the German authorities, flew to Frankfurt to depose a number of German witnesses at an airport hotel).
227 See supra text accompanying notes 84-86.
228 See, e.g., supra notes 219-220 and accompanying text.
legislative process. This did not, however, prevent policymakers from adjusting accepted interpretations of statutes (including international conventions) where additional pressing interests so demanded. Yet even then did German scholars stick to traditional deductive-doctrinal reasoning, as they quickly denounced new positions of the German government before U.S. courts that appeared not only overly aggressive politically but were also untenable under German views of proper interpretive power.

However, as the case of Germany also shows, finding out about the relevant ideational values as well as about the mechanics of procedural law, the preferred approaches to transnational litigation and international law that those values have produced in a particular country is a difficult task not usually undertaken by procedural law reformers fashioning law for transnational litigation. A significant lack of information about the views and approaches to civil procedure and to transnational litigation in the United States led German academics, German Central Authorities, and courts to seriously uninformed decisions. The same fate visited law reformers and courts in the United States with regard to the procedural law of Germany and other civil law countries.

Finally, there is evidence of power politics playing a role. The ease with which some U.S. courts dismissed continental European sovereignty concerns in the service and evidence areas was generally seen in Germany as a result of U.S. economic and political power. Because of that power and the concomitant German sense of powerlessness, the preference for protecting German pro-

---

229 See supra text accompanying note 78 (noting that German authorities gave the U.S. legal system the benefit of the doubt). Because the legislative process is deemed open to pressure-group politics, it is not surprising that open industry pressure to create a blocking statute in the shipping area (see supra note 73 and accompanying text) and to oppose regulations to unilaterally limit application of Article 23 of the Hague Evidence Convention (see supra note 164 and accompanying text) was not considered problematic.

230 See supra note 90 and accompanying text.

231 See supra note 139 and accompanying text (noting that scholars unsuccessfully urged the German government to take a more moderate view).


233 See supra notes 200-209 and accompanying text (discussing efforts in the United States during the 1960s to amend the Federal Rules).

234 See, e.g., Stürner, Justizkonflikt, supra note 132, at 35-43 (attributing U.S. procedural approaches to U.S. hegemony and exploring the reasons for that hegemony).
cedural values and German sovereignty in interpreting the new Hague Evidence Convention was particularly strong. In addition, when it became clear that German attempts to protect German litigants from having to produce evidence located in Germany under U.S. procedural rules had largely failed because most of those litigants had sufficient assets in the United States to be unable to resist U.S. judicial power, efforts to protect domestic firms shifted to areas in which the United States did not have the upper hand. Thus, both the strength of state preferences and the resulting strategic policy choices that shape the law of transnational litigation in a particular country may be affected by perceptions of relative state power.

4. A SUGGESTED FRAMEWORK

4.1. Insights From International Relations Theory

Having identified some of the factors affecting lawmaking for transnational litigation in the German case, I now wish to develop a larger framework for understanding the complex set of actors and behavior relevant to such lawmaking today. For this purpose, an international relations perspective promises to be especially profitable. International relations scholars have considerable expertise in explaining state behavior and in identifying the factors relevant to state action by way of empirically tested causal hypotheses. Moreover, their parsimonious core statements of theory operate on a level of abstraction that is particularly conducive to rethinking traditional starting points in the law applicable to transnational cases, both domestic and international.

235 See, e.g., id. at 43 (stressing need to counter American hegemony in procedure).

236 See supra Section 3.1.3 (discussing the effects in the area of recognition and enforcement of U.S. judgments). In return, the United States may (re)introduce a general reciprocity requirement in proposed federal recognition legislation to punish countries with restrictive recognition practices. See ALI Draft, supra note 10, § 5(c) (offering two different reciprocity requirement proposals currently being considered).

Scholars of international relations base their causal theories on larger theoretical approaches, or schools of thought, that each rest on their own characteristic set of principal assumptions about state behavior.\textsuperscript{238} There are essentially four such schools today: realism, institutionalism, liberalism, and constructivism.\textsuperscript{239} At the risk of serious oversimplification, their basic assumptions are as follows. Realism, articulated as a scientific theory in the late 1930s and 1940s,\textsuperscript{240} assumes that nation states are the primary actors in international politics, and that the basic organizing principle is anarchy—an unhappy term denoting that there is no higher political authority—and thus that state action is a function of power, with the central preference of states to maximize their respective power.\textsuperscript{241} Institutionalism, developed in the 1980s, starts from these realist premises,\textsuperscript{242} but is more optimistic about international cooperation. Modeling international relations as a multilateral prisoner’s dilemma or coordination problem, institutionalists assume that institutions, that is, “established rules, norms, and conventions,”\textsuperscript{243} can mitigate the effects of anarchy by reducing transaction costs, promoting iteration, providing information,

\textsuperscript{238} For a historical account of the development of the major schools in international politics in relation to international law scholarship see Anne-Marie Slaughter Burley, \textit{International Law and International Relations Theory: A Dual Agenda}, 87 AM. J. INT'L L. 205, 206-22, 226-28 (1993) [hereinafter Slaughter Burley, \textit{Dual Agenda}].

\textsuperscript{239} See, e.g., Abbott, supra note 237, at 364-68.


\textsuperscript{241} See, e.g., John A. Vasquez, \textit{The Power of Power Politics: A Critique} 18 (1983); Waltz, supra note 237, at 88-93, 102-28; Greenberg, supra note 21, at 1793-96.


\textsuperscript{243} Keohane, \textit{International Institutions}, supra note 240, at 1; see also Stephen D. Krasner, \textit{Structural Causes and Regime Consequences: Regimes as Intervening Variables}, 36 INT’L ORG. 185, 186 (1982) (“Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures.”). For a discussion on the long debate over the proper definition of institutions, see Beth A. Simmons & Lisa L. Martin, \textit{International Organizations and Institutions}, in \textit{Handbook of International Relations}, supra note 21, at 192, 193.
monitoring, issue-linkage, and reputational benefits and thus promote cooperation.\textsuperscript{244} Liberalism, restated as a paradigm in the 1990s,\textsuperscript{245} abandons the view that states are unitary actors and that they are the only consequential actors. Liberalism instead assumes that the interests of individuals and groups are analytically prior to state politics.\textsuperscript{246} Thus, while states remain important actors, their preferences are determined by the interests and the behavior of groups and individuals acting in domestic and transnational society.\textsuperscript{247} It is the state preferences thus resulting that determine outcomes in international relations, although, importantly, within the constraints imposed by the relative preferences of other states.\textsuperscript{248} Liberalism thus acknowledges the importance of subnational and transnational actors in international relations. Constructivist approaches, finally, oppose the rationalist assumptions more or less underlying the previous three paradigms and argue that both social reality and knowledge of it are socially constructed.\textsuperscript{249} Thus, they concentrate on ideas, norms, beliefs, and identities as consequential factors in international relations.\textsuperscript{250}

\textsuperscript{244} See Cooperation under Anarchy (Kenneth A. Oye ed., 1986); Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 244-46 (1984) [hereinafter Keohane, After Hegemony]. As Dean Slaughter has pointed out, the insight that international institutions can thus promote cooperation was relatively "new only to political scientists," for McDougal-Lasswell jurisprudences and international legal process scholars "had spent the previous three decades defining international law as something other than an Austinian constraint system." Slaughter Burley, Dual Agenda, supra note 238, at 219. For an approach that combines institutionalist and constructivist theory with international legal process, see Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995).


\textsuperscript{246} Id. at 516-17.

\textsuperscript{247} Id. at 518-20; Slaughter Burley, Dual Agenda, supra note 238, at 227-28.

\textsuperscript{248} Moravcsik, supra note 245, at 520-22.

\textsuperscript{249} Emanuel Adler, Constructivism in International Relations, in Handbook of International Relations, supra note 21, at 95. A closer view reveals, however, that choosing between rational choice and constructivism is not exclusively an either/or proposition once one moves beyond the metaphysical debate. See James Fearon & Alexander Wendt, Rationalism v. Constructivism: A Skeptical View, in Handbook of International Relations, supra note 21, at 52.

The case of Germany in the previous Section supports at least some of the tenets of each of the four schools of thought in international relations. The presence of power as a factor influencing state behavior, both in the United States and in Germany, supports the realist assumption that relative state power determines outcomes. The role of groups and individuals in influencing governmental and court action supports the liberal assumption that groups and individuals are consequential actors in international relations. The importance of local ideational values and shared norms of discourse is in line with constructivist theory and its emphasis on the power of ideas. Finally, information deficits are among the major problems in international politics that institutionalists argue can be overcome with international institutions.251

However, some of these theoretical insights fit the German case better than others. There are two primary reasons for this. First, realism and institutionalism are committed to an instrumentalist optic,252 a "logic of consequences" over a "logic of appropriateness."253 This facilitates the building254 and empirical testing255 of rigorous causal theories. Yet the instrumentalist optic makes it difficult for those theories to account for the effect of the ideational values and shared norms of discourse in evidence in the German case.256 Liberalism, although based on instrumentalism as well, at


254 Cf. WALTZ, supra note 237, at 6-7 (defining theory); Goldsmith, supra note 252, at 983-85 (arguing for the use of rational choice techniques to achieve methodological sophistication in international law scholarship).

255 Constructivist theories may be difficult to prove with quantitative methods—a notion, however, that has become the subject of controversy. See, e.g., Thomas Risse, Constructivism and International Institutions: Toward Conversations Across Paradigms, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 597, 598 (Ira Katznelson & Helen V. Milner eds., 2002). Indeed, some constructivists have argued that causal explanations are inappropriate in social inquiry. See, e.g., Fearon & Wendt, supra note 249, at 57.

