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Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law

I. INTRODUCTION

Time will tell whether the problems can be resolved that caused the United States to seek to put the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters on a slower track.¹ That the process has been put on a slower track should not be cause for regret in any country desiring a workable international agreement. Like reform of judicial administration in the United States, international law reform is "no sport for the short-winded."² When speed is a goal, the result will probably be disappointing. To see the wages of inadequate opportunities for mutual education and understanding, we have only to look at the Hague Evidence Convention. It is fitting that, having led the rush on that occasion,³ the United States has called for the application of brakes on this one.

It may be that, given the incentives of the major players to participate in the negotiations, a resolution satisfactory to the United States is critical to the success of the project as treaty-making. Such a resolution should not be necessary, however, to its success in enhanc-

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I have profited immensely in this work from the teaching, scholarship and generous collegiality of Arthur T. von Mehren. In addition, I have received helpful comments from Samuel Baumgartner, George Bermann, Paul Carrington, Kevin Clermont, Trevor Hartley, Charles Mooney, Arnaud Nuyts, Martin Redish, Linda Silberman, Allan Stein and participants in a University of Pennsylvania Law School Faculty Retreat.

1. See letter from Jeffrey D. Kovar, Assistant Legal Advisor for Private International Law, United States Department of State, to J.H.A. van Loon, Secretary General, Hague Conference on Private International Law (Feb. 22, 2000) (on file with author) [hereinafter *State Department letter*].

2. Arthur T. Vanderbilt, *Minimum Standards of Judicial Administration* xix (Arthur T. Vanderbilt ed., 1949).

3. See Burbank, "The Reluctant Partner: Making Procedural Law for International Civil Litigation," 57 *Law & Contemp. Probs.* 103, 131-35 (1994).

ing knowledge about, and understanding of, current approaches to jurisdiction and the recognition of judgments in other countries and the needs of the international legal order in the future. Symposia like the one at which this paper was first presented 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.

Those who framed the Brussels Convention⁴ realized, as did the framers of the Full Faith and Credit Clause of the United States Constitution,⁵ that civil courts can be instruments of economic warfare and, conversely, that shared judgment recognition standards can be powerful facilitators of economic cooperation and integration. From this perspective, the proposed Hague Convention represents an attempt to translate lessons of regional enlightenment to a global audience and hence to add to the forces for economic cooperation the contributions of a public private international law. That is a very ambitious task, requiring statesmanship of a high order. Its success will also require a healthy measure of realism.

The proposed Hague Convention proceeds from a platform of recognition practice, set both in the United States and under the Brussels Convention, that does not permit general reexamination of either the choice of law or the adjudication on the merits in the rendering court and that, therefore, invests with great importance the jurisdiction of that court.⁶ In such a recognition system jurisdiction becomes, as Professor von Mehren has termed it, the "hallmark" of the fairness and impartiality of the adjudicative process in the rendering court.⁷

Moreover, to the extent that it follows the Brussels model of a double convention, directly constraining the freedom of Contracting States to apply domestic jurisdictional law, the proposed Hague Con-

4. European Communities, Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L299) 32, reprinted as amended in 29 I.L.M. 1413 (1990) [hereinafter *Brussels Convention*]. Unless otherwise noted, references to the Brussels Convention include the related Lugano Convention, 1988 O.J. (L319) 40.

5. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof." U.S. Const. art. IV, § 1.

6. See *Hilton v. Guyot*, 159 U.S. 113 (1895); Unif. for. Money-Judg. Recognition Act, §§ 3-4, 13 U.L.A. 265, 268 (1986); Brussels Convention, supra n. 4, art. 29. But see id., art. 27(4) (limited choice of law test for preliminary questions concerning "the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession"). Of course, both regimes permit a limited public policy defense to recognition. In addition to such a defense, any treaty emerging from the negotiations at The Hague might contain a provision permitting a Contracting State to decline to assume the convention's obligations with respect to other States (i.e., who have not participated in the negotiations) seeking to become parties. See Lussier, "A Canadian Perspective," 24 *Brook. J. Int'l. L.* 31, 64-65 (1998).

7. See von Mehren & Trautman, "Recognition of Foreign Adjudications: A Survey and a Suggested Approach," 81 *Harv. L. Rev.* 1601, 1610 (1968).

vention seeks a measure of jurisdictional orthodoxy with effects beyond the international recognition and enforcement of judgments.⁸ It is thus no surprise that, the decision having been made to fashion a mixed convention,⁹ two of the most difficult and contentious problems remaining in the negotiations concern (1) the appropriateness of various grounds of jurisdiction acceptable in the United States or under the Brussels Convention¹⁰ and (2) the extent of the so-called gray zone, the area under a mixed convention in which national jurisdictional law, neither required nor forbidden under the proposed convention, can be applied to cases within its scope but without triggering any treaty obligation to recognize the resulting judgment.¹¹

Compared to these problems, which test notions of jurisdictional exorbitance and ultimate negotiating ambitions, the matters that I will address—*lis pendens*, *antisuit injunctions* and *forum non conveniens*—seem like details. Yet these matters, which I have gathered under the rubric of jurisdictional equilibration,¹² are nonetheless dif-

8. That is because prohibited grounds of jurisdiction cannot be used by a Contracting State, in cases within the draft Convention's territorial scope, even if the judgment could be enforced in that State. See Hague Conference on Private Int'l Law, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, art. 2, 18 (Oct. 30, 1999) [hereinafter *Hague Draft*].

9. The U.S. proposal to the Hague Conference is for a *convention mixte*. Like a *convention double*, a *convention mixte* contains a "white list" specifying approved grounds of jurisdiction. Judgments rendered in a contracting state and resting on an approved jurisdictional basis are entitled to recognition and enforcement under the convention. However, unlike a true *convention double*, the U.S. proposal allows contracting states to assume jurisdiction on other jurisdictional bases not listed in the convention. Judgments resulting from the exercise of jurisdiction on such bases are not assured of recognition under the convention, but a state may—unless the convention expressly provides otherwise—grant recognition and enforcement under its general law. The U.S. mixed convention proposal also contemplates a "black list" of exorbitant jurisdictional bases. With respect to matters covered by the convention, contracting states would be required to forgo exercise of jurisdiction on these bases.

von Mehren, "Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?," 57 *Law & Contemp. Probs.* 271, 283 (1994).

10. See *Hague Draft*, supra n. 8, art. 18.

11. See *id.*, art. 17. The scope of the authority there conferred to apply rules of jurisdiction under national law is expressly limited by the proposed convention's provisions on choice of court agreements, appearance by the defendant, contracts concluded by consumers, individual contracts of employment, exclusive jurisdiction, and provisional and protective measures. It is also expressly limited by the prohibited grounds of jurisdiction in draft Article 18. As the latter list expands, the size of the gray zone contracts, and a putatively mixed convention looks more like a double convention. See State Department letter, supra n. 2, at 4-5, 8-9; Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, (on file with author) ("the Commission's product remains, in spirit and approach, much more a close-knit double convention than a loose-jointed mixed convention").

12. The English word "equilibration" denotes a state of equilibrium or balance, and achieving balance is the essential function I associate with the matters to be discussed. Our French colleagues may imagine a tightrope walker, *un équilibriste*, a

ficult, and their satisfactory resolution is, I believe, critically important to the success of any treaty that may be concluded. For here are located devices easing the agony of foresight by which jurisdiction is protected or declined and its potential to yield an enforceable judgment fructified or frustrated.¹³

The prospect of an enforceable judgment concentrates the attention of litigants and their attorneys, shaping plaintiffs' choice of forum and sometimes leading defendants to take evasive action, whether by seeking to have the lawsuit dismissed or by filing a preemptive or competing lawsuit.¹⁴ The prospect also concentrates the attention of courts and sometimes leads them to take evasive action, by dismissing or staying actions pending before them or enjoining litigants from pursuing actions pending or impending elsewhere. Such moves can be threats not only to a smoothly functioning system of judgment recognition but also to the system of jurisdictional allocation on which it is based. Fashioning rules of jurisdictional equilibration that attend to the reasons for these phenomena in a world without treaties and to the fact that no treaty can eliminate the impulses behind them will also require very considerable statesmanship and realism, not just about human behavior but about jurisprudential assumptions. The negotiations at The Hague present an opportunity for enlightened comparative procedural lawmaking, the results of which could prove a model for law reform in or among States from both of the dominant traditions represented there.

My plan is first to describe how the matters that concern me are treated in litigation in the United States and, more briefly, under the Brussels Convention, respectively, with attention to some of the jurisprudential assumptions underlying such treatment. Second, in the light of that background I propose to examine the treatment of these matters in the current draft of the proposed Hague Convention, with

helpful image whether one thinks only of problems of jurisdiction under the proposed convention or of the current state of the negotiations.

13. On this view of jurisdictional equilibration, one should perhaps also consider provisional and protective measures. I do not do so here for a number of reasons. First, I do not wish unduly to lengthen this article. Second, although regulating these matters to some extent, the Brussels Convention leaves most questions to national law, see Brussels Convention, *supra* n. 4, art. 24, and that is the model adopted in draft Article 13 of the proposed Hague Convention. Finally, domestic United States law on the subject is unsettled. For a discussion of the last point and an argument that federal legislation is needed, see Burbank, "The Bitter with the Sweet: Tradition, History and Limitations on Federal Judicial Power—A Case Study," 75 *Notre Dame L. Rev.* 1291 (2000). The form that such legislation should take remains to be worked out, but it would sensibly combine the treatment of provisional and protective measures with the provisions on *lis pendens*, *antisuit injunctions* and *forum non conveniens* that I recommend below. See *infra* text accompanying nn. 113-53, 183-201.

I also leave out of account the use by potential litigants and treatment by courts of forum selection agreements.

14. Evasive action by defendants may also include dissipating assets or removing them from the jurisdiction. See *supra* n. 13.

attention to possible improvements. The improvements I have in mind include not just revisions to the draft convention. For this American scholar of international civil litigation, the prospects for changes in and the development of national law, under the influence if not the command of a private international law treaty, are among the most exciting aspects of the current project.¹⁵

II. JURISDICTIONAL EQUILIBRATION IN UNITED STATES PRACTICE

An understanding of domestic recognition practice in the United States is helpful to an understanding of what I have called "United States practice," by which I mean the practice obtaining in international cases. And so it is for the subject of my inquiry, "devices by which jurisdiction is protected or declined and its potential to yield an enforceable judgment fructified or frustrated."¹⁶ Of course, here as elsewhere in the American legal landscape, there is ambiguity in the use of the term "domestic,"¹⁷ and here as elsewhere there is a need to paint with a broad brush both that part of the domestic landscape that is relevant, which for these purposes is the territory of interjurisdictional cases, and United States practice.

The precise nature of the community to which the people of the United States aspired when they ratified the United States Constitution remains in dispute,¹⁸ although it is not disputed that the framers of the Constitution perceived and sought to avoid the corrosive effects that disregard of the judgments of sister states could have on the new nation.¹⁹ Yet, inspirational as it may be and has been, the text of the Constitution's Full Faith and Credit Clause is not very nourishing for one who seeks guidance on interstate recognition practice in the United States,²⁰ and neither it nor the statute that, since

15. Others see the same potential. See Clermont, "Jurisdictional Salvation and the Hague Treaty," 85 *Cornell L. Rev.* 89 (1999).

For this purpose, "national law" includes both the law in the United States for domestic and international interjurisdictional cases, and the interjurisdictional law of other States participating in the negotiations at The Hague, including (for member states) that contained in the Brussels Convention.

16. *Supra* text accompanying n. 13.

17. See Burbank, "Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach," 71 *Cornell L. Rev.* 733, 744 (1986). *Cfr.* *supra* n. 15 ("national law").

18. See, e.g., *United States v. Morrison*, 120 S. Ct. 1740 (2000); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000); *Alden v. Maine*, 119 S. Ct. 2240 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

19. The framers sought "not merely to demand respect from one state for another, but rather to give us the benefits of a unified nation by altering the status of otherwise 'independent, sovereign states.'" Reese & Johnson, "The Scope of the Full Faith and Credit to Judgments," 49 *Colum. L. Rev.* 153, 161 (1949) (quoting *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948)).

20. See U.S. Const. art. IV, § 1, quoted *supra* n. 5.

1790, has implemented it by giving content to its command,²¹ speaks directly to the question of jurisdiction.

For almost half of the country's history, jurisdictional orthodoxy bred of a shared legal heritage, coupled with the power indirectly to police jurisdiction by denying recognition, sufficed.²² Thereafter, a federal constitutional law of substantive due process, whose content was initially borrowed from state law arrangements and justified in the territorial terms of public international law, ensured a measure of direct control, and it also had the effect of rationalizing the power of states to deny recognition.²³ With federal checks over jurisdiction and recognition in place, and given the potential of the system to police state choice of law directly,²⁴ the American law of full faith and credit could with relative equanimity forbid non-recognition because of disagreement about the rendering court's adjudication on the merits.²⁵

The influence of American interjurisdictional practice in shaping United States practice is undoubtedly due to a complex of structural, historical and cultural factors that defy brief summary. Having no choice on this occasion, I offer as a cause the fact that, at the founding, the states of the United States were regarded as distinct sovereignties and that the history of both interjurisdictional recognition and jurisdictional equilibration since the founding has been a history of accommodating the perceived needs of sovereignty under constitutional language long on aspiration but short on details. It was, I suggest, easier for such a country and its constituent states to treat other countries like other constituent states than it was or would be for countries without a history of and experience in accommodating internal sovereign claims.

This disposition to assimilate international to domestic interjurisdictional cases has been reinforced by the very powerful im-

21. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1994)). In pertinent part the statute currently provides that state "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts . . . from which they are taken." Note that, although the constitutional obligation is imposed only on states, the statutory obligation extends to "every court within the United States" and thus to federal courts. See Burbank, *supra* n. 17, at 740. A similar obligation exists to respect federal court judicial proceedings, and it can most plausibly be founded in federal common law. See *id.* at 740-47.