256 See supra notes 219-231 and accompanying text (discussing ideational values displayed in the "judicial conflict"); see also Fearon & Wendt, supra note 249, at 60 (arguing that it is a bad idea to view actions in world politics as based on ei-
least allows for ideas, norms, and identities to play a role in determining the relevant interests that states may represent.\textsuperscript{257}

Second, during much of its history, international relations theory has been no less state-centric in outlook than classical international law.\textsuperscript{258} This is particularly true of realism.\textsuperscript{259} But institutionalists, too, largely start from realist premises\textsuperscript{260} and thus are unable to account fully for transnational individual-individual and individual-state relations.\textsuperscript{261} Thus, these theories have difficulty explaining the role of groups and individuals in affecting lawmaking for transnational litigation at home and abroad as evidenced in the case of Germany.\textsuperscript{262} As in international law,\textsuperscript{263} however, this state-centric view of the international system has intermittently been

\begin{itemize}
\item They a logic of consequences or a logic of appropriateness, for, depending on the circumstances and the issue area, it may now be one and then the other, and often a combination of both; Thomas Risse-Kappen, \textit{Structures of Governance and Transnational Relations: What Have We Learned?}, \textit{in BRINGING TRANSNATIONAL RELATIONS BACK IN} 280, 281 (Thomas Risse-Kappen ed., 1995) ("In particular the empirical findings [in the studies of that volume] point to the significance of culture and norms"). Note that in law and economics, too, there are a number of influential scholars who have begun to argue that rational choice theory has significant shortcomings in explaining human behavior and thus needs to be amended with insights from other fields, such as cognitive psychology and sociocultural studies, to provide better predictions about the incentive effects of legal rules. See, e.g., Christine Jolls et al., \textit{A Behavioral Approach to Law and Economics}, 50 STAN. L. REV. 1471 (1998); Russel B. Korobkin & Thomas S. Ulen, \textit{Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics}, 88 CAL. L. REV. 1051 (2000); Cass R. Sunstein, \textit{Behavioral Analysis of Law}, 64 U. CHI. L. REV. 1175 (1997).
\item \textsuperscript{257} See, e.g., Moravcsik, supra note 245, at 513, 523, 525.
\item \textsuperscript{258} See supra notes 28-31 and accompanying text (describing traditional views on international law).
\item \textsuperscript{259} See supra note 241 and accompanying text.
\item \textsuperscript{260} See supra note 242 and accompanying text.
\item \textsuperscript{261} See Slaughter Burley, \textit{Dual Agenda}, supra note 238, at 225. The reason, as Professors Simmons and Martin explain, is that "American institutionalists have largely allowed their research agenda to be defined by responding to the neorealist challenge to show that "institutions matter."" Simmons & Martin, supra note 243, at 202.
\item \textsuperscript{262} Cf. supra notes 215-218 and accompanying text (noting role of groups and individuals in making and applying law of transnational litigation).
\item \textsuperscript{263} See, e.g., \textit{Reparation for Injuries Suffered in the Service of the United Nations}, 1949 I.C.J. 174, 178-79 (Apr. 11) (holding that the United Nations, a non-state actor, has capacity to sue in the ICJ); \textit{PHILIP C. JESSUP, TRANSNATIONAL LAW} (1956) (reevaluing the role of non-state-actors in international lawmaking); Koh, \textit{Why Obey?}, supra note 21, at 2656-57 (positing a theory of transnational legal process involving interaction, interpretation, and internalization by domestic and transnational actors).
\end{itemize}
called into question by international relations scholars. Some constructivists have made particular headway in explaining the relevance of transnational actors, such as transnational advocacy networks and knowledge-based communities, who attempt to change what they consider inadequate practices of states and international organizations. Moreover, with their interest in law and argument, constructivists have a close affinity to the belief systems of laywers and are thus predisposed to research the role of law in transnational relations. However, its eclecticism and lack of a coherent theory make constructivism difficult to use as an analytical first cut of a coherent and rigorous theoretical framework with which to gain fresh insights into the process of lawmaking for transnational litigation.

264 For a concise intellectual history of the role of transnational actors in international politics, see Risse, Transnational Actors, supra note 22, at 256-59.

265 Cf., e.g., Fearon & Wendt, supra note 249, at 56 (pointing out that there are state-centric as well as non-state centric theories within constructivism).


269 Cf. supra notes 219-227 and accompanying text (describing ideational values in the German case); infra notes 342-343 and accompanying text (pointing out different ideational values of lawyers across borders).

270 See, e.g., Ruggie, supra note 250, at 856 (noting that "constructivists have not as yet managed to formulate a fully fledged theory of their own" and thus that "constructivism remains more of a philosophically and theoretically informed perspective on and approach to the empirical study of international relations").

271 See, e.g., id. at 883 (acknowledging that, while constructivism may help provide "a richer understanding of some phenomena ... it lacks rigor and specification"); cf. Moravcsik, supra note 245, at 539-40 (claiming that the assumptions of liberal international relations theory are analytically prior to variables deduced from constructivist theory). Note also that constructivists have as yet spent little time researching the influence of domestic ideas, norms, and modes of discourse on the preference formation of transnational actors that are in evidence in the German case above. See, e.g., Adler, supra note 249, at 109-10.
Liberal international relations theory meets this need best. While normative liberal international relations theories have been around at least since Immanuel Kant published his philosophical sketch toward achieving eternal peace, this particular kind of liberalism seeks to state a theory of how states do behave, rather than how they should behave. As indicated above, it assumes that the interests of individuals and groups are analytically prior to state politics. Thus, states always represent, and respond to, some subset of society, depending on "the underlying identities, interests, and power of individuals and groups (inside and outside the state apparatus)." Liberals assume that the resulting state preferences can vary widely, depending on domestic constitutional structure, interests represented, and transnational context. Moreover, in focusing on individual and group interests, some liberal theorists posit that the state is increasingly disaggregated into its component parts, each representing its own set of interests on

---

272 IMMANUEL KANT, ZUM EWIGEN FREIEN: EIN PHILOSOPHISCHER ENTWURF 1795 (Rudolf Malter ed. 1995). For an attempt to revive Kant's arguments, see, for example, BRUCE RUSSET & JOHN R. ONEAL, TRIANGULATING PEACE: DEMOCRACY, INTERDEPENDENCE, AND INTERNATIONAL ORGANIZATION (2001); Michael W. Doyle, Kant, Liberal Legacies, and Foreign Affairs, 12 PHIL. & PUB. AFF. 205 (1983). The best-known example of a normative liberal international theory is probably Wilsonian liberal internationalism, whose "legal moralist" approach has been derided by the realists in reaction to the experiences surrounding World War II. See, e.g., Slaughter Burley, Dual Agenda, supra note 238, at 207-08 (giving a historical account of this criticism). As recent historical international relations scholarship has pointed out, however, few if any scholars ever held such utopian views. See, e.g., Andreas Osiander, Rereading Early Twentieth-Century IR Theory: Idealism Revisited, 42 INT'L STUD. Q. 343 (1998).


274 See supra note 246 and accompanying text.

275 Moravcsik, supra note 245, at 518. This does not mean that liberal international relations theory only applies to democratic states. In fact, "every government represents some individuals and groups more fully than others. In an extreme hypothetical case, representations might empower a narrow bureaucratic class or even a single tyrannical individual . . . ." Id. However, some liberals have concluded that the quality of the relationship among liberal states is different from that among non-liberal states and among liberal and non-liberal states. See infra notes 349-351 and accompanying text.

276 See, e.g., Abbott, supra note 237, at 366; Moravcsik, supra note 245, at 522-23; Slaughter Burley, Dual Agenda, supra note 238, at 228-29.
the international plane. All this allows liberal international relations theory to take full account of the influence of groups and individuals on state action both at home and abroad, and of the interdependence created by transnational trade and investment patterns, population flows, and social communication.

Liberal theory is thus invaluable in focusing our attention on the important role that transnational groups and individuals play in the development of domestic as well as international law and policy. Once we recognize the significance of this role, the need for a more systematic analysis of the interrelation between transnational actors and the law applicable to them—transnational law—becomes apparent. As Dean Slaughter has pointed out, liberal international relations theory provides a powerful theoretical framework for this purpose. She suggests that “[f]rom a Liberal standpoint, transnational law helps structure patterns of individual and group interaction in transnational society, patterns that in turn generate interests that shape and constrain state action.” This analytical framework engages all those parts of domestic and international law “that directly regulate transnational activity between individuals and between individuals and state governments.” It thus covers not only private and parts of public international law, but also sizable portions of domestic law, some of which may have originally been promulgated solely with domestic purposes in mind, but parts of which have become relevant to transnational actors over time.

---


278 See, e.g., Thomas Risse-Kappen, Bringing Transnational Relations Back In: Introduction, in BRINGING TRANSNATIONAL RELATIONS BACK IN, supra note 256, at 3 [hereinafter Risse-Kappen, Transnational Relations] (“Transnational relations, i.e., regular interactions across national boundaries when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization, permeate world politics in almost every issue area.”) (footnote omitted).

279 Slaughter Burley, Dual Agenda, supra note 238, at 230.

280 Id.

281 Id.
Thus, transnational lawmaking may (but need not originally) represent an attempt to regulate the private endeavors of transnational actors. At the same time, transnational law is itself the result of individual and group preferences—within and outside of government—exerted either directly through participation in the legislative, administrative, and litigation processes, or indirectly by engaging in transactional or litigation strategies designed to take advantage of, or frustrate, substantive or procedural policy. This process runs several ways. Frequently, more than one country attempts to regulate particular patterns of behavior with the result that state action needs to account for the preferences of other governments in the international system. Moreover, affected transnational actors have more than one government to address their grievances. Thus, the policy decisions of one state may result in responsive governmental action both at home and abroad.

4.2. Applying Liberal International Relations Theory to Transnational Litigation

It is within this analytical framework that transnational litigation operates, covering that part of transnational law which deals with the litigation of disputes among transnational actors. At its core, to be sure, litigation procedure involving transnational aspects remains domestic procedure, administered by domestic courts. Yet, the presence of transnational actors triggers the suggested complex inter-relationship among that procedure, transnational groups and individuals, and state action abroad. Moreover, supranational tribunals have begun to assume part of the role traditionally played by national courts in the administration of transnational litigation because private groups and individuals have increasingly been granted an active role in litigation before tribunals, such as the European Court of Justice ("ECJ") and the NAFTA dispute resolution panels. This development is likely to acceler-

282 See supra notes 23-39 and accompanying text.


ate as the negotiators of international treaty regimes, armed with the insights of research in the liberal international vein,\textsuperscript{285} increas-

\begin{quote}
(discussing the investor-state arbitration under NAFTA); Chris Tollefson, Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime, 27 YALE J. INT'L L. 141 (2002) (analyzing the role of individuals and groups in the new NAFTA regime). Dean Slaughter dramatically speaks of a "deep conceptual shift," due to which international tribunals are no longer viewed exclusively as venues where disputes between nations are resolved, while transnational litigation is limited to litigation before domestic courts, but rather of a new concept of transnational litigation that involves both domestic and international tribunals. Slaughter, Community of Courts, supra note 214, at 191-92. Others have raised delegation concerns. See, e.g., Curtis A. Bradley, International Delegations, the Structural Constitution, and Non-Self Execution, 55 STAN. L. REV. 1557 (2003) (discussing constitutional implications of U.S. delegation of authority to international institutions).
\end{quote}

\textsuperscript{285} For instance, research in this vein has demonstrated that efforts to engage private groups and individuals more directly in the implementation of international law in both supranational and domestic litigation have been more successful in bringing about compliance with international law, at least among liberal democratic states, than traditional avenues of enforcement, such as state responsibility, countermeasures, and state-to-state litigation before an international tribunal. See, e.g., William J. Aceves, Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation, 41 HARV. INT'L L.J. 129, 160-71 (2000) (using the Pinochet litigation in Spanish and English courts as a case study to show the effectiveness of litigation initiated by private groups in domestic courts to enforce international human rights law); Anne-Marie Burley & Walter Mattli, Europe Before the Court: A Political Theory of Legal Integration, 47 INT'L ORG. 41 (1993) (identifying the ways in which the ECJ created opportunities for pro-EC subnational actors and national courts and thus provided them with a stake in the promotion of EC law, thus leading to faster and deeper integration than most member states would have liked); Carol Harlow, Toward a Theory of Access for the European Court of Justice, 12 Y.B. EUR. L. 213 (1992) (describing the way pressure groups have used Article 177 referrals to the ECJ to further their interests); Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 282-337 (1997) (tracing the success of the ECJ and the European Court of Human Rights ("ECHR") in terms of compliance with their judgments in cases involving private parties versus their compliance record and that of other international tribunals in traditional state-to-state litigation and isolating the factors contributing to such effective supranational adjudication); Walter Mattli & Anne-Marie Slaughter, Revisiting the European Court of Justice, 52 INT'L ORG. 177 (1998) (canvassing the literature on the role of the ECJ in European integration to paint a richer picture of the preferences and constraints of groups, individuals, and governmental entities that have played a role in the process of integration); ALEC STONE SWEET & JAMES A. CAPORASO, FROM FREE TRADE TO SUPRANATIONAL POLITY: THE EUROPEAN COURT AND INTEGRATION, Ctr. for German and European Studies, Working Paper No. 2.45, 1996) (using statistical analyses and case studies to show the close relationship between the behavior of transnational actors and European integration through the jurisprudence of the ECJ, a jurisprudence mostly at odds with the interests of the most powerful member states), available at http://www.ciaonet.org
ingly provide for the direct involvement of private groups and individuals before international tribunals to help enforce their regimes.\textsuperscript{286} Those in charge of promulgating and applying the procedural law applicable to transnational cases thus need to assess the rules and principles of domestic procedure and the values underlying them within the suggested analytical framework so as to properly account for the transnational environment within which those rules and principles operate. This requires both reflection on the sort of procedural justice that can and should usefully be promoted within this transnational environment and an assessment of existing procedural rules within the policy objectives to be developed for transnational law as a whole.

Consider the growing interest in the interrelationship between litigation procedure and patterns of international trade. The Europeans in particular have been concerned with the adverse effects that some approaches to transnational litigation may have on the right to the free movement of goods, persons, services and capital under the EC Treaty.\textsuperscript{287} In the early 1990s, scholars eloquently argued that the four freedoms guaranteed by the EC Treaty\textsuperscript{288} directly mandate the abolition of procedural rules that in effect oper-


\textsuperscript{288} The four freedoms are the free movement of goods, EC TREATY, \textit{supra} note 287, arts. 9-37; free movement of persons, \textit{id.} arts. 48-58; free movement of services, \textit{id.} arts. 59-66; and free movement of capital, \textit{id.} arts. 67-73h.
ate as barriers to inter-EC trade and, hence, that they require a much broader approximation of transnational litigation practice in the various EU member states than previously envisioned.\textsuperscript{289} This goal is now explicitly supported by Article 65(c) of the EC Treaty.\textsuperscript{290} On its basis, a number of directives on issues ranging from the protection of consumer interests to combating late payments in commercial transactions include procedural minimum standards regarding aspects such as access to justice, costs of proceedings, effective enforcement of judgments, and group litigation.\textsuperscript{291} Moreover, the ECJ hesitantly adopted the argument in a number of cases reaching from Hubbard \textit{v.} Hamburger\textsuperscript{292} to Hayes \textit{v.} Kronenberger.\textsuperscript{293} In most of these cases, the court struck down na-

\textsuperscript{289} The groundbreaking article is Manfred Wolf, \textit{Abbav prozessualer Schranken im europäischen Binnenmarkt, in Wege zu einem Europäischen Zivilprozessrecht} 35 (Wolfgang Grunsky et al. eds., 1992).

\textsuperscript{290} Article 65, in force since January 1, 1999, provides in pertinent part:

Measures in the field of judicial cooperation in civil matters having cross-border implications . . . shall include:

. . . (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

\textsuperscript{291} See, e.g., Council Directive 2000/35/ art. 5, 2000 O.J. (L 200) 35 (requiring member states to "ensure that an enforceable title can be obtained, irrespective of the amount of debt, normally within 90 calendar days of the lodging of the creditor's action" if "the debt or aspects of the procedure are not disputed"); Council Directive 98/27, 1998 O.J. (L 166) 51 (mandating that consumer groups organized under the laws of one member state be given standing to sue in another member state); Council Directive 97/5, art. 10, 1997 O.J. (L 43) 25 (requiring member states to "ensure that there are adequate and effective procedures for the settlement of disputes" in cross-border credit transfers). For further recent European legislation regarding trans-border procedure, see also \textit{supra} text accompanying note 12.

\textsuperscript{292} Case C-20/92, 1993 E.C.R. I-3790.

\textsuperscript{293} Case C-323/95, 1997 E.C.R. I-1718.
tional rules requiring foreign plaintiffs to post a bond as a precon-
dition to hearing their claims, holding that such rules discrimi-
nated against nationals of other member states and thus violated
Article 6 of the EC Treaty.\textsuperscript{294} In \textit{Mund \& Fester v. Hatrex International Transport},\textsuperscript{295} the Court struck down as covertly discrimina-
tory even a provision of the German Code of Civil Procedure, al-
lowing a defendant’s judgment proof status in Germany as
grounds for granting a pre-judgment attachment.

The concern with facilitating international trade in fashioning
rules for transnational litigation is not, however, exclusively a
European phenomenon.\textsuperscript{296} The U.S. Supreme Court, for example,
has decided a line of cases on the assumption that closed-minded
approaches to forum selection and arbitration clauses could ham-
per the interests of U.S. businesses abroad.\textsuperscript{297} While the sincerity of
the Supreme Court’s international-commerce rhetoric in these
cases may be questioned,\textsuperscript{298} the same is not true of a number of re-
cent international trade agreements, most notably the Trade-
Related Aspects of Intellectual Property Agreement ("TRIPS"), the
WTO sub-agreement on matters of intellectual property,\textsuperscript{299} that
contain a significant number of procedural minimum standards on
issues ranging from evidence gathering to available remedies.\textsuperscript{300}
As supranational tribunals become more confident in enforcing these trade regimes, they may well take a closer look at the procedural rules in the various member countries, measuring transnational litigation rules on the policy of free trade. This is well demonstrated by two recent cases in which NAFTA arbitration panels were asked to consider the compatibility of an award of punitive damages—against a Canadian company by a Mississippi court and the dismissal, by a Massachusetts court, of a suit by a Canadian corporation against the City of Boston for reasons of sovereign immunity, respectively, with NAFTA’s investment provisions. NAFTA’s Chapter 11, under which these cases were heard, may be in a “legitimacy crisis” that is partly due to its setup as a private ad-hoc arbitration without public accountability of the arbitrators and a lack of public access to the proceedings. But the maximum extent possible [to] encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area and to create an Advisory Committee on Private Commercial Disputes to study and report on the availability and effectiveness of arbitration and other ADR methods to resolve such disputes.

301 See Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, Loewen Group, Inc. v. United States, sec. 137 (ICSID Case No. ARB(AF)/98/3), available at http://www.state.gov/documents/organization/3921.pdf (last visited Nov. 14, 2004) (holding that the decision by the Mississippi court could itself constitute an expropriation and thus was subject to arbitral review under Chapter 11 of NAFTA). Ultimately, the NAFTA panel dismissed the case for lack of diversity of nationality and for a failure to exhaust local remedies. The panel did, however, register its view that the Mississippi trial and its verdict were “clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.” Loewen Group, Inc. v. United States, (ICSID Case No. ARB(AF)/98/3), available at http://www.state.gov/documents/organization/22094.pdf (last visited Nov. 14, 2004).


304 See, e.g., id. at 68-72. The “legitimacy crisis” of NAFTA’s Chapter 11 in the United States is also due to the fact that the “international standards” of expropriation and “fair and equitable treatment,” long imposed on less-developed countries through bilateral investment treaties, are now for the first time being applied to regulatory and procedural laws and to decisions of courts and authori-
point should be clear.

A liberal perspective aids significantly in understanding the forces that lead to this pressure on domestic procedure by international trade agreements. As the European experience suggests, the scrutiny of domestic procedure by international trade tribunals is particularly likely where individuals and groups have themselves the opportunity to bring cases before such a tribunal.\textsuperscript{305} Moreover, future trade talks may yield more specific procedural rules as transnational groups press proposals for procedural reform that they have been unable to obtain on a domestic level.

Consider Professor Benvenisti's analysis of collective-action failures in the transnational system.\textsuperscript{306} Using public choice theory, he shows that relatively small but transnationally savvy groups such as producers, employers, and service providers have effectively utilized the international arena to exploit less organized groups at home by shifting their activities to different countries or by cooperating with similarly situated foreign groups to persuade their home governments to create international treaties or international organizations in order to avoid undesirable regulatory regimes at home.\textsuperscript{307} He also notes that both international law and domestic constitutional norms premised upon the traditional state-centric view of the international system perpetuate this scheme, leading to a laissez-faire approach that effectively undermines domestic achievements of the welfare state and of standards of environmental and consumer protection.\textsuperscript{308}

Procedural law reformers, both domestic and international, would do well to consider these developments carefully in devising rules applicable to transnational cases. Process values derived from policies of free trade, such as attempts to reduce expense and delay,\textsuperscript{309} may conflict with domestic process values at every turn.\textsuperscript{310}

\textsuperscript{305} See supra note 285.


\textsuperscript{307} Id. at 171-84.

\textsuperscript{308} Id. at 184-96.

\textsuperscript{309} See, e.g., Wolf, supra note 289, at 35.

\textsuperscript{310} See, e.g., Gerhard Walter & Samuel P. Baumgartner, Improving the Prospects of the Transnational Rules of Civil Procedure Project: Some Thoughts on Purpose and
Even the ECJ has realized that facilitating international trade cannot be the only value, nor even the most important one, served by transnational procedure. Only two years after Hayes, in E.D. Srl. v. Fenocchio, the court upheld the limitation under Italian law of the Italian order-of-payment procedure to defendants who can be served with process on Italian territory against a challenge by an Italian creditor who demanded to use the mechanism against his recalcitrant Italian debtor who, at the time, resided in Germany. In the court’s view, “the possibility that nationals would therefore hesitate to sell goods to purchasers established in other Member states is too uncertain and indirect for that national provision to be regarded as liable to hinder trade between Member States.”

Moreover, those involved in the making of transnational law and policy need to contemplate whether they intend to perpetuate, modify, or reverse the developments observed by Professor Benvenisti and to design strategies to implement their choice. Whether these strategies are devised for transnational law as a whole or for specific issue areas within it, they are necessarily interrelated with aspects of procedure. In Dow Chemical Company v.