22. See Weinstein, "The Early American Origins of Territoriality in Judicial Jurisdiction," 37 *St. Louis U. L.J.* 1 (1992).

23. See *Pennoyer v. Neff*, 95 U.S. 714 (1878).

24. For many years, the Supreme Court of the United States appeared of two minds, one that the Constitution required the application of territorial choice of law rules, see, e.g., *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918), and the other that it had nothing to do with choice of law. See *Kryger v. Wilson*, 242 U.S. 171, 176 (1916). The modern Court's approach reposes great latitude in the states to choose the governing law. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

25. See *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

pulse of modern American procedural law, including for these purposes choice of law, to apply the same rules to all cases. American courts have pursued domestic doctrinal uniformity even when doing so resulted in international disuniformity, as in the interpretation of treaties.²⁶

The effects of this process of assimilation can be seen throughout the landscape of international litigation. The process itself helps to explain both the generous treatment accorded internationally foreign judgments in United States practice, which requires no elaboration, and the schizophrenic attitudes of American courts towards existing or potential litigation abroad, to which I now turn.

The capacious language of the Full Faith and Credit Clause of the Constitution could have been used to fashion a federal law of *lis pendens* for actions brought within the United States, as perhaps could the less capacious language of its implementing statute, at least in the service of wholly domestic *lis pendens* or "other action pending" doctrine in the state to which the federal obligation was owed. Notwithstanding some early movement in that direction, however, the obligation came to be tied to the existence of a judgment,²⁷ with the courts of other states and the federal courts free to entertain parallel litigation even if such litigation would be barred in the courts of the state in which the first lawsuit was filed.²⁸ In hindsight, the resulting system was calculated to promote forum shopping and a race to judgment. But hindsight should in this case acknowledge the impediments to forum shopping imposed for much of United States

26. See Burbank, *supra* n. 3, at 135-39.

27. See Burbank, "Where's the Beef? The Interjurisdictional Effects of New Jersey's Entire Controversy Doctrine," 28 *Rutgers L.J.* 87, 110-12 (1996). "But Congress had no problem barring duplicative simultaneous litigation in the child custody area, and its action in that regard may be further support for the proposition that at least the 'judicial proceedings' referred to in the Constitution need not have culminated in a judgment." *Id.* at 112 (footnote omitted). American readers will have noted that "*lis pendens*" for these purposes has to do with doctrine governing a court's response to parallel litigation rather than the effect of litigation on the marketability of property. See, e.g., 28 U.S.C. § 1964 (1994) ("Constructive Notice of Pending Actions").

28. The reference to "parallel litigation" is intended to include both duplicative and related litigation and thus to reflect the fact that American courts today do not draw a sharp distinction between the two for purposes of jurisdictional equilibration devices. As Samuel Baumgartner has suggested, this elision of matters that are treated separately in the Brussels Convention, see *infra* text accompanying nn. 70-72, is due to differences in doctrine and in jurisprudential assumptions, including with respect to the proper role of judicial discretion, the breadth and aggressiveness of preclusion law, and the importance accorded to comprehensive dispute resolution within one proceeding. See Baumgartner, "Related Actions," *ZZPInt* 3 at 203 (1998).

For a thoughtful discussion of different ways to give content to the concept of "parallel litigation" for the purpose of implementing a "zero tolerance solution" to the problem of redundancy as between the federal and state courts in the United States, see Redish, "Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem," 75 *Notre Dame L. Rev.* 1347, 1362-67 (2000).

history by jurisdictional law and the nature of the society whose needs it served.

On this view, the absence of a federal *lis pendens* obligation and the incentives created by a system of full faith and credit to domestic interjurisdictional judgments did not become seriously inconvenient until the needs of the society prompted changes in the federal law constraining state jurisdictional freedom. And on this view, the greater latitude to assert jurisdiction afforded the states by *International Shoe*²⁹ and its progeny dramatically enhanced the opportunities for interstate forum shopping and, coupled with loose federal control of state choice of law,³⁰ the incentives of both litigants and state courts to run a race to judgment, creating a market for litigation in which the voluntary extension of wholly domestic *lis pendens* doctrine to interjurisdictional litigation would constitute surprising self-restraint.³¹

Under this model of litigation one would expect to encounter frequent attempts to preempt the recognition problem through the use of anti-suit injunctions. That such injunctions apparently do not plague modern interstate litigation may suggest limitations in the model, in particular the failure to capture behavior that is not self-regarding, and that is surely part of the explanation. But it may also reflect the bitter lessons of experience in a system that does not require recognition of antisuit injunctions and in which they therefore can proliferate.³² Moreover, the self-regarding behavior of courts may effect the stay or dismissal rather than the jealous maintenance of litigation.

Courts through judges serve interests in addition to the interests animating domestic substantive law and the interests of litigants or their lawyers, including their own institutional interests.³³ When state legislatures directed state courts to take full advantage of the

29. *International Shoe Co. v. Washington*, 325 U.S. 310 (1945).

30. See, e.g., *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); *supra* n. 24.

31. For an unusual example see 735 Ill. Comp. Stat. 5/2-619(a)(3) (West 1992); Burbank, *supra* n. 27, at 120 n.165; Redish, *supra* n. 28, at 1352 n.30.

32. See, e.g., *James v. Grand Trunk Western R.R.*, 14 Ill.2d 356, 152 N.E.2d 858, cert. denied, 358 U.S. 915 (1958); Restatement (Second) of Conflict of Laws § 103, comment b (1988 rev.). The Supreme Court has not ruled on the question, but a recent decision strongly suggests that it will not require states to recognize antisuit injunctions issued by the courts of other states as a matter of full faith and credit. See *Baker v. General Motors Corp.*, 522 U.S. 222, 236 n.9 (1998).

Although Professor Bermann notes that "over the years a large number of antisuit injunctions have been directed against proceedings in sister-state courts," Bermann, "The Use of Anti-Suit Injunctions in International Litigation," 28 *Colum. J. Transnat'l L.* 589, 594-95 (1990), in all of the interstate cases he cites, it is difficult to find one decided less than sixty years ago. See *id.* at 594-604.

In comments on a draft of this article, Professor Bermann suggests that the most baffling interpretation of the full faith and credit obligation is that which has permitted state courts to issue sister-state antisuit injunctions in the first place.

33. See Richard A. Posner, *Overcoming Law* ch. 3 (1995).

constitutional freedom accorded by *International Shoe* and its progeny or the courts seized that advantage themselves,³⁴ they were opening the courthouse door to additional litigation with which the state had very little connection and in which it might have no regulatory interest.³⁵ Means of self-protection, of achieving balance in a system where federal constitutional and statutory law had proved inadequate to the task, were needed. Although not required by federal law, interstate *lis pendens* remained available at the option of the individual states, but that doctrine operates only when another lawsuit is pending. Jurisdictional imposition is not so confined. Thus was the doctrine of *forum non conveniens* given a scope of operation more wide-ranging than its previous employment would have suggested.³⁶

Those who are conversant with the history of *forum non conveniens* in the United States know that it became a real litigation force in that country as a result of decisions of the Supreme Court of the United States in the 1940's,³⁷ decisions that involved federal courts but that were contemporaneous with the loosening of federal constitutional restraints on state court jurisdiction. They also know that, with the advent of a statutory transfer mechanism in 1948, the doctrine became irrelevant in federal litigation that could properly be lodged in another federal court.³⁸ Finally, they know that, although the doctrine has not been embraced in all states, federal decisional law has proved a substantial continuing influence on the tenor of

34. For a discussion of the costs of linking or eliding state and federal constitutional law concerning jurisdiction to adjudicate, see Burbank, "Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?," 7 *Tulane J. Int'l & Comp. L.* 111 (1999).

35. The courts were already open to some such litigation because of the traditional grounds of general jurisdiction on the basis of the presence within the state of the person ("tag jurisdiction") or of property ("attachment jurisdiction") at the time of service, and the development of general "doing business" jurisdiction for corporate and other business entities added to the burden. For these purposes, the importance of *International Shoe* and its progeny is the proliferation of choice resulting from their expansion of the opportunities for specific jurisdiction. For criticism of the Supreme Court's failure to inform due process analysis with a comparative and dynamic consideration of jurisdictional possibilities, see Burbank, *supra* n. 34, at 117-19.

36. See Stein, "Forum Non Conveniens and the Redundancy of Court Access Doctrine," 133 *U. Pa. L. Rev.* 781, 795-812 (1985); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 512 (1947) (Black, J., dissenting).

37. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947).

38. See Act of June 25, 1948, ch. 646, 62 Stat. 869, 937 (codified at 28 U.S.C. § 1404(a) (1994)) ("For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought."); *Ravelo Monegro v. Rosa*, 211 F.3d 509, 513 (9th Cir. 2000) ("The doctrine of *forum non conveniens* survives in federal court only when the alternative forum is in a foreign country.").

many states' law whose reach includes cases that could, as well as those that could not, be lodged in another American court.³⁹

To the extent, therefore, that it is possible to speak of a modern American law of *forum non conveniens*, it has both a federal inspiration and a strong continuing federal influence. Moreover, although initially invigorated to deal with problems created by domestic litigation, the vagaries of its development have led to law for domestic cases being shaped, in those states that follow the federal lead, by the responses of federal courts to international civil litigation.

Ostensibly a tool to implement litigation convenience for litigants and courts, as formulated by the Supreme Court in the 1940's, *forum non conveniens* doctrine invited attention to regulatory concerns, and hence to choice of law, through consideration of what the Court called "public interest factors."⁴⁰ Ironically, such attention became essentially irrelevant in the context in which the doctrine was (re)born, because a change in the governing substantive law was held to be impermissible in diversity of citizenship cases that could be transferred under the mechanism enacted in 1948.⁴¹ Yet, the presence or absence of a perceived domestic regulatory interest often seems critical to the result of a *forum non conveniens* motion in international cases.⁴² Moreover, although the justification for treating foreign plaintiffs differently than domestic plaintiffs is framed in terms of inferences concerning litigation convenience,⁴³ judgments about regulatory interest are not very far beneath the surface, if beneath the surface at all.⁴⁴ As a result, the consequence of even dramatic changes in the substantive law may not defeat a *forum non conveniens* motion,⁴⁵ but choice of law concerns are hardly irrelevant.

The dynamic of doctrine applicable in domestic cases changing shape because of international litigation is not unique to *forum non conveniens* law. International civil litigation in the United States has involved doctrinal cross-fertilization between domestic and international cases.⁴⁶ Unfortunately, as the possibility of continuing use

39. See Gary B. Born, *International Civil Litigation in United States Courts* 298 (3d ed. 1996).

40. See *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

41. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (defendant's motion); *Ferens v. John Deere & Co.*, 494 U.S. 516 (1990) (plaintiff's motion); *Ravelo Monegro v. Rosa*, 211 F.3d 509, 513 n.3 (9th Cir. 2000).

42. See Stein, *supra* n. 36, at 784, 831-40; Robertson, "Forum Non Conveniens in America and England: 'A Rather Fantastic Fiction,'" 103 *L.Q. Rev.* 398, 406-07 (1987); Sheinkopf, Hoffman & Rowley, "Forum Non Conveniens Analysis in Federal Statutory Cases," 49 *Emory L.J.* 1137 (2000).

43. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (1980).

44. See *id.* at 251-52, 260-61.

45. See *id.* at 247 ("The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry").

46. See Burbank, "The World in Our Courts," 89 *Mich. L. Rev.* 1456 (1991) (book review); Burbank, *supra* n. 3, at 125-27.

by state courts of contemporary federal foreign non conveniens doctrine may suggest, the models borrowed are not always appropriate, either in their original or in their transplanted contexts.

We have seen that, as between American state courts, there is no federally imposed obligation of *lis pendens* and that there are reasons for state courts to be sparing in the use of antisuit injunctions against litigation in other states. When the question is rather whether a federal court will dismiss or stay litigation before it because of, or enter an injunction against, parallel litigation pending elsewhere in the United States, different answers are likely depending on whether the other litigation is pending in a federal or state court. Although the differences can be explained, the answers are not immune to criticism. Moreover, the fact that *both* approaches have been borrowed for, and coexist in case law treating, the same problems in international cases is indefensible.

When parallel litigation is pending in two federal courts, something very close to a system of *lis pendens* operates, with a strong preference in favor of the first filed case. For these purposes federal courts consider themselves part of the same system of courts, even when different state substantive laws would govern in the respective cases. They are not shy about implementing the first-filed preference through antisuit injunctions as well as dismissals or stays.⁴⁷

When parallel litigation is pending in state and federal courts, on the other hand, the federal courts follow different rules.⁴⁸ The ability of a federal court to dismiss a case in favor of state court litigation is constrained by that branch of the Supreme Court's abstention doctrine associated with the *Colorado River* case,⁴⁹ while its ability to enjoin the continued prosecution of such litigation is constrained by the Court's interpretation of the federal Anti-Injunction Act.⁵⁰ The former imputes a "virtually unflagging obligation"⁵¹ to federal courts to exercise the subject matter jurisdiction conferred by statute, toler-

47. See *Landis v. North American Co.*, 299 U.S. 248 (1936) (stay); *National Equipment Rental, Ltd. v. Fowler*, 287 F.2d 43 (2d Cir. 1961) (injunction). True *lis pendens* or "other action pending" doctrine may be available when the cases are pending before the same federal court. See *Chinn v. Giant Food, Inc.*, 100 F. Supp. 2d 331 (D. Md. 2000); *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849 (1st Cir. 1947).

48. See Burbank, "The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection," 19 *U. Pa. J. Int'l Econ. L.* 1, 15-16 (1998); Redish *supra* n. 28, at 1356-60.

49. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

50. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283 (1994). See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977).