---

Means of Implementation, in 18 RITSUMEIKAN L. REV. 169 (2001) [hereinafter Walter & Baumgartner, Prospects]; see also Brand, supra note 296, at 627 (suggesting that “fundamental jurisprudential disagreements” may justify non-recognition of a foreign judgment in spite of a preference for the free movement of judgments from a free-trade perspective).

311 Case C-412/97, 1999 E.C.R. I-3845.

312 The procedure, called decreto ingiuntivo, allows a creditor who believes to have an uncontested claim for the payment of a sum of money to obtain an enforceable judgment within 60 days at minimal cost by simply filling out a form identifying the debtor, sum of money owed, and a brief description of the cause of action, thus obviating the need for filing a full complaint. The court then orders the defendant to either pay the sum of money or to object to its order. In the latter case, the plaintiff can overcome the objection only by initiating an ordinary civil proceeding. However, if the defendant neither pays nor objects within the time identified, the court declares the order an enforceable judgment in the amount claimed. See CODICE DI PROCEDURA CIVILE [CPC], art. 633 et seq. (Italy). Together with a similar procedure available in Germany and France, it served as the basis for the recent European Late-Payment Directive, supra note 291.

313 1999 E.C.R. I-3845 at no. 11 (citation omitted).

314 Professor Benvenisti, for one, envisions the creation of transnational institutions to coordinate policies. See supra note 306, at 202-211. Professor Trimble, on the other hand, suggests to tackle “laissez-faire globalism” by moving from a preoccupation with state authority to a concern with substantive justice by strengthening and democratizing international institutions. See Phillip R. Trimble, Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy, 95 MICH. L. REV. 1944, 1969 (1997) (book review).
Castro Alfaro, for example, Justice Dogget, in a concurrence, engaged some of his colleagues on the Texas Supreme Court in an interesting debate on the issue of whether the doctrine of forum non conveniens should be abolished so that U.S. corporations that take advantage of substandard worker and consumer protection arrangements abroad by shifting some of their activities there can be held accountable in Texas courts. Of course, there are other important policies to be considered when deciding whether to grant a motion to dismiss for forum non conveniens or whether the doctrine serves any useful purpose at all, but the point should be clear.

In short, procedural law reformers need to act in awareness of the complex interdependence between transnational actors and the law applicable to them. Otherwise their work product risks unintentionally supporting patterns of individual and group behavior they may not wish to condone, such as those observed by Professor Benvenisti, and unnecessarily hampering others, such as international trade. This, in turn, may lead to individual and group initiatives whose effect is to subject transnational procedure to particular substantive interests, most importantly, the promotion of free

---

315 786 S.W.2d 674 (Tex. 1990).
316 Dow Chemical Co., 786 S.W.2d at 688-89 (Dogget, J., concurring). But see Dow Chemical Co., 786 S.W.2d at 697 (Gonzalez, J., dissenting) (suggesting that the court lacks the power to make this policy decision). The Texas legislature subsequently reenacted the doctrine of forum non conveniens in personal injury actions. See Tex. Civ. Prac. & Rem. Code § 71.051 (1997). So far, the argument has not had much success in blocking the application of the doctrine of forum non conveniens in the United States. See, e.g., Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (affirming dismissal for forum non conveniens); In re Union Carbide Corp. Gas Plant Disaster, 89 F.2d 195 (2d Cir. 1987) (affirming dismissal for forum non conveniens); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D.Tex. 1994) (dismissing complaint on grounds of forum non conveniens). In the English case of Lubbe v. Cape Plc., 1 W.L.R. 1545 (2000), however, the House of Lords was apparently swayed by the argument and denied a dismissal on forum non conveniens grounds in favor of a class of South African plaintiffs who had filed suit at the defendant's place of incorporation in England for claims arising out of the defendant's operation of asbestos-mining operations in South Africa although all the relevant factors seemed to point clearly toward South Africa as the more convenient forum.
trade. On the other hand, transnational actors may simply choose to circumvent disfavored substantive and procedural law by structuring their behavior so as to avoid its application. Arbitration and forum selection clauses, for example, are frequently used by international business firms to stay out of countries with what is considered business-unfriendly litigation procedure and to avoid the application of domestic law deemed to be insufficiently sensitive to the needs of international trade.\(^{318}\) This, in turn, may create pressure either to change the disfavored laws for the benefit of those transnational actors or,\(^{319}\) conversely, to limit their exit options in favor of those incurring the negative externalities flowing from them.\(^{320}\) In considering the alternatives for transnational litigation

\(^{318}\) See, e.g., Ives Dezaley & Briant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (1996) [hereinafter Dezaley & Garth] (recounting how international commercial arbitration, depending on the country in question, has become more or less of a privatized venue to adjudicate international business disputes away from the public courts to the extent that those courts are viewed as unfriendly to particular business interests); Thomas E. Carboneau, National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error, in International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity 115, 116-17 (Richard B. Lillich & Charles N. Brower eds., 1993) (suggesting that if domestic "legal processes are too rigid to adapt and to undergo reform," they fuel a demand for international commercial arbitration). This development is further strengthened by the attempts of a number of countries to attract international commercial arbitration and the business it produces for the local bar and infrastructure services by drafting international arbitration laws that provide for a minimum of judicial interference in the arbitral process. See, e.g., Dezaley & Garth, supra, at 129-81 (discussing how British and U.S. lawyers have used and developed international arbitration to their business advantage); Gary B. Born, International Commercial Arbitration in the United States 30-34 (2d ed. 2001) (describing the Federal Arbitration Act and how Congress sought to facilitate development of a stable system of international commercial dispute-resolution favoring business interests).

\(^{319}\) See, e.g., Moravcsik, supra note 245, at 518 (noting that "cost-effective exit options, such as emigration, noncompliance, or the transfer of assets to new jurisdictions or uses, insofar as they constrain governments, may be thought of as substitutes for formal representation," by which the preferences of those groups are translated into state policy).

law, in particular whether and to what extent facilitating international trade should be its goal, domestic proceduralists may also wish to consider participating both in fashioning those international free-trade regimes that increasingly promise to control transnational litigation practice, and in debating their proper interpretation in the relevant transnational tribunals.

4.3. Refining the Suggested Framework

If this were all, one would be hard pressed to contest that the analysis suggested above is neither particularly novel nor fully compelling in arguing that there is more that separates transnational litigation from domestic interstate procedure than an opportunity for cross-fertilization. At least in the United States, scholars have "long been alert to the observation that public life consists of 'competition among pressure groups for political influence'" as well as to the incentive effects of rules. If so, however, these insights have had surprisingly little effect on lawmaking for transnational litigation. The view that "a sovereign state may fashion domestic law as it deems fit," particularly prevalent among federal judges and federal rulemakers in the United States, has led to approaches that largely proceed as if transnational litigants had no transnational exit options at their disposal, no foreign or international tribunals, legislatures, or administrative agencies to address their grievances; and no opportunity to engage in transactional or litigation strategies abroad designed to take advantage of, or frustrate, domestic substantive or procedural policy. To be sure, the various interest-balancing tests that have been introduced to tackle issues as varied as the reach of domestic legislative jurisdic-

321 See supra text accompanying notes 16-18.
322 Benvenisti, supra note 306, at 169 (citation omitted).
323 See, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (6th ed. 2002). This does not mean, however, that there is agreement on how to analyze and predict those incentive effects. See supra note 256.
324 Supra text accompanying note 27.
325 See supra note 39; In re Anschuetz & Co., GmbH, 754 F.2d 602, 608-09 (5th Cir. 1985) ("We have a party, we have jurisdiction, and under Rule 34 that party is required to produce documents which are in its possession, custody or control... The fact that the documents are in West Germany is, to this court, immaterial." (quoting the district court)); BAUMGARTNER, supra note 9, at 30-45 (tracing U.S. history of unilateral approaches to transnational litigation).
transnational discovery,\textsuperscript{326} or dismissals on forum non conveniens grounds\textsuperscript{328} would provide opportunities to take these aspects of transnational interconnectedness into account, at least on the level of judicial lawmaking.\textsuperscript{329} Yet, courts as well as commentators have done so only on occasion and without developing a systematic approach.\textsuperscript{330}

But there is more. While similarities do exist between the interstate and the transnational levels in the ways groups and individuals and the interests of foreign states affect the law-making process,\textsuperscript{331} there are also significant differences. The first difference from the domestic interstate situation is that some of the major players are not the same. As Professor Benvenisti demonstrates, transnationally savvy groups are more likely to influence policy than other actors, often outsmarting domestic lawmakers along the way.\textsuperscript{332} This is not only true with regard to the making of international law, where well organized transnational groups can influence state preferences twice: at the negotiation stage and at the rati-

\textsuperscript{326} See, e.g., Timberlane v. Bank of America, 549 F.2d 597 (9th Cir. 1976) (adopting a balancing test to determine whether extraterritorial jurisdiction should be exercised); Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (agreeing substantially with the Ninth Circuit's test and describing the factors to consider); \textit{Restatement (Third)}, \textit{supra} note 32, § 403 (discussing the limits on domestic jurisdiction).


\textsuperscript{328} See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (balancing private and public interests factors for a determination of whether or not to grant a dismissal on grounds of forum non conveniens).

\textsuperscript{329} See, e.g., Slaughter, \textit{Economic Law}, \textit{supra} note 242, at 735 (observing that the development of the law controlling the reach of U.S. legislative jurisdiction from territoriality to the "rule of reason," which requires the balancing of the relevant interests, is in line with liberal international relations theory "precisely because it suggests a shift from a focus on power to a focus on interests"). Whether it is appropriate for a court to engage in the type of policy analysis suggested above is a different question. \textit{See infra} text accompanying notes 385-387.

\textsuperscript{330} Cf., e.g., Slaughter, \textit{Economic Law}, \textit{supra} note 242, at 736 (critiquing that the "rule of reason" remains too closely tied to notions of physical power rather than truly determining the extent to which the underlying interests of groups and individuals can be harmonized).

\textsuperscript{331} See \textit{supra} text accompanying notes 322-323; Burbank, \textit{World}, \textit{supra} note 16 \textit{passim} (analyzing a number of examples of such similarities).

\textsuperscript{332} Benvenisti, \textit{supra} note 306, at 184-89; \textit{see also} Risse-Kappen, \textit{Transnational Relations}, \textit{supra} note 278, at 26 (arguing that "'[c]lever' transnational actors adapt to the domestic structure to achieve their goals").
fication or implementation stage, both times with significant advantages of information and access to both domestic and foreign governments.333 As the case study above suggests, transnational actors also have an impact at the domestic levels of lawmaking.334 For instance, there is a growing transnational bar that is well informed about the procedural traits of various countries and about their primary exit option—international commercial arbitration. This segment of the bar has become proficient in playing those procedural traits and in influencing local law reform in search of the best option for their clients.335 A variety of procedural issues, from approaches to personal jurisdiction and parallel proceedings, to the availability of discovery and contingency fee agreements, to the circumstances under which arbitration is available, have played a role in this scenario.336 This is not to say that transnational lawyers are engaging in reprehensible behavior. On the contrary, they are doing their job.337 Rather, the point is that, unlike on the interstate level, they possess knowledge and access that other groups and individuals, including those involved in the making of procedural law, often do not have, and thus are able to influence the process of fashioning approaches to transnational litigation to a much greater extent than at the purely domestic level.

The second difference, closely related and nicely supported by the German case above, is that information about the policies and approaches of other countries to transnational cases remains a scarce commodity.338 This type of information is crucial, for with-

333 Benvenisti, supra note 306, at 184-89; HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION 14-17, 20-23, 67-98 (1997); see also KECK & SIKKINK, supra note 266 (exploring the role of NGOs in collecting information and in pressuring governments at home and abroad to adopt particular policies).
334 See supra notes 215-218 and accompanying text.
335 As far as arbitration is concerned, see DEZALEY & GARTH, supra note 318 (discussing the role of specialized lawyers in the development of international commercial arbitration).
337 See, e.g., id. at 571-72 (noting that effective representation of clients is a lawyer's duty).
338 See supra notes 232-233 and accompanying text (describing lack of knowledge as to U.S. litigation approaches). On the many undesirable effects of actors' inadequate information in international politics, see GEORGE DOWNS & DAVID ROCKE, OPTIMAL IMPERFECTION: DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1995); ROBERT JERVIS, PERCEPTION AND Misperception
out it, we cannot assess the real and potential effectiveness of our chosen procedural approaches.\textsuperscript{339} While this kind of knowledge about other states' legal systems is quite easy to obtain within a federal system, the same is not true on the transnational level. The problem may be logistical.\textsuperscript{340} Mostly, however, it is due to differences in legal history, culture, economy, and procedural philosophy, which severely impede the endeavor of someone trained in the legal system of one country to locate the rules and principles in point in another, let alone to gain a proper understanding of their relevance. Even where the language of a foreign country is the same, these differences of legal background may easily lead to misunderstandings.\textsuperscript{341} Under these circumstances, it is much easier for those with a particular agenda to control the information fed to courts and procedural law reformers.

With that, we have identified the third difference. In domestic interstate relations, factors such as national identity, national economy, constitutional architecture, a federal or central government, legal education and practical training, and a discrete legal culture with its own history and philosophy tend to impose a distinct

\textsuperscript{339} For example, the prerequisites for provisional relief differ so widely from country to country that there may be "a black hole in which a defendant can escape out of sight and become unreachable." Mercedes Benz AG v. Leiduck, [1996] 1 A.C. 284, 305 (P.C. 1995) (appeal taken from Hong Kong) (Lord Nicholls dissenting). In that case, Mercedes Benz was unable to secure an attachment of the defendant's Hong Kong property before the courts of Monaco, the defendant's domicile, because Monaco law does not allow the attachment of property located abroad. Subsequently, the Privy Council equally upheld the reversal of the decision of a Hong Kong trial court to grant such an attachment by the Hong Kong courts of appeal because of a lack of personal jurisdiction over the defendant. On the difficulties with the various national laws in regard to preliminary relief, see, for example, \textsc{The International Law Association, Report of the Sixty-Seventh Conference Held at Helsinki, Finland} 185 (James Crawford & Michael Byers eds., 1996) [hereinafter \textsc{ILA Report}].

\textsuperscript{340} See, e.g., Walter & Baumgartner, \textit{Recognition}, supra note 58, at 4-5 (noting difficulties in locating legal materials in some Eastern European countries).

\textsuperscript{341} See, e.g., Geoffrey C. Hazard, Jr., \textit{Foreword} to \textsc{U.S. Statement}, supra note 8, at xiii, xiv (reporting that, "although the United States and Canada share a common language and common source in English law, in this project we discovered the truth that literal equivalencies sometimes can mask important substantive differences"); Lawrence Collins, \textit{The Hague Evidence Convention and Discovery: A Serious Misunderstanding?}, 35 \textsc{Int'l} & \textsc{Comp. L.Q.} 765 (1986) (suggesting that U.S. courts misconceived the Hague Convention as being designed to further the process of discovery).
value system. True, there is often vigorous disagreement among the legal elite on jurisprudential as well as on policy issues. But the way lawyers think, the way they draft their laws and legal opinions, what they consider convincing arguments, and who they consider important legal actors, as well as a great number of detailed assumptions about the best way to conduct a civil proceeding with and without foreign parties tend to be heavily ingrained. The same is not true on the transnational level, where there tend to be significant differences from country to country in the way lawyers think, in what they expect from particular legal institutions, and in those institutions themselves.

The fourth and final difference transnational litigation involves is the jurisdictions of sovereign nations. Unlike states in a federal system, these nations are neither subject to a unifying constitutional structure nor to a federal or central government. The precise content of their sovereignty has, however, become the subject of a spirited debate. Despite conflicting empirical claims regarding the status of actual state autonomy, the problem arises from a nor-

---


343 William Ewald, Comparative Jurisprudence (I): What Was it Like to Try a Rat?, 143 U. PA. L. REV. 1889 (1995) [hereinafter Ewald, Comparative Jurisprudence]; see also George P. Fletcher, The Right and the Reasonable, 98 HARV. L. REV. 949 (1985) (distinguishing flat and structured legal reasoning); William B. Ewald, What’s So Special About American Law?, 26 OKLA. CITY U. L. REV. 1083, 1095-96 (2001) (noting that among the things that puzzle his foreign students about American law are the civil jury and the resulting complexities of the law of evidence, pretrial discovery, contingent fees, the death penalty, “intellectual movements such as law and economics or critical race theory,” the “practice of electing judges and prosecutors, and of allowing them to run what is in effect a political campaign, complete with campaign contributions and the support of a political party”); Linda S. Mullenix, Lessons From Abroad: Complexity and Convergence, 46 VILL. L. REV. 1, 11 (2001) (suggesting that “American students and the American practicing bar typically recoil from [the] civil law jurisprudence” that does not provide for things such as trial by jury, full-fledged discovery, the American rule of costs, entrepreneurial lawyers, punitive damages, class actions, and American-style adversary litigation).

344 Among international law scholars, it has become an article of faith that state sovereignty has waned significantly within the last fifty years. See, e.g., Goldsmith, supra note 252, at 979; see also RICHARD W. MANSBACH ET AL., THE WEB OF WORLD POLITICS, NON-NATION ACTORS IN THE GLOBAL SYSTEM (1976) (making claims as to the demise of state sovereignty); JAMES N. ROSENAU, THE STUDY OF GLOBAL INTERDEPENDENCE, ESSAYS ON THE TRANSNATIONALIZATION OF WORLD AFFAIRS (1980) (making similar claims). As Professor Krasner has demonstrated in a careful empirical study, however, states have for centuries encroached upon the
tative concept of sovereignty that no longer seems practicable in a world in which domestic lawmaking is increasingly constrained by international regimes, such as the WTO, NAFTA, and various human rights treaties, some of which may be considered to have constitution-like effects. One may see in these developments a loss of the protection of national sovereignty under international law, or a change of its content. However, to the extent that reconceptualizations of the norm of sovereignty goes beyond that achieved by the ratification of treaties that limit actual state autonomy and is instead sought unilaterally, it tends to be resisted by nations—especially smaller ones—that continue to value their autonomy in making law for transnational litigation.

Consider U.S. courts and federal rulemakers, who have long been impatient with what they consider to be impractical insistence on formalities. Dean Slaughter's empirical research on the use of the act of state doctrine puts an interesting spin on this observation, finding that U.S. courts tend to be less reluctant to sit in judgment on the acts of a foreign sovereign if that sovereign is another liberal democratic state. This confirms her theory that lib-

sovereignty of others by imposing constitutions, rules on the treatment of a state's own citizens (particularly minorities), and dictates on economic regulation in connection with the granting of sovereign loans. Stephen B. Krasner, Sovereignty 73-219 (1999).


347 See, e.g., Chayes & Chayes, supra note 244, at 27 (suggesting that sovereignty now exists "in membership in reasonably good standing in the regimes that make up the substance of international life," while "[i]solation from the pervasive and rich international context means that the state's potential for economic growth and political influence will not be realized").

348 See, e.g., United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (holding that the reach of the Sherman Act is not limited by territorial boundaries); In re Anschuetz & Co., GmbH, 754 F.2d 602, 606 (5th Cir. 1985) (dismissing German sovereignty concerns that would result in limiting the effectiveness of the Federal Rules); supra note 200-207 and accompanying text.

eral states have been able to shift a significant portion of their transnational relations with one another from a political level to one controlled by law.\textsuperscript{350} Thus, she concludes, "in court, pleas of the prerogatives of sovereignty are more likely to be honored with respect to nonliberal states than with respect to liberal states."\textsuperscript{351} There is, however, a danger in turning these empirical findings on the behavior of U.S. federal courts into normative choices for international law binding on the entire world.\textsuperscript{352} Groups and individuals in countries less powerful than the United States may view such undertakings from a more realist perspective.\textsuperscript{353} To them, U.S. courts and lawmakers may simply be calculating when it is in the best interest of their country to defer to a political solution.\textsuperscript{354} From this perspective, a "shared approach" that suggests substituting mutual interest balancing for the recognition of "abstract 'sovereign interests'"\textsuperscript{355} is apt to increase the view that the power of mighty states determines the values governing transnational law and litigation at the expense of smaller nations.\textsuperscript{356}

Thus, fresh concepts of national sovereignty, whether or not they distinguish between liberal and nonliberal states, will have to allow for some measure of self-determination by less powerful

\textsuperscript{350} Id. at 1909-10.

\textsuperscript{351} Slaughter Burley, Dual Agenda, supra note 238, at 230 (emphasis in original).

\textsuperscript{352} But see id. at 229-30.

\textsuperscript{353} As Professor Jackson points out, Westphalian sovereignty has always served to protect weaker from more powerful nations. ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 6 (1990).

\textsuperscript{354} See supra notes 234-235 and accompanying text. Dean Slaughter acknowledges this view. See Burley, Liberal Internationalism, supra note 349, at 1963 (noting that "judges respond not to a subconscious identification of a particular state as 'liberal' or 'nonliberal,' but rather to individualized assessments of the particular economic and political interests at stake on the facts of a given case").

\textsuperscript{355} ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 230 (1996) [hereinafter LOWENFELD, QUEST]; see also Burley, Liberal Internationalism, supra note 349, at 1980-86 (suggesting that the courts of liberal states deal with contentious regulatory disagreements between governments by balancing the interests involved rather than deferring to a political solution).