51. *Colorado River*, 424 U.S. at 817. See also *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

ating a dismissal only in "exceptional circumstances."⁵² The latter confines their ability to protect their jurisdiction against pending state litigation by injunction to situations involving or analogous to those involving tangible property.⁵³ The perceived jurisdictional constraint dissolves, and a federal court has broad discretion to dismiss (or stay) parallel litigation, in a case seeking a declaratory judgment.⁵⁴

When parallel litigation is pending in a federal court and in the court of another country, until such time as the Supreme Court provides guidance, the rules governing a motion to dismiss or stay and a motion for an antisuit injunction may depend on the federal circuit in which that federal court sits. It appears that a reason for such differences in circuit law on *lis pendens* and antisuit injunctions in international cases has been the choice of "domestic" models, the model of litigation entirely within the federal court system (federal-federal) or the interjurisdictional (federal-state) model.⁵⁵ A court that follows the former model perceives that it has broad discretion to dismiss or stay parallel litigation in favor of litigation filed abroad⁵⁶ and also to enjoin litigation abroad in favor of the case before it.⁵⁷ A court that follows the latter model will dismiss or stay parallel litigation before it, and similarly will enjoin parallel litigation abroad, only in exceptional circumstances.⁵⁸

52. *Colorado River*, 424 U.S. at 813.

53. See *Vendo Co.*, 433 U.S. at 641-42; *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985); *Redish*, supra n. 28, at 1359. The text concerns the "in aid of jurisdiction" exception. Note, however, the two other exceptions to the Anti-Injunction Act's bar. See supra n. 50. For other limitations on the ability of a federal court to enjoin pending state litigation, see *Redish*, supra n. 28, at 1372-73.

54. See *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

55. See *Born*, supra n. 39, at 461-65, 475-78; *Burbank*, supra n. 48, at 15-17. I do not mean to suggest that this is the only explanation for the differences among the circuits. Mr. Baumgartner has helpfully analyzed the cases from the perspective of "exclusive adjudication of a case in the forum in which the entire transaction or occurrence can be resolved." Baumgartner, supra n. 28, at 214. He continues:

[I]t is interesting that those federal decisions that favor a more restrained approach to antisuit injunctions in the United States happen to involve simple reverse-action situations with identical parties and causes of action. Perhaps, the prospect that the judgment in one litigation cannot be used as *res judicata* by or against all parties in the other significantly weakens the rule in favor of parallel proceedings. . . .

Id. at 215-16 (footnote omitted). Note that the federal-federal model would best enable "having all aspects of a dispute adjudicated in a single forum," which he recognizes is "a general policy of common law procedure, particularly of federal procedure in the United States." *Id.* at 216 (footnote omitted). It may not be an appropriate model in the international context, however. See *infra* text accompanying n. 62.

56. See, e.g., *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408 (S.D.N.Y. 1982).

57. See, e.g., *Cargill, Inc. v. Hartford Accident & Indemnity Co.*, 531 F. Supp. 710 (D. Minn. 1982).

58. See, e.g., *Neuchatel Swiss General Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193 (9th Cir. 1991) (dismissal/stay); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (injunction).

For different reasons, both Professor Redish and I have argued that the treatment of parallel federal-state litigation is incoherent.⁵⁹ The perceived requirements of separation of powers appear to have been a source of the difficulty, coupled with failure by the Supreme Court adequately to distinguish among the circumstances in which a federal court may be asked to decline to exercise, or to postpone the exercise of, subject matter jurisdiction. The Court *has* recently distinguished the refusal to grant declaratory relief from abstention⁶⁰ and the power of a federal court to stay as opposed to dismiss an action.⁶¹ These decisions suggest both that additional changes are necessary in the doctrine for federal-state cases and that, at least until such changes are made, it is not an appropriate model for international litigation. The federal-federal model is coherent, but in the absence of the unifying influences of a treaty, it is not obviously more appropriate for international cases.⁶²

III. JURISDICTIONAL EQUILIBRATION UNDER THE BRUSSELS CONVENTION

The extraordinary achievement of the Brussels Convention is apparent when one considers the tenor and variousness of the national recognition law for international cases that it replaced in signatory States. Indeed, as Professor Walter and Mr. Baumgartner have recently made clear, although the Brussels Convention has "cross-fertilized" the recognition doctrine that some States apply in cases outside its scope, even today there is a stark contrast between its regime and the law that some other States apply to non-Brussels foreign judgments.⁶³

In one sense, the contrast is not surprising, insofar as the traditional recognition laws of many countries "developed during a time of pronounced nationalism,"⁶⁴ yielding a "strict territorialist ap-

59. See Redish, *supra* n. 28, at 1355-60; Burbank, *supra* n. 48, at 16-17.

60. See *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

61. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). "Because it is not clear that dismissal and stay are functionally distinguishable for these purposes . . . the case may represent a knowing wink in the direction of, rather than an effort to honor, separation of powers." Burbank, *supra* n. 13, at 1295 n.18 (citation omitted). See *infra* text accompanying n. 112.

For a thoughtful critique of separation of powers arguments in connection with decisions by federal courts to decline jurisdiction, see Shapiro, "Jurisdiction and Discretion," 60 *N.Y.U.L. Rev.* 543 (1985).

62. See Burbank, *supra* n. 48, at 17.

63. See Walter & Baumgartner, "The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions (Sept. 1998)," forthcoming in 3 *Civil Procedure in Europe, the Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions* (Gerhard Walter & Samuel P. Baumgartner, eds.) (on file with author). For examples of cross-fertilization from the Brussels Convention to national jurisdictional law, see Fawcett, "General Report," in *Declining Jurisdiction in Private International Law* 10 (J.J. Fawcett ed. 1995).

64. Walter & Baumgartner, *supra* n. 63, at 2.

proach."⁶⁵ As a result some States refused to recognize foreign judgments in the absence of a treaty, while others implemented a strong sense of sovereign prerogatives through practices and/or requirements that had the effect of one hand taking back what the other conferred. For nations desiring more favorable treatment, the answer lay in treaties. The Brussels Convention can thus be seen as the most ambitious of a "staggering number of treaties that the continental European states have concluded over the last 150 years."⁶⁶

More striking than the ambition of using a multilateral treaty to achieve the purposes of the European Community by liberalizing judgment recognition practice is the ambition, legal and and political, of pursuing and successfully concluding a double convention. The signatory States thus secured agreement to displace national law with uniform rules concerning grounds of adjudicatory jurisdiction required to be afforded, as well as those prohibited, in cases within the convention's scope. It seems likely that the dominance of a shared tradition among the original signatory States eased the task, as to both the form and content of the jurisdictional rules prescribed.⁶⁷ That legal tradition puts a very high premium on certainty and predictability in general and particularly as to adjudicatory jurisdiction. Moreover, it only grudgingly admits a role for judicial discretion, if it admits any such role at all. Both are reasons not to give a court vested with jurisdiction discretionary power to decline to exercise that jurisdiction, and they help to explain why the *forum non conveniens* doctrine is rejected in most of the civil law world and in the Brussels Convention.⁶⁸

Yet, even when States aspire to more than community and have the confidence and collective political will to agree upon a closed list of jurisdictional bases, the choice of forum remains important to litigants, and even a double convention cannot prevent the filing of lawsuits in inappropriate forums or in multiple forums, although it surely reduces their incidence. A regime seeking to avoid judgments that are denied recognition because they are irreconcilable with domestic judgments or rendered in conflict with a grant of exclusive jurisdiction⁶⁹ also needs either a requirement or authority for a Contracting State to stay or dismiss litigation in favor of potential or existing litigation elsewhere. It requires jurisdictional equilibration devices.

65. *Id.* at 5.

66. *Id.*

67. See von Mehren, *supra* n. 11.

68. See Zekoll, "The Role and Status of American Law in the Hague Judgments Convention Project," 61 *Albany L. Rev.* 1283, 1297-1300 (1998); Burbank, *supra* n. 37, at 119-20; Fawcett, *supra* n. 63, at 21-24.

69. See Brussels Convention, *supra* n. 4, art. 27(3) & (5) (recognition denied in the event of certain irreconcilable judgments); *id.*, art. 28 (recognition denied if judgment conflicts with, *inter alia*, exclusive jurisdiction provisions).

And so, Article 19 of the Brussels Convention requires that a court of a Contracting State "declare of its own motion that it has no jurisdiction" of a claim concerning "a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16." Where actions are brought in different Contracting States, Article 21 gives strict precedence to the court first seised to the extent that they involve the same cause of action and are between the same parties,⁷⁰ while Article 23 does the same "[w]here actions come within the exclusive jurisdiction of several courts."⁷¹ For related actions, Article 22 permits any court other than the court first seised to stay its proceedings ("while the actions are pending at first instance"), and, upon application of a party, to decline jurisdiction if the court first seised has jurisdiction over both and consolidation is permitted.⁷²

An appreciation of experience under Articles 21 and 22 of the Brussels Convention can perhaps best be gained, and it can be gained most economically, by considering the differences between those provisions and the comparable provisions of the proposed Hague Convention, which were drafted in the light of that experience.⁷³ A few observations may, however, usefully precede, by framing, that discussion.

Experience with interjurisdictional *lis pendens* in Europe, both prior to and independent of the Brussels Convention, reveals a close link between that doctrine and recognition practice,⁷⁴ a link that is obscured by Article 21's requirement that the court second seised decline jurisdiction as soon as "the jurisdiction of the court first seised is

70. Article 21 of the Brussels Conventions provides:

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

71. Article 23 of the Brussels Convention provides:

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

72. Article 22 of the Brussels Convention provides:

Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

73. See *infra* text accompanying nn. 85-112. To the extent reported decisions are a guide, there appears to be little experience under Article 23.

74. See Baumgartner, *supra* n. 28, at 205-06; Fawcett, *supra* n. 63, at 28.

established." The same experience indicates awareness, not apparent from the text of the Brussels Convention, that the doctrine fosters a race to the courthouse which may be part of a litigation strategy wholly unconcerned with, and perhaps fearful of, adjudication on the merits and that it should therefore be relaxed in circumstances of undue delay.⁷⁵

If Article 21 of the Brussels Convention may for such reasons be thought insufficiently progressive even within Europe, Article 22 was venturesome indeed. For, although the laws of many countries on the continent address the problem of related litigation that is wholly domestic, as reported by Mr. Baumgartner, "these code provisions have not found their way into transnational practice the way the doctrine of *lis pendens* has."⁷⁶ In considering possible reasons for this, he suggests the traditional civil law concerns about courts surrendering jurisdiction and exercising discretion.⁷⁷ More interesting, I believe, are his empirical observation that "the stay in favor of related actions does not seem to be used very often in purely domestic proceedings,"⁷⁸ and his jurisprudential speculation that "[a] further reason for the reluctant use of related-action stays may lie in a procedural philosophy that views a civil proceeding more as an efficient adjudication of the plaintiff's claim than as an equitable resolution of a dispute or, as in the United States, of an entire 'transaction or occurrence'.⁷⁹ This philosophy, he suggests, may help to explain why there are so few published opinions involving Article 22 of the Brussels Convention from the European Court of Justice or "the courts of the Convention's civil law member states."⁸⁰ There are limits to the power of a treaty both to cross-fertilize domestic law and to alter jurisprudential assumptions.

Even the most painstaking efforts of expert drafters cannot prevent interpretative dissonance. When the effort involves languages that are to serve as authoritative prescriptions in countries to which they are foreign, the risk is greater. It is greater still when those prescriptions are silent on questions necessarily and obviously included within their scope. The risk becomes a virtual certainty when the languages are brought into service in countries from different le-

75. See Baumgartner, *supra* n. 28, at 205-06. Note, however, that both the Lugano and San Sebastian Conventions *did* address the problem of the court first seised deciding that it did not have jurisdiction after the court second seised had declined jurisdiction, with the possible running of the applicable limitations period, by distinguishing between a stay and declining jurisdiction. See Kennett, "Lis Alibi Pendens: A View from the UK," in *The European Area in Civil and Commercial Matters* (R. Fentiman, A. Nuyts, H. Tagaras & N. Watté, eds. 1999), at 104. This change is now reflected in the text of the Brussels Convention, quoted *supra* n. 70.

76. Baumgartner, *supra* n. 28, at 207.

77. See *id.* at 207-10.

78. *Id.* at 209.

79. *Id.* at 210 (footnotes omitted).

80. *Id.*

gal traditions. It is thus no surprise that a need was soon acknowledged to enable the European Court of Justice to reduce the interpretative noise by making binding interpretations of the Brussels Convention.⁸¹

Finally, although the *lis pendens* provision in Article 21 of the Brussels Convention may appear "rigid, mechanical and crude"⁸² to common law eyes, in recent years the costs of discretionary justice within a highly entrepreneurial adversarial system have become apparent.⁸³ The negotiations at The Hague are taking place at a time when signals from both domestic law and other international initiatives point towards a rapprochement between the jurisprudential assumptions of the common law and civil law traditions with regard to the proper roles of rules and discretion, and of judges and lawyers, in seeking procedural justice.⁸⁴

IV. THE PROPOSED HAGUE CONVENTION, THE ROAD AHEAD AT THE HAGUE AND PROGRESS IN NATIONAL LAW

A. *Lis Pendens and Antisuit Injunctions*

1. The Proposed Hague Convention

The proposed Hague Convention's *lis pendens* provisions, contained in draft Article 21,⁸⁵ are an excellent example of the fruits of "enlightened comparative procedural lawmaking, . . . which could

81. As originally adopted, the Brussels Convention "did not give the European Court jurisdiction to interpret its provisions; consequently, a protocol was signed in Luxembourg on 3 June 1971 to make provision for preliminary references." Hartley, "Introduction to the Brussels Jurisdiction and Judgments Convention," in *V Collected Courses of the Academy of European Law*, Book 1, at 229 (1996) (footnote omitted). For the protocol, see 1978 O.J. (L304) 50. On the preliminary reference procedure, see Koen Lenaerts & Dirk Arts, *Procedural Law and the European Union* ch. 6 (Robert Bray, ed. 1999).

82. *Neste Chemicals SA v. DK Line SA*, [1994] 3 All E.R. 180 (Eng. C.A. 1994).

83. See, e.g., Burbank, "Implementing Procedural Change: Who, How, Why, and When?," 49 *A.L.A. L. Rev.* 221 (1997).

84. See, e.g., American Law Institute, *Transnational Rules of Civil Procedure* (Preliminary Draft No. 2, March 17, 2000).

85. Draft Article 21 provides:

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

prove a model for law reform in or among countries from both of the dominant traditions represented [at The Hague].⁸⁶ The draft provisions sensitively reflect experience under the Brussels Convention, greatly improving the treatment of the subject in that treaty, and they reflect as well experience under common law systems, appropriating a common law device in order to impart greater flexibility.

As described previously, the Brussels Convention treats the subject of *lis pendens* briefly and, from a common law perspective, rigidly. As a result both the European Court of Justice and national courts have been given a load of interpretative work that has tested jurisprudential assumptions of the civil law tradition. The proposed Hague Convention has profited from the evidence furnished by those cases and, although following the basic preference for the court first seised, has sensibly resolved many of the problems they reveal. In taking this approach, the drafters have not only advanced the goals of certainty and predictability. They have provided greater hope of uniformity for a regime that lacks a mechanism to ensure it.

Thus, for instance, the drafters at The Hague have acknowledged the difficulties arising from the Brussels Convention's failure to define the critical determinant of precedence, when a court is seised, a gap that the European Court declined to fill when it held that the matter was to be determined by national law.⁸⁷ So also, recognizing from experience under the Brussels Convention that the condition requiring the proceedings to be based "on the same causes of action" could greatly limit the scope of the provision's application,⁸⁸ the

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised—
a) when the document instituting the proceedings or an equivalent document is lodged with the court, or
b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised—

a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised, and
b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

86. *Supra* text accompanying nn. 14-15.

87. See Case C-129/83, *Zelger v. Salinitri*, 1984 E.C.R. 2397, [1985] 3 C.M.L.R. 366 (1984).

88. See, e.g., Case C-144/86, *Gubisch Maschinenfabrik KG v. Palumbo*, 1987 E.C.R. 4861, [1989] E.C.C. 420 (1987).

drafters at The Hague included the qualifier "irrespective of the relief sought." Indeed, they went much further, drawing on experience in common law jurisdictions suggesting that precedence should not in some circumstances be given to cases in which the plaintiff seeks only declaratory relief, and crafting a provision that reverses the normal rule where (1) such relief is sought in the court first seised, (2) "an action seeking substantive relief is brought in the court second seised" and (3) "the court second seised is expected to render a decision capable of being recognized under the Convention."⁸⁹

The last quoted qualification from draft Article 21(6)(b) implements a broader rule that itself constitutes an advance in the proposed Hague Convention, again reflecting experience under the comparable provision in the Brussels Convention. For, under draft Article 21(1), the obligation of the court second seised to suspend proceedings arises only "if the court first seised has jurisdiction and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12."

This provision, which responds to the authority to apply national jurisdictional law under a mixed convention, also answers a question apparently (and surprisingly) still open under the Brussels Convention, to wit, whether *lis pendens* applies when the court second seised has exclusive jurisdiction.⁹⁰ Indeed, it appears to be partially redundant in that regard, since judgments based on a ground of jurisdiction which conflicts with Articles 4 and 12 are among those denied recognition and enforcement under draft Article 26.⁹¹ Moreover, by permitting the court second seised to consider whether a judgment of the court first seised is "capable of being recognised under the Convention," this provision appears to affirm the power of the court second

89. See, e.g., *Capitol Indemnity Corp. v. Haverfield*, 218 F.3d 872 (8th Cir. 2000); *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942); *supra* text accompanying n. 54. But see Case C-406/92, *The Maciej Rataj, Tetry v. Maciej Rataj*, [1995] All E.R. (EC) 229 (1994). This categorical treatment of declaratory relief cases may be too broad. See *infra* nn. 131, 145.

90. See Case C-351/89, *Overseas Union Insurance Ltd v. New Hampshire Ins. Co.*, [1991] E.C.R. I-3317 (1991); *Continental Bank NA v. Aeakos Compania Naviera SA*, [1994] 1 Lloyd's Rep. 505, [1994] 1 W.L.R. 588 (Eng. CA 1993); *Glencore International AG v. Metro Trading International, Inc.*, [1999] 2 Lloyd's Rep. 632 (Q.B. 1999); Beaumont, "A United Kingdom Perspective on the Proposed Hague Judgments Convention," 24 *Brook. J. Int'l L.* 75, 100 (1998); Kennett, *supra* n. 75, at 118-20. Cf. *Toepfer International GmbH v. Societe Cargill France*, [1998] 1 Lloyd's Rep. 379 (Eng. CA 1997) (referring to European Court questions concerning applicability of Brussels Convention, including Article 21, to litigation arising out of relationship governed by arbitration agreement). For an interesting argument distinguishing Articles 16 and 17 of the Brussels Convention for these purposes, see Fentiman, "Exclusive Jurisdiction and Article 17," in *The European Judicial Area*, *supra* n. 75, at 127.

91. Draft Article 26 provides:

A judgment based on a ground of jurisdiction which conflicts with Articles 4, 5, 7, 8, or 12, or whose application is prohibited by virtue of Article 18, shall not be recognised or enforced.

seised independently to determine the jurisdiction of the court first seised. If so it answers a question suggested by the condition, "if the court first seised has jurisdiction," and does so, except perhaps for instances of exclusive jurisdiction, contrary to the solution worked out under the Brussels Convention.⁹²

A strict *lis pendens* regime is most palatable where, as in the Brussels Convention, there is also a closed jurisdictional system in which participating States have confidence. The required confidence concerns not only the likelihood that the jurisdictional standards will ensure an appropriate relationship between the forum and the defendant(s), but, where neither a choice of law test nor reexamination of the merits (*révision au fond*) is permitted, also an appropriate relationship between the forum and the matter in controversy. To the extent that required jurisdictional bases do not inspire such shared confidence and/or that other jurisdictional bases are permitted, a safety valve is needed that permits the equilibration of competing jurisdictional claims by means other than a strict first-filed (or first-seised) rule.

The proposed Hague Convention contains such a safety valve, borrowed from the common law, providing in draft Article 21(7) that the convention's *lis pendens* rule is inapplicable "if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute under the conditions specified in Article 22."⁹³

Two other, conceptually linked, advances over the comparable provisions in the Brussels Convention should be noted. Whereas under Article 21 of the Brussels Convention, the court second seised is required to decline jurisdiction "[w]here the jurisdiction of the court first seised is established,"⁹⁴ under draft Article 21 of the proposed Hague Convention, suspension and declining jurisdiction are treated separately, with the latter required only when the court second seised "is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention." In addition, draft Article 21(3) permits the court second seised, upon application of a party, to "proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or

92. See Case 351/89, *Overseas Union Insurance Ltd. v. New Hampshire Insurance Co.*, [1991] E.C.R. I-3317 (1991). Note, however, that in connection with recognition, although draft Article 27(1) provides that "[t]he court addressed shall verify the jurisdiction of the court of origin," in doing so it is "bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default" under draft Article 2(2).

93. Draft Article 22 is set forth *infra* at n. 163. Note, however, that draft Article 21 as a whole, and hence this provision, does not operate where *the court first seised* is exercising jurisdiction under national law pursuant to draft Article 17.

94. See *supra* n. 75 and accompanying text.

if that court has not rendered such a decision within a reasonable time." These aspects of the proposed Hague Convention constitute an important hedge against the risks of strategic behavior that are inevitable in any system of jurisdictional equilibration and an important protection of a court's ability to do justice against the demands of efficiency and consistency.⁹⁵

2. The Road Ahead at The Hague

This is an impressive record of progress that should inspire diffidence in anyone suggesting additional refinements. One matter should not be controversial, although it may resist solution because of technical difficulties and differences in national law. Unless the addition of the condition, "irrespective of the relief sought," and its French counterpart in draft Article 21⁹⁶ is thought to cover the matter, the proposed Hague Convention imports from the Brussels Convention the ambiguity raised by the use of different conditions in the English and French versions ("same causes of action" in the English version and "la même cause et le même objet" in the French version), ambiguity that has engaged the attention of the European Court on more than one occasion and to which that tribunal assigns some importance.⁹⁷

95. See *Re Proceedings in Two Fora* (II ZR 3/85), [1987] E.C.C. 273 (BGHZ 1985). For forerunners of such provisions in Swiss (as of 1987) and Italian (as of 1995) law, see Baumgartner, *supra* n. 28, at 205-06.

96. The French language version of draft Article 21(1) provides:

Lorsque les mêmes parties sont engagées dans des procédures devant des tribunaux d'États contractants différents et que ces procédures ont la même cause et le même objet, quelles que soient les prétentions des parties, le tribunal saisi en second lieu suspend la procédure si le tribunal premier saisi est compétent et s'il est à prévoir que ce tribunal rendra un jugement susceptible d'être reconnu en vertu de la Convention dans l'État du tribunal saisi en second lieu, sauf si ce dernier est exclusivement compétent en vertu des articles 4 ou 12.

97. See *Case C-144/86, Gubisch Maschinenfabrik v. Palumbo*, 1987 E.C.R. 4861, [1989] E.C.C. 420 (1987); *Case C-406/92, The Maciej Rataj, Tetry v. Maciej Rataj*, [1995] All ER (EC) 229 (1994). See also *Haji-Ioannou v. Frangos*, [1999] 2 Lloyd's Rep. 337 (Eng. C.A. 1999); Kennett, *supra* n. 75, at 105-08. The notion that the addition of the words "irrespective of the relief sought" ("*quelles que soient les prétentions des parties*" in the French version) was intended to bridge the gap finds support in the official report explaining the provisions of the preliminary draft of October 30, 1999. See Peter Nygh & Fausto Pocar, *Report of the Special Commission 85* (2000). Samuel Baumgartner informs me that "la même cause" has no technical meaning in French and that the wording chosen was deemed "better (because known from Brussels as interpreted in *Gubisch*) than inserting some explanatory phrase into the French text." Letter from Samuel P. Baumgartner to Stephen B. Burbank 3 (Sept. 30, 2000). See also International Law Association, Committee on International Civil and Commercial Litigation, *Third Interim Report: Declining & Referring Jurisdiction in International Litigation* 32 (2000) (Principle 4.1 of the Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters) ("proceedings involving the same parties and the same subject-matter"); *id.* at 37 ("des demandes ayant la même cause . . . entre les mêmes parties").

More controversially, one might question the decision to exclude from the operation of draft Article 21 situations in which the court first seised is exercising jurisdiction under national law as permitted by draft Article 17. The recognition check in draft Article 21(1) (deleting "under the Convention") might be thought to provide adequate protection to the court second seised. Moreover, acknowledging that an interjurisdictional *lis pendens* provision can only reach so far without ignoring or affecting domestic law, including procedural and *res judicata* law,⁹⁸ it is worth asking whether draft Article 21 goes as far as it properly can and should go in other respects to advance shared interests in efficiency and consistency. Thus, experience under the Brussels Convention might at least counsel elaboration of the concept of "same parties."⁹⁹ And should concern for the integrity of national procedural law prevent this provision from reaching claims that are in fact compulsory counterclaims in the court first seised?¹⁰⁰

One answer to the last question might be that draft Article 21 is less concerned with efficiency than with the prevention of irreconcilable judgments (consistency). But even if that is a plausible account of the Brussels regime,¹⁰¹ both the departures from that regime that I have described above and the fact that the proposed Hague Conven-

98. For example, an American might be tempted to formulate a *lis pendens* provision so as to comprehend claims that the defendant in the court first seised has against the plaintiff that arise out of the same transaction or occurrence, taking inspiration from Fed. R. Civ. P. 13(a)'s definition of a compulsory counterclaim. One problem with such a broad formulation is that other States may not countenance counterclaims, or require that they be asserted, and any such provision would therefore operate so as to upset the policy judgments implicit in their normal rules of procedure in the cases to which it applies. A second problem is that even a legal system that is aggressive in requiring the assertion of counterclaims, like the American federal system, recognizes that there must be limits to the compelled loss of choice of forum, and the perceived need for such limits is likely to be more insistent in the international context.

99. See Case C-351/96, *Druot Assurances SA v. Consolidated Metallurgical Industries*, [1999] Q.B. 497 (1998); Handley, "Res Judicata in the European Court," 116 *L.Q.R.* 191 (2000); Kennett, *supra* n. 75, at 108-11.

100. See *Turner v. Grovit*, [1999] 3 All E.R. 616, [1999] 1 W.L.R. 794 (Eng. C.A. 1999); *supra* n. 98.

If in these respects the Special Commission may be thought to have kept its ambition too well under control, that cannot be said about draft Article 2(1)(c), pursuant to which "even if all the parties are habitually resident in [a Contracting] State" "Articles 21 and 22 shall apply where the court is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State." As a result, a United States court adjudicating a case involving only United States parties would be required to apply the Convention's *lis pendens* provisions if it were second seised, and its *forum non conveniens* provisions if the alternative forum advanced were in another Contracting State.

101. See Case C-144/86, *Gubisch Maschinenfabrik KG v. Palumbo*, 1987 E.C.R. 4861, [1989] E.C.C. 420 (1987); Case C-406/92, *The Maciej Rataj, Tatry v. Maciej Rataj*, [1995] All E.R. (EC) 229 (1994).

tion does not, while the Brussels Conventions does, contain a separate article on related actions,¹⁰² deprive it of persuasive force.