\textsuperscript{356} Cf., e.g., Samuel P. Baumgartner, Human Rights and Civil Litigation in United States Courts: The Holocaust Era Cases, 80 WASH. U. L.Q. 835, 846-49 (2002) (noting instances when transnational public law litigation in U.S. courts has come across to influential groups and individuals abroad as simply another arrow in the quiver of a powerful country that attempts to impose its own political preferences upon others).
Otherwise, negative reactions by groups and individuals in those smaller states are to be expected. Such reactions do not need to culminate in responsive legislative and executive action, such as diplomatic protests and blocking statutes. As the German case demonstrates, they can affect foreign state action in much subtler ways that are nonetheless capable of adversely affecting the procedural values chosen for transnational cases elsewhere.

4.4. What Makes Transnational Litigation Different?

Returning, thus, to the question of the law controlling transnational cases, it becomes clear that, from a strictly positivist point of view, the law applicable to transnational litigation is indeed

357 Cf. Benedict Kingsbury, Sovereignty and Inequality, 9 EUR. J. INT’L L. 599 (1998) (arguing that a radical change in the traditional concept of sovereignty will be hazardous to both international law and international society if not accompanied by the development of an alternative concept that is capable of serving that concept’s function of equalizing inequality among nation states).

358 Cf., e.g., Greenberg, supra note 21, at 1818 (pointing to the realist insight that “a great nation that in its actions inspires resentment among friendly and neutral states, generates hatred and humiliation among those who perceive themselves to be subjected to its power and . . . will inspire alliances against it—alliances that threaten to undermine that nation’s prosperity and security”).

359 See, e.g., Ernest L. Kerley, Contemporary Practice of the United States Relating to International Law, 56 AM. J. INT’L L. 794 (1962) (reporting a Swiss diplomatic protest to the United States when a U.S. agency served a Swiss corporation with documents by mail, an act that infringed on Switzerland’s sovereign power). For some more obscure sources of such protests, see BORN, supra note 13, at 849-50.

360 See, e.g., BORN, supra note 13, at 850-52 (describing different categories of foreign blocking statutes).

361 See supra notes 234-236 and accompanying text. As indicated above, the views on what is considered protected by national sovereignty are to some degree connected to prevailing jurisprudential views and procedural particularities. See supra text accompanying notes 44-45. This increases the difficulty of those trained in one legal system to understand the views on sovereignty in another. See, e.g., LOWENFELD, QUEST, supra note 355, at 229 (“I have long wondered how the concept of sovereignty crept into the subjects here discussed . . . . Is it really pertinent to the limits of the effects doctrine, or to procurement of evidence for purposes of discovery or trial?”). As a leading international law scholar well versed in foreign approaches, of course, Professor Lowenfeld is expressing more than the view of an American lawyer by querying whether the civil law insistence on sovereignty in these matters still makes sense in today’s world of transnational interdependence. See id. at 2. This question is perfectly legitimate, but as I have just noted in the text, it is not the only relevant question. See supra notes 210-214 and accompanying text.

362 See supra note 28 and accompanying text.
primarily domestic in nature. From this point of view, nation states may truly fashion the law of transnational litigation as they deem fit,\textsuperscript{363} although their efforts are superseded by a growing patchwork of rules and standards of international law\textsuperscript{364} and are increasingly controlled by the jurisprudence of supranational tribunals.\textsuperscript{365} As a matter of policy, however, once attention is focused away from state-centric modes of analysis, we detect a strong interrelation between transnational-litigation law and patterns of behavior of transnational actors. This interrelation is complex, running up and down from national governmental entities, to groups and individuals, to governmental entities both at home and abroad as well as back and forth among governmental entities of different nations as they attempt to fashion their substantive and procedural policies in relation to the perceived preferences of other states. Through these various channels, one country's approaches to transnational litigation are likely to affect and constrain that country's own policies and law-making efforts as well as those of other countries in the future.

Such constraints may be legal as well as factual. To the extent that this interaction between transnational actors and transnational litigation law partakes of a larger "transnational legal process,"\textsuperscript{366} it has normative force.\textsuperscript{367} Thus, a particular approach to a problem of transnational litigation may not only inhibit or facilitate, as the case may be, group and individual behavior that adversely affects the substantive or procedural policies in the country in question, it may also result in the formation of a new norm of transnational litigation. This new norm may be the result of group and individual pressure on the same governmental body that promulgated the initial rule, such as when the U.S. courts partly retracted from overly aggressive assertions of legislative jurisdiction in the antitrust area in response to vigorous criticism at home and abroad.\textsuperscript{368}

\textsuperscript{363} See supra note 27 and accompanying text.
\textsuperscript{364} See supra notes 287-304 and accompanying text.
\textsuperscript{365} See supra notes 285-286 and accompanying text.
\textsuperscript{366} Harold Hongju Koh, Transnational Legal Process, 75 Neb. L. Rev. 181 (1996) [hereinafter Koh, Transnational Legal Process].
\textsuperscript{367} Id. at 184 (suggesting the normative quality of transnational legal process); Koh, Why Obey?, supra note 21, at 2626-27, 2646 (suggesting that transnational legal process is normative, constitutive, and dynamic).
\textsuperscript{368} Compare United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), with Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir.
More often, however, the new norm emanates from lawmaking in international or foreign fora, over which the original lawmaker has no direct control, but which nonetheless constrains that lawmaker's future endeavors.\footnote{See, e.g., supra Section 3; notes 287-304 and accompanying text.}

If, therefore, those in charge of lawmaking for transnational litigation—be they legislators, judges, or court rulemakers—want to be in control of their efforts, they need to act in awareness of the possible ways in which their decisions may affect their own policy choices through this web of transnational interdependence. They must carefully consider the values that they can and want to usefully pursue for transnational litigation. In doing so, they need to be mindful of the special circumstances that particularly set procedural lawmaking for transnational cases apart from its sister enterprise in domestic interstate litigation, including: the presence of different actors, both private individuals\footnote{See, e.g., supra notes 331-337 and accompanying text.} and sovereign foreign governments;\footnote{See, e.g., supra notes 344-361 and accompanying text.} differences in legal history, culture, and procedural philosophy;\footnote{See, e.g., supra text accompanying notes 342-343.} and the scarcity of adequate information about policies and norms on transnational litigation in other countries.\footnote{See, e.g., supra text accompanying notes 338-341.}

Effective lawmaking for transnational litigation therefore requires a strategy to deal with these particular circumstances.

Before turning to my suggested approach to deal with these is-
issues in Section 5, however, let me briefly clarify a couple of points. First, notice that I do not claim that taking transnational litigation seriously as a field means adopting a code of civil procedure specifically for transnational cases, a code that would contain distinct norms for everything from the filing of the complaint to the enforcement of a judgment. Nor do I mean to suggest that we should discard the values underlying domestic procedure in dealing with transnational cases. This would be neither wise nor feasible. As pointed out above, the mechanics of civil procedure and the values underlying them tend to be deeply ingrained in the minds of the local bench and bar. Thus, to the extent that suggestions to change those norms for transnational cases cannot be supported by convincing arguments, such as their necessity to regulate transnational society in the desired fashion, they are likely to be strongly resisted. This is particularly true in the United States, where the ideal of transsubstantive rules has held sway in federal procedure, whether in the promulgation of the Federal Rules or in case law, since 1938. Strong resistance against what are perceived to be unnecessary changes was also in plain view in a survey that Professor Walter and I conducted among lawyers in Germany and Switzerland on the feasibility of adopting, in those two countries, the Transnational Rules of Civil Procedure, originally drafted by Professors Hazard and Taruffo and now a project of both the American Law Institute and UNIDROIT. If adopted, the rules would entirely replace, in transnational cases, the current "judge-centered procedure" in Germany, Switzerland, and other civil law countries with an adversarial model, albeit one that forgoes many of the characteristic elements of U.S. civil procedure, a prospect few of our respondents considered worth contemplating at this time.

374 See supra text accompanying notes 340-343.
375 See, e.g., Burbank, Reluctant Partner, supra note 25, at 111-12; Robert M. Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 YALE L.J. 718, 722 (1975); Subrin, supra note 2, at 977; see also supra note 19 (noting further reasons for the resistance to treat transnational cases differently than domestic ones in the United States).
376 See supra note 7 and accompanying text.
377 1998 Draft, supra note 7, § 0.3 cmt.
378 2004 Draft, supra note 7, at 7-8.
379 Gerhard Walter & Samuel P. Baumgartner, Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-
What we need to do, however, is carefully reflect on the values we can and should promote for transnational law in general, and trans-border litigation in particular, and to contemplate which of those domestic procedural norms need adapting or supplementing for most effective implementation of those values within the operational constraints imposed by transnational society. This may increasingly lead to the adaptation of procedural norms that casebooks and treatises on transnational litigation do not usually deal with, thus providing more reason and opportunity for transnational groups to cause transnational-litigation lawmakers to act. If the European experience regarding payment orders is any indication, there may increasingly be pressure on domestic law reformers to provide simplified and inexpensive mechanisms for the enforcement of transnational debts. Similarly, issues that have received lackluster treatment in courses on transnational litigation, such as judicial cooperation to secure preliminary relief or preliminary relief in transnational litigation in general, may rise to


380 See supra notes 291, 312 and accompanying text (noting Italian, German and French procedural amendments that served as the basis for the European Late Payment Directive and the underlying attempt to speed up transnational debt collection within the EC).

381 Summary judgment, initially introduced into common law procedure as a means to help creditors enforce uncontested debts (see, for example, Jeffrey W. Stempel, A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process, 49 Ohio St. L.J. 95, 136 (1988)), is unlikely to meet this demand fully.

382 In the United States, courts have been unable to agree on whether or not to provide such cooperation. Compare, e.g., Pilkington Bros. v. AFG Indus. Inc., 581 F. Supp. 1039, 1047 (D. Del. 1984) (refusing to issue an injunction duplicative of an interim injunction issued by an English court against a Delaware corporation), with Cardenas v. Solis, 570 So. 2d 996, 1000 (Fla. Dist. Ct. App. 1991) (affirming injunction freezing husband’s Florida bank accounts on request of Guatemalan court). See also David Westin & Peter Chrocziel, Interim Relief Awarded by U.S. and German Courts in Support of Foreign Proceedings, 28 Colum. J. Trans. L. 723 (1990).

prominence as the analysis of law reformers reveals the enormous importance of these issues in ordering transnational society.384

Second, if in a given jurisdiction procedural law reformers decide to promote their chosen values for transnational litigation by "adjusting the rules of the game for a larger playing field rather than playing by different rules,"385 this is a workable alternative as long as the net is cast wide enough to allow for the profound policy-cum-comparative analysis I suggest is necessary to successfully anticipate the effects of a particular approach on the behavior of transnational actors. However, it is an alternative that showcases the importance of the question of who, inside a nation state, should have the power to make the rules on transnational litigation. Casting the net wide enough to maintain the same norms for transnational as for domestic litigation in effect requires delegating the power of making the relevant policy choices to the trial court.386 Whether this type of ad-hoc decision-making is desirable or even

1334-45 (2000) [hereinafter Burbank, The Bitter With the Sweet] (critiquing Grupo Mexicano, supra, from the perspective of transnational litigation). In continental Europe, the issue of preliminary relief in transnational cases has been somewhat more prominently on the minds of specialists of "international civil procedure" than in the United States. See, e.g., BUCHER, supra note 24, at 118-32; CAMPEIS & DE PAULI, supra note 24, at 260-64; SCHACK, supra note 24, at 183-92; WALTER, supra note 24, at 140-41, 405-06. This may have to do with a strict territorialist approach to transnational litigation there, see, for example, Walter & Baumgartner, Recognition, supra note 58, at 5. In addition, with Articles 24 and 26 of the Brussels and Lugano Conventions (and now Articles 31 and 33 of the Brussels Regulation), as interpreted by the ECJ in Case 125/79, Denilauer v. Coucht Fieres, 1980 E.C.R. 1553 (1980), they have had provisions regulating the most basic aspects of transnational preliminary relief. But Article 24 of the Brussels Convention, too, has recently given rise to more difficult transnational issues before the ECJ. See, e.g., Case C-99/96, Mietz v. Intership Yachting Sneek, 1999 E.C.R. I-2277 (1999) (setting limits to jurisdiction based on Article 24 so as to disallow its use to circumvent the jurisdictional requirements of Articles 2-18); Case C-53/96, Hermès Int'l v. FHT Mktg. Choice BV, 1998 E.C.R. I-3637 (1998) (delineating jurisdiction under Article 24 from jurisdiction to enter preliminary relief under Article 50 of TRIPS); Case C-391/95, Van Uden Mar. BV v. Deco-Line, 1998 E.C.R. I-7122 (1998) (allowing a national court to issue preliminary relief in a case governed by an arbitration clause under certain circumstances).

384 See also supra note 339 (highlighting the difficulties with "various national laws in regard to preliminary relief").

385 Burbank, World, supra note 16, at 1467; see also LOWENFELD, QUEST, supra note 355 passim (suggesting that transnational litigation be controlled by the principle of reasonableness).

386 Cf. Burbank, Costs of Complexity, supra note 3, at 1473-74 ("Many of the Federal Rules authorize essentially ad hoc decisions and therefore are transsubstantive in only the most trivial sense").
acceptable under a particular country's constitutional architecture of separation of powers is a legitimate question. It is a question that in transnational cases is complicated by the further inquiry into the proper role of courts in the interpretation and application of international law.\(^\text{387}\)

5. THE BASIS OF THE FIELD: COMPARATIVE PROCEDURE AND INTERNATIONAL RELATIONS THEORY

As we have seen, the law of transnational litigation in one country can affect the behavior of groups and individuals in transnational society, and, through them, substantive and procedural law abroad and at home. We have also seen that this reality requires lawmakers to be aware of those interconnections and to act accordingly if they want to remain in control of their efforts.\(^\text{388}\) The next question, then, is how transnational litigation as a field can help us better understand this process of transnational interaction and to predict outcomes.

The discussion thus far has demonstrated that international relations scholarship, both theoretical and empirical, has much to contribute to such a field. Liberal international relations theory with its emphasis on the behavior of groups and individuals and its de-emphasis of the nation state as the primary actor in international relations has particular potential to aid in a better understanding of the functioning of lawmaking for transnational society.\(^\text{389}\) Yet, as the case of Germany in Section 3 has shown, other international relations theories also have important insights to contribute.\(^\text{390}\)

Interdisciplinary cooperation between international relations scholars and lawyers specializing in litigation procedure and international law is therefore likely to prove most fruitful in assisting those who make and apply the law of transnational litigation in predicting whether their proposals are likely to work the way they are intended to work.\(^\text{391}\) Because international relations scholars

\(^{387}\) See supra notes 36-37 and accompanying text; infra note 428 and accompanying text.

\(^{388}\) See supra text accompanying notes 370-372.

\(^{389}\) See supra Sections 1 and 2.

\(^{390}\) See supra Section 4.3; supra notes 251-271 and accompanying text.

have paid relatively little attention to litigation procedure, the pre-
cise pathways through which such procedure may affect the be-
havior of groups and individuals as well as that of states—
particularly procedural law’s correlation with transnational eco-
nomic interaction—are still relatively poorly understood and thus
would offer interesting avenues of research for international rela-
tions scholars interested in the transnational-litigation setting.

Lawyers, on the other hand, can make the most valuable con-
tribution to the field by helping to reduce the gaping informational
deficits regarding foreign legal systems that pervade lawmaking
for transnational litigation today. They can do so by bringing to
bear their relative advantage in understanding both jurisprudential
starting points and the intricacies of procedural approaches.392 For
if, as we have seen,393 local ideational values and shared terms of
discourse both affect the impact of group interests on transna-
tional-litigation lawmaking and determine the strength and con-
tent of the preferences of procedural law reformers, getting to un-
derstand those values is crucial for the development of our field.
Only with such an understanding will lawmakers fully be able to
anticipate the ways in which their suggested norms may affect
transnational actors in conjunction with the norms of other na-
tions;394 to communicate effectively, both directly and indirectly,
with foreign lawmakers; and to anticipate the reaction of other
countries to contemplated approaches to transnational cases. In-
deed, the case of Germany explored in Section 3 suggests that lack
of knowledge about foreign procedural systems may be the single
most pervasive barrier to making informed choices in transnational

392 See, e.g., Koh, Transnational Legal Process, supra note 366, at 206 (suggesting
comparative advantage of lawyers vis-à-vis political scientists in so far as lawyers
“specialize in the close reading of texts, examining the social impact of procedural
rules, understanding the power of norms in civil society, and designing public
policy against a backdrop of law”); Friedrich Kratochwil, Constructivism as an Ap-
proach to Interdisciplinary Study, in CONSTRUCTING INTERNATIONAL RELATIONS: THE
NEXT GENERATION 13 (Karin M. Fierke & Knud Erik Joergensen eds., 2001) (“Since
lawyers have been arguing with rules all their lives, their ‘style’ of argument as
well as their methodologies deserve far greater attention than they have received
from social scientists.”)

393 See supra text accompanying notes 219-231, 342-343.
394 See supra notes 370-373 and accompanying text.
litigation.

What is sorely needed, therefore, is in-depth comparative analysis to overcome this persistent information deficit. Unfortunately, there has been very little comparative analysis that fits this need. Indeed, there has been very little procedural comparison, period.395 This may partly be the result of a general “malaise” affecting comparative law396 and a concomitant lack of interest in the “comparative method,” as it is also known,397 among students, scholars, and the legal profession.398 Partly, it may be due to the traditional view that procedure, whether domestic or transnational, is generally controlled by domestic law,399 a view that does not envision a particular need for procedural comparison. If so, the discussion so far should have exposed the latter assumption as at least shortsighted,400 and the identified need for comparative procedural analysis may light the way out of the “malaise.” The comparative enterprise necessary for our purposes would entail a

397 See SCHLESINGER, supra note 90, at 1 (arguing that the term “comparative method” is preferable to “comparative law”). As a number of comparatists have recognized, however, the term “comparative method” is as much a misnomer as the term “comparative law,” for there is no one single method, nor even a number of clearly identified methods or methodologies that practitioners of comparative law would agree upon as accepted approaches to their field. See, e.g., Hiram Chodosh, Comparing Comparisons: In Search of a Methodology, 84 IOWA L. REV. 1025 (1999).
398 See, e.g., John H. Langbein, The Influence of Comparative Procedure in the United States, 43 AM. J. COMP. L. 545, 545 (1995) (reporting that “[t]he study of comparative procedure in the United States has little following in academia, and virtually no audience in the courts or in legal policy circles”); Mathias Reimann, The End of Comparative Law as an Autonomous Subject, 11 TUL. EUR. & CIV. L.F. 49, 52 (1996) (“There are but very few full-time teachers in the field even at the top law schools. Students mostly ignore the subject . . . . This situation is so familiar to comparatists as well as nonspecialists that I need not describe it at any greater length.”)
399 See supra notes 23-39 and accompanying text. Similarly, the lex fori principle, the choice-of-law principle according to which the court always applies the law of the forum in matters of procedure, has in part been developed precisely for the purpose of keeping domestic courts out of the business of inquiring into foreign procedural law and thus is also partly responsible for the lack of in-depth procedural analysis today. See, e.g., SCHACK, supra note 24, at 16-18.
400 See supra notes 363-373 and accompanying text.
clearly stated objective (to provide knowledge about foreign ideational values underlying procedural approaches) and a defined topic (the views relevant to transnational litigation), and would clearly limit the available methodologies, thus avoiding some of the chief obstacles facing traditional comparative legal scholarship and teaching.401

There is, however, one problem usually associated with comparative law that the analysis needed for our field cannot easily avoid. It is reflected in the frequent objection that research into the legal approaches of foreign countries is unduly demanding and prone to error.402 To some degree, this problem is defused by having a clear purpose, defined topic, and limited choice of meth-

401 As Professor von Mehren has observed,

Most subject matters in our curriculum, given focus by the needs of the practicing profession, experience no difficulty in establishing a core of information and theory that is carried forward, developed, and refined by succeeding generations of scholars. Work in comparative law, on the other hand, tends to be scattered and diffuse as to topic, legal system, and purpose. Although much excellent scholarship has been achieved, no shared body of information and theory, no scholarly tradition susceptible of transmission to succeeding generations has emerged. One has the uneasy feeling that comparative-law scholarship is always beginning over again, that comparatists lack a shared foundation on which each can build.

Arthur T. von Mehren, An Academic Tradition for Comparative Law?, 19 AM. J. COMP. L. 624, 624 (1971) (emphasis added). On the issue of methodology, see supra note 397. See also Jennifer Widner, Comparative Politics and Comparative Law, 46 AM. J. COMP. L. 739, 748 (1998) (suggesting that comparative law, as comparative politics, may gain an edge in the market for relevancy if its practitioners will be able to offer decision makers "observations that clarify thinking or show the likely empirical results of selecting one course of action over another").

402 Professor Ewald's description of often-heard objections against the teaching of comparative law equally applies to comparative scholarship:

Comparative law is said to be:

(a) Superficial, because not even the teacher, let alone the students, can master all of the intricacies of two distinct legal systems; . . .

(d) Futile, because the students will never achieve the proficiency of a continental lawyer, or even learn to do research in foreign legal materials; and finally

(e) Misleading, because, for all the preceding reasons, both students and teachers will be tempted by their ignorance to draw false analogies between legal systems, thus undermining the value of the "fresh perspectives" on domestic law.