Of course, this line of reasoning raises perhaps the most difficult question for one who admires this aspect of the work at The Hague but who desires to make a constructive contribution to the process as it goes forward. Why is it that the current draft does not contain a provision on related actions comparable to Article 22 of the Brussels Convention? Granted that the co-existence of Articles 21 and 22 in the latter has posed some serious interpretative problems for the European Court¹⁰³ and for national courts,¹⁰⁴ and acknowledging again the progress that draft Article 21 represents, it is still a provision of quite limited scope, hardly adequate to meet the strategic ingenuity of modern litigants or otherwise to eliminate the inefficient consumption of scarce judicial resources. It does not appear that draft Article 22 of the proposed Hague Convention could, even if it was intended to, serve the purpose.¹⁰⁵ Moreover, particularly in light of extensive discussion of mechanisms for judicial cooperation during the deliberations of the Special Commission,¹⁰⁶ it seems a shame that perhaps the best vehicle for the development of experience along those lines is absent from the proposed convention.

As experience under the Brussels Convention demonstrates, it is not easy wholly to banish antisuit injunctions from a legal culture

102. See *supra* text accompanying nn. 70-72; *infra* text accompanying nn. 103-06.

103. See Case C-406/92, *The Maciej Rataj, Tetry v. Maciej Rataj*, [1995] All E.R. (EC) 229 (1994).

104. See, e.g., *Glencore International AG v. Metro Trading International Inc.*, [1999] 2 Lloyd's Rep. 632 (Q.B. 1999); *Kennett*, *supra* n. 75, at 115-17, 124-26.

105. Draft Article 22, which is set forth in full *infra* n. 163, permits suspension/dismissal only "[i]n exceptional circumstances," only if "it is clearly inappropriate for [the court seised] to exercise jurisdiction," and only "if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute." These conditions are cumulative and to be taken seriously. See *Nygh & Pocar*, *supra* n. 97, at 99. The second of them in particular deprives the provision of utility for the consolidation of related actions. Compare the proposal for a "combination of a narrowly defined *lis pendens* rule and a widely defined related actions rule modelled on *forum non conveniens*," *Beaumont*, *supra* n. 90, at 101, which the author suggested "might prove a negotiable compromise in the Hague even if it cannot be achieved in the Brussels and Lugano revision." *Id.* (See in that regard *Leuven/London Principle 4.2*, *supra* n. 97 (where related actions are pending, "either court may suspend or terminate its proceedings and refer the matter to the alternative court . . . provided that the actions can be consolidated in the alternative court").

106. See Hague Conference on Private Int'l Law, Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Working Document No. 144 E, 8-10 (Nov. 20, 1998) [hereinafter *Working Document No. 144 E*]; Catherine Kessedjian, Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Preliminary Document No. 9, at 40-44 (1998) [hereinafter *Preliminary Document No. 9*]. Note also *Leuven/London Principle 5.2*, *supra* n. 97, providing for direct communication between courts, when permitted by the respective States, and encouraging States to "permit their courts to make, and respond to, such communications").

accustomed to them.¹⁰⁷ Moreover, even in a closed jurisdictional system that relies primarily on a strict *lis pendens* regime, and even where binding interpretation of governing jurisdictional and *lis pendens* law is possible, *antisuit* injunctions may have a (very) limited role to play. Duplicative litigation may reflect more than a litigant's attempt to secure a more favorable forum in a world of choice. It may represent an attempt to evade a grant of, or an agreement to submit to, exclusive jurisdiction in another tribunal. It may also represent an attempt to wear down the opponent, to prevail without prevailing on the merits.¹⁰⁸ In both situations, the potential of ultimate correction pursuant to the binding interpretation of a central tribunal may not suffice to deter, as under the Brussels Convention, and neither may the ability of the court that possesses exclusive jurisdiction to continue to judgment, as under the proposed Hague Convention.¹⁰⁹

In both situations, therefore, there is an argument to be made in favor of limited power in a court properly vested with jurisdiction to enjoin the abuse. The fact that some countries participating in the negotiations at The Hague may regard *antisuit* injunctions issued unilaterally by the courts of another country as an infringement of territorial sovereignty should not deter the effort, since agreement in the treaty would solve the problem, at least to the extent that agreed standards were determinate. Moreover, the absence of a tribunal empowered either to resolve differences between signatory States or to issue interpretations binding on them suggests that the need is greater than it is under the Brussels Convention. Perhaps, however, the subject of *antisuit* injunctions is too controversial to broach in negotiations, leaving their availability or not to national interpretation, which will be influenced by national legal culture, tradition and rules.¹¹⁰

107. See *Turner v. Grovit*, [1999] 3 All E.R. 616, [1999] 1 W.L.R. 794 (Eng. C.A. 1999); Hartley, "Antisuit Injunctions and the Brussels Jurisdiction and Judgments Convention," 49 *Int'l & Comp. L.Q.* 166 (2000). Note, however, substantial German authority for the proposition that Articles 21 and 22 of the Brussels Convention occupy the field, excluding *antisuit* injunctions. See Letter from Samuel P. Baumgartner to Stephen B. Burbank, *supra* n. 97, at 4 (citing Rolf Stürner, *Anmerkung*, 109 *ZfP* 224, 228 (1996)).

108. See *Turner v. Grovit*, [1999] 3 All E.R. 616, [1999] 1 W.L.R. 794 (Eng. C.A. 1999); *Toepfer International GmbH v. Societe Cargill France*, [1998] 1 *Lloyd's Rep.* 379 (Eng. C.A. 1997).

109. See Hague Draft, *supra* n. 8, art. 21(1); *supra* text accompanying n. 90-91. For some of the means to facilitate uniform interpretation of the proposed Hague Convention considered to date, see Preliminary Doc. No. 9, *supra* n. 106, at 45-46; Zekoll, *supra* n. 68, at 1286 n.16.

110. As Mr. Baumgartner has pointed out, this could lead to serious mischief if common law countries interpreted the convention as simply not dealing with *anti-suit* injunctions and civil law countries took the view that they were preempted. See letter from Samuel P. Baumgartner to Stephen B. Burbank, *supra* n. 97, at 3-4.

3. Progress in National Law

When one looks to see what lessons those who have been considering changes in the Brussels regime have drawn from the experience under that convention to date, and what if anything they have drawn from the deliberations at The Hague, one finds only that "the date on which an action is 'pending' for the purposes of [Article 21] is defined autonomously, and a mistake in the framing of the related actions rule in the Brussels Convention has been corrected."¹¹¹ If nothing else were changed, in this respect at least it would be hard to avoid the conclusion that an opportunity had been missed.¹¹² Let us hope that more will be done to bring the Brussels Convention's provisions on *lis pendens* in line with experience and to inform them with comparative insight. Let us hope, moreover, that the United States can profit from both, as well as from recent scholarship on domestic law.

The Supreme Court's recent decisions distinguishing a federal court's power to refuse declaratory relief from its power to abstain and, within the domain of abstention, distinguishing a stay from dismissal, suggest that the "exceptional circumstances" requirement of *Colorado River* abstention may have been responsive to the separation of powers concerns to which those distinctions speak.¹¹³ They also suggest that, so long as a federal court desiring to give precedence to parallel litigation pending in a state court stays rather than dismisses the case before it, such concerns are satisfied and thus that exceptional circumstances should not be required for that reason.¹¹⁴

Except in the case of an exclusive jurisdiction clause that "has been manifestly breached according to the law applicable in the courts of both states," the Leuven/London Principles do not permit anti-suit injunctions where the respective states are parties to a convention providing common jurisdictional rules or where the court from which an injunction is sought "is satisfied that these Principles will be applied by the court in which proceedings have been instituted." Leuven/London Principle 7, *supra* n. 97.

111. Commission of the European Communities, Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 19 (1999) (on file with author). For a discussion of this not uncontroversial effort, see Beaumont, *supra* n. 90; Horatia Muir Watt, *New Perspectives for Jurisdiction and Judgements in Europe: A Critical View* (on file with author).

112. Cf. Fentiman, *supra* n. 90, at 159 (remarking failure of Commission proposals to clarify the problem of exclusivity within Article 17).

113. See *supra* text accompanying nn. 47-62. In *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), the Court emphasized its oft-repeated characterization of the Declaratory Judgment Act as "an enabling act, which confers a discretion on the courts rather than an absolute right on the litigant." *Id.* at 287 (quoting *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952)). On that view neither a stay nor a dismissal of a declaratory judgment action presents separation of powers concerns.

114. See *Burbank*, *supra* n. 48, at 16-17. In *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1 (1983), the Court applied *Colorado River's* "exceptional circumstances" test in concluding that the District Court's stay (not dismissal) of the federal action was inappropriate. That decision long antedated the rationalization of precedent in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), and as an action to compel arbitration, it would not have been subject to the prohibition on dis-

In a recognition system that mandates application of the preclusion (*res judicata*) law of the rendering court and subjects that law to very modest federal checks, as does the Full Faith and Credit statute,¹¹⁵ a stay may appear, *ex post*, functionally indistinguishable from dismissal.¹¹⁶ The *ex ante* difficulties of predicting the extent of duplication and the likelihood and extent of potential preclusion may provide some functional support for the stay alternative, as may potential limitations bars in the absence of a tolling rule.¹¹⁷ Moreover, even for separation of powers purposes one should perhaps distinguish between situations in which a federal court yields, or yields provisionally, to a state court seized of parallel litigation and a situation in which a federal court refuses for other reasons to adjudicate a case, no other litigation has yet been filed and the federal plaintiff is therefore forced to file a lawsuit in state court.¹¹⁸

Professor Redish has called for a "zero tolerance solution to the duplicative litigation problem."¹¹⁹ His effort is concerned with federal courts law and is avowedly preliminary. He is agnostic about the scope of application of the regime he favors,¹²⁰ the standards for determining forum preference,¹²¹ and about whether the regime should be implemented by decisional or statutory law.¹²² Although he does not discuss the federal-federal context,¹²³ the changes he proposes in federal law governing both dismissal and antisuit injunctions for par-

missal that *Quackenbush* discerned for common law damages cases. In any event, there were reasons other than concern about separation of powers that supported the result, if not the test. See further *infra* n. 118 and accompanying text.

115. See Burbank, *supra* n. 17, at 797-829.

116. See *Wilton v. Seven Falls Co.*, 515 U.S. 277, 283 (1995); Yelin, "Note, Burford Abstention in Actions for Damages," 99 *Colum. L. Rev.* 1871 (1999); *supra* n. 61.

117. See *Wilton*, 515 U.S. at 288 n.2; Preliminary Doc. No. 9, *supra* n. 106, at 41. Cf. Clermont & Huang, "Converting the Draft Hague Treaty into Domestic Jurisdictional Law," (on file with author) (proposed statutory tolling provision in connection with dismissal for lack of territorial jurisdiction).

118. Congress' extension of the constitutional obligation of full faith and credit to the federal courts and its use of state preclusion law as the referent necessarily mean that federal litigation can be cut short by a state court judgment. At least in cases governed by substantive state law, it is difficult to see why a federal court's unwillingness to run the race to judgment with parallel state court litigation should be thought any different. It is more difficult to reconcile with the larger statutory context the action of a federal court which, rather than responding to a motion stimulated by state court litigation, creates the need for such litigation by refusing to adjudicate a case within its statutory subject matter jurisdiction, and, where that is true, the functional similarities of a stay and a dismissal may dwarf any theoretical distinctions. See Note, *supra* n. 116. Cf. *Federal Reserve Bank of Atlanta v. Thomas*, 2000 U.S. App. LEXIS 18288, at *38 (11th Cir. July 31, 2000) ("It is an abuse of discretion . . . to dismiss a declaratory judgment action in favor of a state court proceeding that does not exist."). But see *Aetna Casualty & Surety Co. v. Ind-Com Electric Co.*, 139 F.3d 419 (4th Cir. 1998).

119. Redish, *supra* n. 28.

120. See *id.* at 1362-67.

121. See *id.* at 1374-75.

122. See *id.* at 1375-76.

123. See *supra* text accompanying n. 47.

allel litigation between the federal and state courts could substantially assimilate the two contexts, removing both supposed separation of powers and federalism roadblocks, and leaving the development of *lis pendens* and antisuit injunction jurisprudence free to focus on litigant convenience and institutional needs.

Although I share Professor Redish's view that current federal law in this area is incoherent,¹²⁴ I suspect that his proposed "zero tolerance solution" goes both too far and not far enough. Thus, it is not clear to me that the circumstances in which a federal court should decline to dismiss or stay duplicative litigation in favor of state court litigation are *always* circumstances in which an antisuit injunction would be appropriate.¹²⁵ In other words, zero tolerance may be too little tolerance of parallel litigation even within the United States. In addition, recognizing that state courts represent half of the problem of federal-state parallel litigation and much more than that when the problem is defined to account for all of the litigation in the United States, I do not see the wisdom in baking less than half a loaf, particularly if preheating the oven will require overcoming legislative inertia. Agreeing that the Supreme Court's interpretation of the "in aid of jurisdiction" exception in the Anti-Injunction Act has been unfortunate,¹²⁶ I nonetheless doubt that federal, state or interjurisdictional interests would be best served by a system that relied on injunctions rather than reciprocal forbearance pursuant to uniform federal law.

I am inclined to believe, in other words, that, having inspired those who negotiated the Brussels Convention to emulate our full faith and credit approach to the recognition of judgments, we can benefit by seeking to emulate, if not precisely to replicate, that Convention's approach to the problem of equilibration when there is parallel litigation, as refined and improved in the proposed Hague Convention. It is time to implement the Full Faith and Credit Clause, the grants of judicial power in Article III, and federal statutes conferring subject matter jurisdiction, with legislation that provides federal *lis pendens* standards, binding in state and federal courts alike, whose decisions interpreting and applying those standards can be reviewed by the Supreme Court.¹²⁷ The standards

124. See Burbank, *supra* n. 48, at 14-17.

125. Cf. *SNI Aerospatiale v. Lee Kui Jak*, [1987] 3 All E.R. 510 (P.C. 1987); *Workers' Compensation Board v. Amchem Products, Inc.*, 1 Can. S.C.R. 897 (1993). The tribunals deciding both of these cases were at pains to distinguish the standards governing a *forum non conveniens* dismissal or stay from those governing issuance of an anti-suit injunction. See Beaumont, "Great Britain," in *Declining Jurisdiction*, *supra* n. 63, at 230-31.

126. See *supra* text accompanying nn. 50, 53; Redish, *supra* n. 28, at 1371. See also Hoffman, "Removal Jurisdiction and the All Writs Act," 148 *U. Pa. L. Rev.* 401, 459-69 (1999).

127. Changes in current law regarding the timing of appellate review may be necessary. Cf. Redish, *supra* n. 28, at 1367-69.

should not usually permit parallel litigation,¹²⁸ and they should make it impossible ever again to suggest that normative thinking about American law supports such litigation generally.¹²⁹ At the same time, *pace* Professor Redish, the standards should not implement any general preference for federal or state courts, or usher in a multi-factored "case-by-case form of systemic and/or litigant 'interest analysis,'"¹³⁰ as opposed to a defeasible preference for the court in which litigation seeking a coercive (that is, not declaratory) remedy was first filed.

Because federal constitutional law places such minimal restraints on both jurisdiction and choice of law in the United States, while federal constitutional and statutory law so strictly constrain the freedom to deny recognition, a "safety valve . . . that permits the equilibration of competing jurisdictional claims by means other than a strict first-filed (or first-seised) rule"¹³¹ should be part of the suggested federal *lis pendens* statute. Such a provision would constitute, as it were, a limited but mandatory federal doctrine of *forum non conveniens*, to be considered apart from any broader proposal to federalize *forum non conveniens* law.¹³² It would be limited, as under the

For a suggestion that the Full Faith and Credit Clause might ground both a rule prohibiting interstate *antisuit* injunctions and a rule of *lis pendens*, see Bermann, *supra* n. 32, at 602-03 n.58. As he points out, "[i]f a *lis pendens* rule risks provoking races to the courthouse, it should at least avoid a more treacherous race to judgment." *Id.* at 603 n.58.

128. Note that the definition of "parallel litigation" is likely to differ for the domestic, as opposed to the international, interjurisdictional context. See *supra* n. 28. Even domestically, however, acknowledgment of differences in procedural and preclusion rules should probably result in a definition that does not seek to impose on the country as a whole the broadest conceptions of litigation efficiency and consistency. See Burbank, *supra* n. 27, at 98-102; *supra* n. 98; *infra* text accompanying n. 144.

129. See Redish, *supra* n. 28, at 1350-55. This is not the only example of the phenomenon of something that under current conceptions must be tolerated because of the perceived requirements of federalism being transmogrified into a normative good. See Burbank, *supra* n. 34, at 113.

130. Redish, *supra* n. 28, at 1374. Of course, neither a preference for federal court nor a preference for state court would serve to resolve problems of interstate parallel litigation, with which the proposed statute would also deal. See also *infra* n. 132.

131. *Supra* text accompanying nn. 92-93. If the categorical *lis pendens* treatment of declaratory relief cases under the proposed Hague convention is deemed too broad, see *supra* n. 89, *infra* n. 145, the overbreadth can be cured through the application of this limited *forum non conveniens* safety valve.

132. See *infra* text accompanying nn. 178-201. Just because we may be stuck with multi-factored case-by-case analysis as the basis of decision in one corner of the law, but see *infra* n. 200, does not mean that we should sweep it into others, even if they are adjacent. Moreover, there probably is a greater need for flexibility, and hence discretion, in international than in domestic cases. I am here advocating, for wholly domestic cases, a rule that presumptively favors the court in which the first coercive suit is filed, with statutory specification of the considerations that might lead to another choice. Realism about what really motivates most *forum non conveniens* motions—and it is not litigation convenience—should prompt Congress not simply to ape the doctrine that formally governs the resolution of such motions when specifying exceptions to the statutory *lis pendens* rule. If so, it would be "a limited . . . federal doctrine of *forum non conveniens*" in more than one sense.

proposed Hague Convention,¹³³ because applicable only where parallel litigation was pending interjurisdictionally. Unlike the proposed Hague Convention provision, it would be mandatory, and federal appellate review would be available to ensure that a federal state court did not ignore or seriously misapply the governing standards.¹³⁴

If even a closed jurisdictional system backed up by strict *lis pendens* doctrine cannot deter evasive action that inflicts substantial costs on litigants and courts,¹³⁵ the proposed federal *lis pendens* statute should permit but strictly control the grant of antisuit injunctions. Whether an aspect of the statutory controls should be a requirement that the litigant seeking the injunction in the (few) situations permitted first seek a stay from the other court is worth consideration. Any such requirement might also have to negate the possibility of preclusion arising from the first court's decision on the statutory requirements.¹³⁶ Moreover, careful attention would be required to the alternatives of asymmetric treatment of federal and state courts, on the one hand, and reversal of current law barring in almost all cases state court injunctions against federal litigation on the other.¹³⁷

How then should American courts respond to parallel international litigation *in the absence of a treaty or in cases that are not within the scope of any treaty concluded*? I have sketched a model for a federal solution to parallel interjurisdictional litigation within the United States, one that is based in a federal statute binding on federal and state courts alike. Federal legislative power to dictate a national solution for international cases is as clear as it is for domestic interjurisdictional cases, and whichever serves as the lead in the effort to move Congress to action, the argument from legislative inertia

133. See Hague Draft, *supra* n. 8, art. 21 (7); *supra* text accompanying n. 93.

134. Other problems of appellate review aside, see *supra* n. 127 and accompanying text, any forum non conveniens provision is likely to present serious obstacles to effective review. See *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). Those problems could be reduced if there were, as I advocate, statutory specification of the considerations that could lead to defeasance of the first filed rule and if those specifications did not simply repeat current forum non conveniens doctrine. As Allan Stein has helpfully observed:

Particularly where the forum choice turns on regulatory choices, there is absolutely no reason for appellate deference under an abuse of discretion standard. Moreover, effective appellate review of forum choices must be interlocutory. The final judgment rule here is an undermining of coherent policy as the standard of review.

Letter from Allan Stein to Stephen Burbank 1 (Sept. 22, 2000).

135. See *supra* text accompanying nn. 107-09.

136. Cf. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986) (state court ruling on preclusive effect of prior federal litigation itself entitled to full faith and credit in proceeding seeking injunction from federal court otherwise permitted under the relitigation exception to the Anti-Injunction Act).

137. See *Donovan v. City of Dallas*, 377 U.S. 408 (1964).

extends to all litigation contexts where there is a plausible national need.

The federal courts at least have used inappropriate domestic models to deal with parallel international litigation in the past, inconsistently treating litigation in Italy as if it were litigation in another federal court or in a state court. The models used have been inappropriate either because their extension to international cases lacked normative justification, or because the model itself was incoherent in the context in which it was initially used, or for both reasons.¹³⁸ Having suggested the unitary treatment of parallel interjurisdictional litigation that is wholly domestic, I turn to the question whether it would be an appropriate model for international litigation.

The generous recognition treatment of internationally foreign judgments characteristic of American law for more than a century has represented a remarkable act of faith, one that has been tested, if only because put in relief, by the discriminatory provisions of the Brussels Convention¹³⁹ and that would be tested again if proposed changes were implemented eliminating the mechanism by which the United States could escape such discriminatory treatment.¹⁴⁰ A due process check on jurisdictional exorbitance can provide no greater assurance internationally than it does in domestic interjurisdictional litigation. Moreover and as an anterior matter, it is not clear whether, in a judgment recognition world that comprehends vastly different cultures and legal traditions, standards of adjudicatory jurisdiction can properly be taken as the hallmark of fairness and impartiality of the rendering court. Due process also does not provide much protection against procedural unfairness, and a truly limited public policy defense is hardly a replacement for choice of law control.

Whatever the force of these concerns as to recognition practice, they do suggest that, in the absence of a treaty, international cases should not be assimilated to domestic cases for purposes of lis

138. See *supra* text accompanying nn. 59-62, 119-26.

139. See Brussels Convention, *supra* n. 4, at 4; von Mehren, *supra* n. 9, at 278-79; Hartley, *supra* n. 81, at 231-33. The scope of potential discrimination was, of course, increased with the Lugano Convention.

140. Article 59 of the Brussels Convention "allows a Contracting State . . . to enter into a convention . . . with a non-Contracting State . . . in which it undertakes not to recognize judgments given in other Contracting States against a defendant domiciled or habitually resident in the other party to the convention . . . in those cases in which the judgment-granting court only had jurisdiction on one of the grounds expressly outlawed by Article 3 of the Convention." Hartley, *supra* n. 81, at 233 (footnote omitted); see also Zekoll, *supra* n. 68, at 1289 n.33. The proposed Council Regulation of the Commission of the European Communities would eliminate that authority prospectively. See Proposed Council Regulation, *supra* n. 108, at 26, 51. This would be a result far different from that urged by the United Kingdom's representatives, namely, abolition of the underlying discrimination. See Beaumont, *supra* n. 90, at 102-04. Discussion at the Symposium suggested that this proposal is highly controversial and may not be part of any final regulation.

pendens and antisuit injunctions, whether in case law as it develops in the federal and state courts, or under the proposed federal lis pendens statute.

So long as the inquiry concerns the content of a proposed federal statute, an important concern that may attend unilateral judicial lawmaking for international cases need not detain us.¹⁴¹ Congress and the President are competent to decide whether and when dismissing or staying litigation in the United States in response to, or enjoining, parallel litigation abroad, would well serve the nation's interests. Indeed, the fact that federal and state courts are currently making such decisions, and doing so inconsistently, is one argument for legislation as the vehicle of change.

An argument can be made that, at least in the absence of reciprocity, American courts should not in general defer to parallel litigation abroad. The argument would probably acknowledge that it is too late in the day to reverse the historic generosity of American courts in recognizing internationally foreign judgments. Indeed, it might well rely on that proposition, as well as the realities of modern international forum shopping,¹⁴² for the normative stance that the United States should not further handicap itself and its people by refusing to enter the race to judgment.

This argument is not without force. Yet, some of the costs of parallel international litigation are visited on domestic parties and domestic courts. Moreover, the general faith in other legal systems evidenced by the United States' generous judgment recognition practice surely has a firmer basis today than it did 100 years ago. So does the concept of an international system whose needs should be considered in the formulation and application of national law. These considerations suggest that an attempt to rely on a normative principle of dual jurisdiction would ring hollow. Unless the goal were to take back part of the territory surrendered by international recognition practice, such a crude rule would not be necessary to protect the interests that, according to that practice, are relevant. And such a goal would be hard to defend at a time when "[t]he need for courts to rely on each other in order to serve justice has been recognized in an increasing number of international civil litigation cases."¹⁴³

Assuming then that some rule of deference is appropriate, the existence of litigation in different countries that may follow different procedural rules and reflect different legal traditions counsels caution or modesty in giving content to the concept of parallel litigation. This is one justification for the very narrow scope of Article 21 of the

141. See Burbank, *supra* n. 3, at 138-39.

142. See Lowenfeld, "Forum Shopping, Antisuit Injunctions, Negative Declarations and Related Tools of International Litigation," 91 *Am. J. Int'l L.* 314 (1997).

143. Lussier, *supra* n. 6, at 60.

Brussels Convention and the narrow scope of Article 21 of the proposed Hague Convention.

For these purposes, the focal point of difference is likely to be the content of domestic preclusion law, including in particular the scope given to the operation of claim preclusion, the treatment of counter-claims, and the existence and scope of issue preclusion. These matters, in turn, may reflect, although they do not exhaust the relevance for these purposes of, domestic procedural rules on such matters as joinder of claims and parties. Although consideration of changes in the law on *lis pendens* for domestic interjurisdictional cases can reasonably assume substantial homogeneity as to such matters, that is not true internationally. And United States *lis pendens* practice should no more impose on foreign institutions than should United States judgment recognition practice.¹⁴⁴

At the least, a *lis pendens* provision for international cases, taking inspiration from the proposed Hague Convention, should require the second seised American court to assure itself that a recognizable judgment was in prospect.¹⁴⁵ This element, which is not necessary for domestic interjurisdictional litigation, would enable the American court to satisfy itself that the expense and delay of parallel litigation could be avoided, and that it would be fair to do so, by inquiring whether the basis of jurisdiction in the foreign court met minimum standards and, *ex ante*, that there was no systemic or insuperable situational barrier to the fair conduct of proceedings abroad and no likelihood of a judgment manifestly incompatible with American public policy. It would also involve engagement with the law of preclusion applicable to the foreign litigation. Finally, since *ex ante* predictions about recognition and delay are more difficult in the international context, the provision should require a stay, with dismissal to follow, if appropriate, upon presentation of a judgment eligible for recognition.¹⁴⁶

144. See *supra* n. 128; Burbank, "Federal Judgments Law: Sources of Authority and Sources of Rules," 70 *Texas L. Rev.* 1551, 1582-87 (1992).

145. The inspiration derived should extend to other matters not mentioned in the text. Thus, an international *lis pendens* provision should qualify the obligation to defer to the first filed case by including a limited *forum non conveniens* check, but one that conferred greater discretion than that for *lis pendens* in wholly domestic cases. See *supra* note 132. Whether it should follow the proposed Hague Convention in carving out actions for declaratory relief depends on the view taken of the potential of such actions "to level the forum shopping playing field." Letter from Allan Stein to Stephen Burbank, *supra* n. 134, at 2. For a more nuanced treatment, see Leuven/London Principles 4.1 & 4.3, *supra* n. 97.