Ewald, Comparative Jurisprudence, supra note 343, at 1968 (emphasis in original).
ods,\textsuperscript{403} thus allowing for more focused research. Yet, even with these restrictions in place, it cannot be denied that gaining and imparting knowledge about the ideational values underlying the approaches to procedure and transnational litigation in various foreign countries is an arduous and time-consuming task full of dangers of reverting to assumptions and simplifications. However, rather than an argument against conducting comparative procedural analysis, this should be a bugle call to action on developing the methods and training needed to avoid some of the pitfalls of procedural comparison. As with empirical research to determine the efficacy of domestic procedural rules, to argue that it is too demanding is an odd objection against engaging in the only type of research capable of producing the knowledge necessary for law reformers to make informed decisions.\textsuperscript{404} Moreover, once a respectable body of comparative procedural analysis has been accumulated and once research methodologies have been refined and a certain stock of comparative knowledge has become second nature for specialists of transnational litigation, further and deeper analysis will be much easier to conduct.\textsuperscript{405}

Finally, unilateral comparative analysis by academics and individual law reformers is not the only path leading to much-needed knowledge about foreign litigation systems. As institutionalist international relations scholars have shown, a powerful means to overcome information deficits and the uncertainty attending them in the international realm is to increase the quantity and quality of communication.\textsuperscript{406} Perhaps the most effective path toward this goal on the state-to-state level consists of entering into treaties. Treaties provide a forum for communication and information exchange not only at the negotiation stage, but also by setting up

\textsuperscript{403} See supra text accompanying notes 400-401.

\textsuperscript{404} Responding to a similar practical objection against research into domestic preferences in international relations, Professor Moravcsik points out that “[n]o respectable philosophy of science recognizes the difficulty of performing relevant empirical research with current techniques as a legitimate reason to abandon a promising scientific paradigm. Instead, scientific technique and training should adjust—an argument for thorough training in languages and primary-source analysis.” Moravcsik, supra note 245, at 544.

\textsuperscript{405} Cf. Widner, supra note 401, at 746 (relating that in comparative politics as in comparative law “[t]he greater the extent of prior research on which the investigator may rely, the better a project will perform with regard to quality criteria”).

\textsuperscript{406} See, e.g., KEOHANE, INTERNATIONAL INSTITUTIONS, supra note 240, at 117, 120.
more or less sophisticated mechanisms for generating and dis-
seminating information and for monitoring state behavior.\textsuperscript{407}

There are also many other ways to promote information ex-
change specifically for purposes of transnational-litigation law-
making that are less formalized than treaties, from academic con-
ferences\textsuperscript{408} to more institutionalized processes of public and private
organizations; from domestic organizations, such as the ALI, to in-
ternational ones, such as UNIDROIT and UNCITRAL. For ex-
ample, as mentioned above, the ALI has undertaken the task of draft-
ing Transnational Rules of Civil Procedure to be applied in all
transnational cases in domestic courts.\textsuperscript{409} Although those rules, as
currently drafted, focus too strongly on harmonizing the phases of
a lawsuit rather than on more pressing issues of transnational li-
tigation,\textsuperscript{410} their further discussion on several levels, including in co-
operation with UNIDROIT,\textsuperscript{411} has the potential of allowing for a
sophisticated information exchange on domestic approaches to
procedure, transnational litigation, and (as far as relevant) inter-
national law and the ideational values underlying them among the
impressive array of leading practitioners and scholars involved in
the enterprise.\textsuperscript{412}

Whether this type of comparative education is gained by way of
transnational communication, comparative scholarship, or both,
its results are likely to benefit transnational-litigation lawmakers

\textsuperscript{407} See, e.g., CHAYES & CHAYES, supra note 244, at 154-96; Abbott, supra note
251, at 36-46; see also Burbank, World, supra note 16, at 1477 (suggesting that the
"framework for dialogue that an international convention establishes" may be "its
most enduring contribution").

\textsuperscript{408} See, e.g., Burbank, Equilibration, supra note 19, at 204 ("Symposia like [this
one] provide opportunities for scholars from countries with different traditions to
educate each other and, through their writing, domestic and foreign audiences,
including courts, about those approaches and needs.").

\textsuperscript{409} See supra text accompanying notes 376-379.

\textsuperscript{410} See Walter & Baumgartner, Utility, supra note 379, at 466-75.

\textsuperscript{411} See 2004 Draft, supra note 7, at 4-5 (noting partnership with UNIDROIT).

\textsuperscript{412} From this perspective, the current practice of the ALI to organize meetings
exclusively for the American, European, and Asian advisers, respectively, while
understandable from a logistical point of view, is less than ideal for the success of
the enterprise. It does not allow for direct discussions among the three groups;
indeed it does not allow for much information exchange among those groups at
all, for the contribution of one group largely remains unknown to the others. For
further suggestions to supply the in-depth comparative analysis necessary for a
successful completion of the project, see Walter & Baumgartner, Utility, supra note
379, at 475-76.
not only directly—by providing information helpful to pinpoint possible problems with intended policy choices—but also indirectly—by providing scholars of international relations with the factual material with which to develop and test new and more intricate theories about the effects of lawmaking in transnational society in general and in the transnational-litigation setting in particular. If such international-relations scholarship is to further assist law reformers in predicting the likely effects of their contemplated actions, it needs to overcome the tendency of rationalist international relations scholars, as of U.S. economists,413 to base their work on assumptions and empirical data taken mostly from the U.S. experience.414 Some international relations scholars have recently noticed the importance of incorporating comparative insights.415 Hence, recognizing the importance of comparative knowledge about the ideational values underlying foreign litigation systems should no longer require a leap of faith. Doing so will allow international relations theory optimally to contribute to the further development of transnational litigation as a field.

6. CONCLUSION

For far too long, judges and procedural law reformers have approached transnational litigation exclusively from the precepts of domestic procedure, failing to engage the larger implications of lawmaking in a transnational setting. This has produced suboptimal lawmaking, at times severely so. It has led to unnecessary international tensions,416 the perpetuation of approaches and concepts that are not in line with some of the declared values that lawmakers want to pursue in transnational litigation,417 to the stall-

413 See Ronald Dore, Goodwill and the Spirit of Market Capitalism, 34 Brit. J. Soc. 459, 469 (1983) (quipping that American economists "write as if the world were America").

414 See, e.g., supra text accompanying notes 352-361.

415 See, e.g., Helen V. Milner, Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics, 52 Int'l Org. 759 (1998); Moravcsik, supra note 245, at 543-44 (noting the necessity of research into domestic preference formation).

416 See supra Section 3 (tracing judicial conflict).

ing of important treaty negotiations,\textsuperscript{418} and, most often, to unintended consequences, large and small.\textsuperscript{419}

Depending on one’s jurisprudential vantage point, there is nothing wrong with the view that the law of transnational litigation is controlled primarily by domestic law. However, together with state-centric assumptions about lawmaking and with the traditional belief that there is a clear line separating domestic and international law,\textsuperscript{420} this view tends to mask the transnational interconnectedness of lawmaking for transnational litigation.\textsuperscript{421} For, as a matter of fact, lawmaking in one country, through the behavior of transnational actors, may affect lawmaking in another as well as on the international stage, where more and more treaties and conventions on substantive issues of transnational law, particularly on trade law, contain provisions affecting domestic procedure and allow transnational groups to help enforce those provisions by filing suit in both domestic and international tribunals. Thus, in effect, the process of lawmaking for transnational litigation involves groups and individuals at home and abroad, whether private or in government service, as well as state power. It is different from the purely domestic lawmaking process in that it involves different actors and nation states with their own lawmaking power and in that it requires overcoming severe information deficits about foreign litigation systems and the jurisprudential views underlying them.\textsuperscript{422} Approaching transnational litigation in one country in disregard of these interconnections may result in reactions abroad that can hamper future transnational policies in the originating country for quite some time.

Therefore, it is time that we take transnational litigation seriously on its own. This requires that we attempt to better understand the causal pathways through which lawmaking for transnational cases in one country is interconnected with that in others and with transnational lawmaking as a whole.\textsuperscript{423} This task is com-

\textsuperscript{418} See, e.g., supra text accompanying note 41 (noting difficulties with the Hague Jurisdiction and Judgments Project).
\textsuperscript{419} See, e.g., supra Section 3 for many examples.
\textsuperscript{420} See supra text accompanying notes 27-42 (outlining notions underlying the traditional approaches to the subject).
\textsuperscript{421} See supra Section 4.
\textsuperscript{422} See supra Section 4.3.
\textsuperscript{423} See supra text accompanying note 391.
plicated by the reality, neglected by rationalist international relations theory and underestimated by much of the traditional international-law scholarship, that law is socially constructed by the legal elite in a particular country. Thus, the views on what are proper approaches to problems of transnational litigation under international as well as under domestic law depend heavily on local jurisprudential values and traditions, particularly on those underlying domestic procedure. Thus, we need to inform ourselves and then teach our students—the next generation of law reformers—more extensively about foreign procedural systems and their underlying values. On the basis of such newly gained knowledge, we can then make informed choices on the values that we want transnational litigation to serve.

This is not to suggest that courts and lawmakers must choose a multilateral approach to making law for, or interpreting treaties relevant to, transnational litigation. That is, they may not necessarily be “willing to apply the laws of [other nations] under specified conditions” so as to “balance the advantages accruing to individual citizens operating transnationally with a minimum assurance that the policies embedded within their own laws will be effectuated by other states.” Separation of powers concerns, constraints arising from federalism, or simply their good judgment may prevent judges in particular from engaging in what might be perceived as a giveaway. My suggestion is simply that we gain the necessary knowledge to allow judges and procedural law reformers to make informed decisions. If the process of gaining that knowledge results in a loss of overly self-regarding attitudes about one’s own approaches to procedure and thus to an increased use of multilateral approaches, to treaty negotiations, and, ultimately, to

424 See, e.g., Burbank, Costs of Complexity, supra note 3, at 1471.
425 See supra text accompanying notes 392-415.
increased procedural harmonization, all the better.

Moreover, taking transnational litigation seriously as a field will require proceduralists to engage in policy discussions far beyond those they have traditionally contemplated. Most importantly, proceduralists will need to take an active role in discussing the relationship between domestic approaches to transnational litigation and supranational and international trade organizations. It will no longer suffice simply to observe supranational courts, such as the ECJ, and international trade organizations, such as the WTO and NAFTA, as they regulate one aspect of procedure after another, often from narrow vantage points. Otherwise we run the risk of yielding control over transnational procedure to those few groups and individuals in transnational society that do have access to the type of information domestic lawmakers have not cared about and thus are learning quickly to play the policy-making game, as occurred in early international law.\footnote{See, e.g., Benvenisti, supra note 306, at 175-77 (describing how seventeenth century international merchants engaged the services of the great international lawyers of the time to help fashion international law in their favor and thus to cause the externalization of their costs upon domestic society).}