146. See *supra* text accompanying nn. 59-62, 94, 117. Regulation by statute would moot any separation of powers concerns that attended dismissal of litigation involving legal (as opposed to equitable) claims from federal court in deference to litigation abroad. In *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1222-23 (11th Cir. 1999), the Court of Appeals held that the restrictions on abstention announced in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), did not apply to "international abstention." With respect, the court's reasoning confuses the grounds of the putatively applicable

American courts and scholars are prone to ignore or dismiss the interests in sovereignty with which some other countries invest procedural mechanisms that operate extraterritorially.¹⁴⁷ As a result, perceived American imperialism may have an intellectual dimension. In any event, one of the many matters as to which such a difference of view is likely concerns injunctions entered against litigation abroad. Some Americans may comfort themselves with the notion that the order is directed to a litigant within the court's jurisdiction, resuscitating a distinction akin to the distinction between *in personam* and *in rem* actions that has been thoroughly discredited in other contexts.¹⁴⁸ Others take the view that an antisuit injunction has inescapable extraterritorial implications, which is the view taken in the interpretation and application of the federal Anti-Injunction Act.¹⁴⁹

Precisely because antisuit injunctions in international litigation are reasonably perceived to operate extra-territorially and to constrain courts as well as litigants, their issuance should be governed by a federal statute binding on federal and state courts alike. Moreover, respect for other nations counsels care in specifying the circumstances in which an international antisuit injunction can be issued, as do the risks and costs of error when courts dabble in comparative law.¹⁵⁰ Here existing law governing parallel federal-state litigation, however incoherent for the context for which it was developed, may in fact be an appropriate model, at least insofar as it would permit an injunction to protect the American court's jurisdiction (the so-called anti-antisuit injunction).¹⁵¹ American courts should also have the power to prevent a manifest attempt to evade important national policy,¹⁵² but perhaps only in those situations where the policy in question would not be adequately protected through the denial of recognition. Finally, the federal-state model also suggests as appropriate internationally, in the absence of a treaty governing recognition, power in the American court to enjoin the continuation of litigation abroad when that is necessary to protect or effectuate a judgment that it has rendered.¹⁵³

abstention doctrine with the basic separation of powers limitations that, rightly or wrongly, the *Quackenbush* Court set out to rationalize and enforce.

147. See *Burbank*, supra n. 3, at 112-23 (service of process and waiver of service).

148. Cf. *Burbank*, supra n. 13, at 1338-39 (asset freeze orders).

149. See *Laker Airways v. Sabena*, 731 F.2d 909, 927 (D.C. Cir. 1984); 28 U.S.C. § 2283 (1994); *County of Imperial v. Munoz*, 449 U.S. 54, 58-59 (1980).

150. See *Bermann*, supra n. 32, at 627-32; Andersen, "What Can the United States Learn from English Anti-Suit Injunctions? An American Perspective on *Airbus Industrie GIE v. Patel*," 25 *Yale J. Int'l L.* 195 (2000).

151. See *Laker*, 731 F.2d 909. For the influence of the federal-state model, see *id.* at 926.

152. See *Laker*, 731 F.2d at 931; *China Trade & Development Corp. v. MV Choong Yong*, 837 F.2d 33 (2d Cir. 1987).

153. See *Laker*, 731 F.2d at 926-27. Note, however, that the same concerns which caution modesty in the definition of parallel international litigation, see supra text

B. *Forum Non Conveniens*

1. The Proposed Hague Convention

It is commonplace to link the *forum non conveniens* doctrine to the need to discipline jurisdictional law (including, in the United States, federal venue law) that reaches too far. As the above summary of American developments suggests,¹⁵⁴ there is force in the observation. Those who make it should admit the possibility, however, that American jurisdictional law does not have a monopoly on over-reaching and that the limitations of foresight can call forth a similar need in other systems. Even such a hallowed jurisdictional ground as domicile may benefit from the equilibration that *forum non conveniens* or some similar device can provide,¹⁵⁵ and functionally similar jurisdictional equilibration may already occur without invocation of the dreaded Latin phrase.¹⁵⁶ Just as by substituting "inquiring" for "inquisitorial," "the bad becomes the good,"¹⁵⁷ so it may be that changing *forum non conveniens* to "circumstances for declining jurisdiction" lowers a red flag and allows those from different legal traditions to be candid about what courts really do—the discretion that dares not speak its name—and the measure of equilibration flexibility that is appropriate in a jurisdictional system that is hybrid both because it combines standards from different traditions and because it is neither closed nor open.

Of course, judgments about both jurisdictional over-reaching and the acceptable limits of foresight are culturally contingent. Recalling the persistence of attention to regulatory interests in American *forum non conveniens* cases, one can perhaps identify a normative basis for judgments about over-reaching from the American perspective that is broader and more faithful to actual practice than litigation convenience simpliciter. According to this view, the failure of American law to integrate jurisdictional and choice of law doctrine, together with a recognition practice that permits neither a choice of law test

accompanying nn. 143-44, should restrain the use of anti-suit injunctions to export peculiarly American notions of claim or issue preclusion.

Consideration of experience under the Brussels Convention may also suggest scope for a carefully defined power to enjoin litigation abroad that is, and is intended to be, oppressive. See *supra* text accompanying nn. 107-10.

154. See *supra* text accompanying nn. 16-46.

155. A civilian mind assumes that the need to have discretion to decline to exercise jurisdiction must be because the country has over broad, or exorbitant, rules of jurisdiction. However, it may simply be the case that it is impossible to devise rules of jurisdiction which will always lead to an appropriate court hearing the case. Even the archetypically fair jurisdiction rule, the domicile of the defendant . . . can lead to an inappropriate forum. Beaumont, *supra* n. 90, at 76 (footnotes omitted).

156. See Kennett, "Forum Non Conveniens in Europe," 54 *Cambridge L.J.* 552 (1995); Fawcett, *supra* n. 63, at 24-27 ("forum non conveniens substitutes").

157. *Hearings Before the Commission on Revision of the Federal Court Appellate System*, second phase, vol. I, at 205 (1974) (statement of Friendly, J.).

nor reexamination of the merits, renders it important to consider domestic regulatory interests before jurisdiction is surrendered. Jurisdictional standards that more broadly implemented domestic regulatory interests should diminish the need for this equilibration device.¹⁵⁸

It would be surprising if the jurisdictional standards in the current draft of the proposed Hague Convention, some of which seem more responsive to what Americans would regard as choice of law than to jurisdictional concerns,¹⁵⁹ did not "more broadly implement [] domestic regulatory interests" than American state jurisdictional law based on the federal constitutional floor of due process.¹⁶⁰ From the American perspective there is still a need for an escape device, however, even if only because the proposed convention preserves some freedom to apply national jurisdictional law that is neither required nor prohibited (the gray zone again). It will also be useful in some cases if the final product contains, as does the current draft, jurisdictional bases that not only over-reach but may be exorbitant as a matter of due process.¹⁶¹ Thus, whether or not *forum non conveniens* is redundant in domestic cases,¹⁶² a provision for declining jurisdiction under the proposed convention may be important to the ability of the United States faithfully to comply both with the treaty and with domestic constitutional law.

In this light, Article 22 of the current draft¹⁶³ is an important provision from the American perspective, and it could have a salutary

158. See Clermont & Huang, *supra* n. 117.

159. See *Hague Draft*, *supra* n. 8, art. 6 (contracts), art. 11 (trusts).

160. See Burbank, *supra* n. 34, at 112-19.

161. See *Hague Draft*, *supra* n. 8, art. 10(1)(b) (torts or delicts), art. 14 (multiple defendants), art. 16 (third party claims).

162. See Stein, *supra* n. 36.

163. Draft Article 22 provides:

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular—

- a) any inconvenience to the parties in view of their habitual residence;
- b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
- c) applicable limitation or prescription periods;
- d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant es-

effect on domestic law in other signatory States, since it would authorize courts openly to exercise a measure of jurisdictional equilibration that they may approximate today through other means.¹⁶⁴

Draft Article 22 permits a court that has jurisdiction under the convention, other than exclusive jurisdiction or jurisdiction under provisions protective of consumers and employees, to suspend its proceedings "[i]n exceptional circumstances" if the exercise of jurisdiction would be "clearly inappropriate" and "if another State has jurisdiction and is clearly more appropriate to resolve the dispute." The draft article requires the court to consider certain factors, forbids discrimination on the basis of nationality or habitual residence, and prescribes circumstances in which security may or must be required from the defendant seeking suspension. Finally, the draft article provides for a court that has suspended its proceedings (1) to decline jurisdiction if the court of the other State exercises jurisdiction or if the plaintiff does not bring proceedings in that State in the time specified, or (2) to proceed with the case "if the court of the other State decides not to exercise jurisdiction."

By permitting a court seised of jurisdiction under the Convention to suspend its proceedings, and ultimately to decline to exercise jurisdiction, in favor of "a court of another State," rather than only "a court of another Contracting State," draft Article 22 appears to give broad scope to this jurisdictional equilibration device. The drafting history confirms that such was the intent.¹⁶⁵ For one who previously assumed that compromise between the civil law and common law traditions would limit the operation of the common law device to cases in which "an alternative forum [was] available in another signatory state,"¹⁶⁶ this is surprising. Indeed, without the aid of the drafting history and the Special Commission's Report, one might have been

establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.

5. When the court has suspended its proceedings under paragraph 1,
 - a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or
 - b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

164. See *supra* text accompanying n. 156. Might the example of Québec have helped to persuade skeptics to accept a limited form of *forum non conveniens* in the proposed Hague Convention? See Lussier, *supra* n. 6, at 46, 50; Fawcett, *supra* n. 63, at 16-17.

165. See Working Document No. 144 E, *supra* n. 103, art. 24; Hague Conference on Private Int'l Law, Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Working Document 241 E, art. 24 (June 1999) ("if a court of another [Contracting] State has jurisdiction and is clearly more appropriate to resolve the dispute"). See also Nygh & Pocar, *supra* n. 97, at 89.

166. Burbank, *supra* n. 34, at 122. Wendy Kennett had suggested foreclosing the operation of *forum non conveniens* "in cases where the plaintiff was domiciled in a Contracting State." Kennett, *supra* n. 156, at 568-69.

tempted to conclude that the failure to specify "Contracting State" was inadvertent.¹⁶⁷ Not wishing to criticize the basic compromise reached, I note only that the provision for security in draft Article 22(4) apparently does not reach cases in which the other court sits in a non-Contracting State.¹⁶⁸

It is difficult to fault the conditions set forth in draft Article 22(1), to wit, the requirement of exceptional circumstances, the carving out of certain bases of exclusive and protective jurisdiction and the limitations requiring that the exercise of jurisdiction in the court seized be clearly inappropriate and that there be some other clearly more appropriate State whose courts have jurisdiction.¹⁶⁹ Moreover, although draft Article 22(2) requires the court entertaining a motion to suspend to take account of certain factors, it does not exclude the consideration of other factors that might signal "exceptional circumstances" and that might inform judgments about the appropriateness of the respective forums.¹⁷⁰

It is not clear why, however, and it is a source of considerable controversy in the United States that, draft Article 22 appears to govern dismissals by the courts of Contracting States even when exercising jurisdiction under national law as permitted by draft Article

167. Draft Article 2(1)(c) provides that Article 22, like Article 21, displaces domestic law in situations where all parties to the litigation are habitually resident in the State but the court there "is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State." Draft Article 22(4) contains a special provision for security in situations where "the other court has jurisdiction only under Article 17." Draft Article 21(7) permits escape from the requirements of *lis pendens*, requirements that are applicable only when there are proceedings in different Contracting States, "under the conditions specified in Article 22." None of these provisions would be dispositive on the question of scope, but all might be thought to suggest what I previously assumed would be the rule if compromise were possible, namely that the proposed convention would permit a court in a Contracting State to decline jurisdiction only in favor of the courts of another Contracting State.

168. That provision requires the suspending court to "order the defendant to provide sufficient security to satisfy any decision of the other court on the merits" in situations where "the other court has jurisdiction only under Article 17" and "unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced." Draft Article 17, in turn, applies only to Contracting States.

169. Recall, however, that these conditions make it hard to credit the notion that this Article could effectively serve the purposes of Article 22 of the Brussels Convention on related actions. See *supra* text accompanying note 105. Compare Leuven/London Principle 4-3, *supra* n. 97, which requires a court to "decline jurisdiction and refer the matter to an alternative court where it is satisfied that the alternative court is the manifestly more appropriate forum for the determination of the merits of the matter."

170. "The list is not exhaustive, as indicated by the words 'in particular'. Other factors, such as: the substantive law to be applied in resolving the dispute, the availability of legal aid or the extent of the relief which may be granted in each forum, may also be relevant." Nygh & Pocar, *supra* n. 97, at 91.

17.171 Fortunately, the Special Commission Report flags the issue, notes arguments for and against that interpretation and wisely concludes that "[t]his point will require clarification at the Diplomatic Conference."¹⁷²

One of the factors that a court is required to consider under draft Article 22(2), "applicable limitation or prescription periods," is often the subject of conditional forum non conveniens stays or dismissals in the United States and other countries, the party seeking to escape the jurisdiction being required to waive any time bar in the alternative forum.¹⁷³ The draft article does not explicitly authorize the imposition of such a condition, and the fact that another factor, "the possibility of obtaining recognition and enforcement of any decision on the merits," is the subject of a separate provision, draft Article 22(4) authorizing or requiring the taking of security from the defendant, might be the basis for a negative inference in that regard.¹⁷⁴ The article should explicitly authorize the imposition of conditions, in addition to the provision of security, which experience in common law countries indicates may be necessary and appropriate to wise jurisdictional equilibration practice.¹⁷⁵

Divining the motive force behind draft Article 22(3), which forbids discrimination on the basis of the nationality or habitual residence of the parties in deciding whether to suspend proceedings, does not require great imagination. The possibility of invidious discrimination under the Brussels Convention, after all, was an important

171. At the Symposium a member of the United States delegation went so far as to term the application of Article 22 in cases governed by national jurisdictional law "unacceptable."

172. Nygh & Pocar, *supra* n. 97, at 89.

173. See Bies, Comment, "Conditioning Forum Non Conveniens," 67 *Chi. L. Rev.* 489, 501-02 (2000). Compare Leuven/London Principle 5.3, *supra* n. 97, encouraging the parties and the court to consider "appropriate terms of referral," including submission to jurisdiction and "the terms on which the applicant may assert a defense of limitation or prescription of action in the alternative court."

174. The Special Commission's Report suggests, although not with great clarity, that such a conditional dismissal is permitted. It states: "In most common law countries it is possible for a defendant to waive the benefit of a limitation period by agreeing not to plead it. Such an agreement may counteract consideration (*sic*) set out in sub-paragraph (c)." Nygh & Pocar, *supra* n. 97, at 91.

175. This could be done by enumerating permissible conditions or stating general criteria. If the latter approach were taken, a normative framework would be necessary, and it does not presently emerge from the American cases. See Comment, *supra* n. 173. The enterprise should also take account of the perverse incentives that a regime of conditional dismissals may create. See *id.* at 517. Cf. Braucher, "The Inconvenient Federal Forum," 60 *Harv. L. Rev.* 908, 938 (1947) (recommending that proposed federal transfer statute include a provision "that the court may order or deny transfer on condition that any party to the action comply with such terms . . . as the court in its discretion considers just"). I agree with Allan Stein, however, that "[u]nless narrowly constrained, . . . conditions can totally undermine the point of forum non [*conveniens*]." Letter from Allan Stein to Stephen Burbank, *supra* n. 134, at 2.

reason for the United States to initiate this process at The Hague.¹⁷⁶ Those on the receiving end of such implied criticism may take the view that discrimination is discrimination,¹⁷⁷ even if as a result the poor moth is blocked from the light.¹⁷⁸ But we are all, I hope, discriminating, and thus, if this provision remains in Article 22, capable of distinguishing differences in treatment that are prompted by the consistent application of factors that are nationality-neutral from differences that are causally tied to the consideration of nationality (or habitual residence).

The critical question here, I believe, is the extent to which consideration of what the Supreme Court of the United States has called "public interest factors," which includes, even if not acknowledged as such, the regulatory interests of the forum, is permissible in declining jurisdiction under draft Article 22.¹⁷⁹ It may be that, at least in most cases where the proposed convention provides the jurisdictional standards, a measure of regulatory interest is assured. But that will not be true in some cases, including particularly cases in which jurisdiction is asserted within the gray zone as authorized in draft Article 17.¹⁸⁰

If further negotiations do not lead to the restriction of Article 22 to cases in which jurisdiction is asserted under the convention, perhaps draft Article 22(3) should be revised to exempt from the non-discrimination provision cases in which jurisdiction is founded on Article 17. That may not be necessary, however, and it may not be desirable from the perspective of domestic United States law reform "under the influence, if not the command, of a private international law treaty."¹⁸¹ It would not be necessary if perceived lack of regula-

176. See von Mehren, *supra* n. 9, at 278-82.

177. See Zekoll, *supra* n. 68, at 1299. They may also point out that one's reaction to perceived discrimination may depend upon whether one is a potential victim or beneficiary, using the proposed Hague Convention as Exhibit 1. See Droz, *Preliminary Draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: Provisions on Jurisdiction*, (on file with author). Unlike the Brussels Convention, however, the proposed Hague Convention does not require Contracting States to recognize judgments entered by the courts of other Contracting States, pursuant to jurisdictional bases declared to be exorbitant, in cases not within the scope of the convention.

178. "As a moth is drawn to the light, so is a litigant drawn to the United States." *Smith Kline & French Laboratories Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (Eng. C.A. 1982).

179. See *supra* text accompanying nn. 40-45. The Special Commission's Report suggests that consideration of such matters is appropriate. See Nygh & Pocar, *supra* n. 97, at 91, quoted *supra* n. 170. Note, however, the English view that "public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the court has to make." *Lubbe v. Cape plc*, [2000] W.L.R. 1545 (H.L. 2000). See Fawcett, *supra* n. 63, at 15-16.

180. The relevance of this point depends, of course, on the answer to the question whether draft Article 22 governs in cases where jurisdiction is asserted under national law pursuant to draft Article 17. See *supra* text accompanying nn. 171-72.

181. *Supra* text accompanying n. 15.

tory interest were a permitted factor in making judgments about "exceptional circumstances" and about appropriateness of the forum under Article 22, and if United States courts applying Article 22 were candid about the influence of regulatory considerations on decisions to decline jurisdiction.¹⁸²

2. Progress in National Law

This discussion suggests that, apart from the proposed Hague Convention, but in part because of the perception of invidious discrimination in United States *forum non conveniens* law that it reflects, domestic law should be purged of differential presumptions based on nationality that supposedly implement considerations of litigation convenience but that often mask crude judgments about regulatory interest. At the same time, the doctrine should be reshaped explicitly to comprehend attention to regulatory interest,¹⁸³ an important check on jurisdictional equilibration that has nothing to do with convenience and that, indeed, cannot properly be confined to the policies underlying the substantive law. The realities of international forum selection revealed by decisions in the United States and abroad demonstrate that the American legal system is distinctive as much for the rules by which it ensures and fructifies access to court as by its rules of substantive law.¹⁸⁴

If I am correct that regulatory interest is reflected in those arrangements, including procedural arrangements, that are consequential to the implementation of substantive law norms, explicit attention to that matter should force American lawmakers finally to confront the relevance if any that the loss, not only of more favorable substantive law, but also of the ability to finance a lawsuit, should have on the decision to decline jurisdiction. Although American decisions occasionally discuss that matter, no coherent approach emerges

182. This reorientation would not necessarily eliminate discrimination, however, since the definition of regulatory interest can itself be discriminatory. See Hart Ely, "Choice of Law and the State's Interest in Protecting its Own," 23 *Wm. & Mary L. Rev.* 173 (1981).

183. See Hoffman & Rowley, *supra* n. 42.

184. See, e.g., *Piper Aircraft Co. v. Piper*, 454 U.S. 235, 252 n.18 (1981). In argument before the Appellate Committee of the House of Lords seeking to have an injunction against personal injury litigation in Texas set aside, "the defendants undertook (1) to waive their claim to punitive damages, and (2) to waive reliance on the principle of strict liability." *Airbus Industrie GIE v. Patel*, [1999] 1 A.C. 119, [1998] 2 All E.R. 257 (H.L. 1998). The American legal system is also distinctive for, and *forum non conveniens* practice is strongly influenced by, the institution of the jury. See Weintraub, "Admiralty Choice-of-Law Rules for Damages," 28 *J. Mar. L. & Com.* 237, 237, 253 (1992); Hoffman & Rowley, *supra* n. 42. "[M]ost often, party selection is dictated by the procedural characteristics of the forum concerned (costs rules, jury trial, provision for discovery etc.) or simply by the relative advantage of playing at home rather than abroad." Third Interim Report, *supra* n. 97, at 5. See Fawcett, *supra* n. 63, at 20-21.

from them.¹⁸⁵ English cases, applying doctrine that explicitly accounts for the loss of litigation advantage, are more informative, but there too coherence has been lacking, at least until recently, probably because of differences of views about what is a "legitimate" litigation advantage (which are culturally contingent).¹⁸⁶

American forum non conveniens law seems generally to contemplate dismissal rather than a stay or suspension of proceedings,¹⁸⁷ although a conditional dismissal may be the functional equivalent of a stay. In this as well, it is different from similar doctrine in some other Anglo-American jurisdictions.¹⁸⁸ It also differs from draft Article 22, which authorizes a suspension of proceedings ripening into action declining jurisdiction if "the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court," but which directs the suspending court to "proceed with the case if the court of the other State decides not to exercise jurisdiction."

Apart from the proposed Hague Convention, but again under its influence, American forum non conveniens law should be changed to make a stay rather than dismissal the norm.¹⁸⁹ Even if the recommended attention to comparative litigation finance did not yield a change in doctrine, for instance preventing a forum non conveniens dismissal where there was a domestic regulatory interest and the plaintiff lacked the ability to finance litigation elsewhere, conditional dismissals might not always guarantee that there would be a compe-

185. Compare *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987), with *Fiorenza v. United States Steel Int'l*, 311 F. Supp. 117, 120-21 (S.D.N.Y. 1969) and *Waterways Ltd. v. Barclays Bank plc*, 571 N.Y.S.2d 208 (App. Div. 1991). Cf. *Mercier v. Sheraton International, Inc.*, 981 F.2d 1345 (1st Cir. 1992) (rejecting condition that defendant waive cost-bond requirement under Turkish law).

186. See *Lubbe v. Cape plc*, [2000] 1 Lloyd's Rep. 139 (Eng. C.A. 1999); see also *Airbus Industrie GIE v. Patel*, [1999] 1 A.C. 119, [1998] 2 All E.R. 257 (H.L. 1998). On July 20, 2000, the House of Lords removed the stay upheld in the Court of Appeal in the *Lubbe* case. Critical to that decision were the findings that legal aid would not be available to the plaintiffs in South Africa and that they would have no other means of obtaining the professional representation or expert evidence that would be essential to the just adjudication of their claims. See *Lubbe v. Cape plc*, [2000] W.L.R. 1545 (H.L. 2000).

It appears that the issue can properly be considered in decisions under draft Article 22 of the proposed Hague Convention. See Nygh & Pocar, *supra* n. 97, at 91, quoted *supra* n. 170. Otherwise, if a plaintiff whose case has been suspended thereunder does not bring proceedings in a court of "the other State" within the time specified, the suspending court is required to decline to exercise jurisdiction.

187. See Robertson, "The Federal Doctrine of Forum Non Conveniens: 'An Object Lesson in Uncontrolled Discretion,'" 29 *Texas Int'l L.J.* 353, 370 n.139 (1994) ("In the federal system, dismissal is the unvarying rule.").

188. See, e.g., Kennett, *supra* n. 156, at 555.

189. See Bickel, "The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion," 35 *Cornell L.Q.* 12, 28 n.69 (1949).

tent court in the more appropriate State.¹⁹⁰ Moreover, whatever the psychological and bureaucratic benefits of getting rid of a case, preserving the opportunity to take a look at developments abroad *ex post* would ease the agony, or discipline the sincerity, of prediction, enabling American courts to respond more sensitively, and on the basis of actual information, to situations in which any relief, let alone justice, proved only theoretically possible in another forum.¹⁹¹

It might be argued that another reason for federal forum non conveniens law to change from a norm of dismissal to one of stay or suspension arises from the Supreme Court's bright line approach to that distinction for separation of powers purposes in the cognate area of abstention and from the Court's failure to date to rationalize the forum non conveniens doctrine for that purpose.¹⁹² Whatever the force of separation of powers concerns in connection with jurisdictional equilibration in general, and whatever functional differences there may be between dismissal and stay, however, it would be difficult to rest on the distinction when suspending or declining jurisdiction did not require the existence of actual litigation in another forum and was not concerned with the potential for a recognizable judgment.

Having suggested a number of changes in American forum non conveniens law for international cases, some of which are inspired by the proposed Hague Convention, I conclude this discussion by considering how such changes should be implemented and whether there is sufficient need for uniformity that federal law should provide the governing rules, or some of them, for both federal and state courts. The two questions are analytically related.

Under current conceptions of the requirements of federalism, it appears to be difficult if not impossible to carry an argument for a federal judge-made law of forum non conveniens that is binding on

190. See *Preliminary Document No. 9*, supra n. 106, at 43.

191. See Robertson, supra n. 187, at 364; id. at 371 ("in the real world, everyone knows that international plaintiffs who suffer forum non conveniens dismissals in the United States are typically unable to go forward in the hypothesized foreign forum").

The Principles address a concern expressed in many quarters about the process of declining jurisdiction, namely the prospect that it could lead to a denial of justice in which a plaintiff is left without an effective forum in which to secure relief. They do so by coupling the process of declining jurisdiction with that of *referral*. This process ensures that, in cases where a court is permitted to decline jurisdiction by these Principles, it shall always refer the matter to an alternative court, and provides a mechanism to ensure that such referral is effective.

Third Interim Report, supra n. 97, at 18.

192. See supra text accompanying n. 47-62, 112. "The Court [in *Quackenbush*] was less successful in bringing within the analytical fold post-1948 cases dismissing damages actions on the ground of *forum non conveniens*, to which it understandably imputed a separate history." Burbank, supra n. 48, at 17 (footnote omitted).

state courts.¹⁹³ Moreover, as I have suggested, it is equally difficult to sustain the continued use of federal forum non conveniens law, the scope of application of which is essentially confined to international cases—here, cases in which no other domestic court is available—as a model for state forum non conveniens law, whose scope is broader.¹⁹⁴ If uniformity is deemed sufficiently important, both considerations support federal statutory treatment of the subject, at least in international cases.

Arguments for legislation as the vehicle of change, although not for uniformity, are that it would put to rest any remaining questions about current federal judge-made doctrine as a matter of separation of powers, and that it could put to rest remaining questions prompted by special venue provisions in federal statutes.¹⁹⁵ More broadly, and a matter that does implicate uniformity where there is concurrent subject matter jurisdiction in the federal and state courts, legislation could dispose of doubts about the legitimacy of forum non conveniens dismissals under certain federal regulatory statutes.¹⁹⁶ Congress could do so simply by enumerating the federal statutory claims, if any, to which the doctrine could not be applied. Alternatively and probably preferably, Congress could articulate the relevance of regulatory interest, broadly defined, to the analysis and thus perhaps influence the development of doctrine in areas not formally reached by its commands.¹⁹⁷

193. See *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); Burbank, *supra* n. 144, at 1571-82.

194. See *supra* text accompanying nn. 39, 46.

195. Compare *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948) with *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949). See Hoffman & Rowley, *supra* n. 42.

196. Compare, e.g., *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890-91 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983) (forum non conveniens not available in federal antitrust cases) with *Capital Currency Exchange, N.V. v. National Westminster Bank plc*, 155 F.3d 603, 606-09 (2d Cir. 1998), cert. denied, 119 S. Ct. 1459 (1999) (forum non conveniens available in federal antitrust cases). See Born, *supra* n. 39, at 354-56; Hoffman & Rowley, *supra* n. 42. Recall that because of the federal transfer statute, 28 U.S.C. § 1404 (1994), a forum non conveniens dismissal from federal court will usually occur only when the alternative court is located abroad. See Robertson, *supra* n. 42, at 402.

197. I am inclined to believe that, in cases under federal regulatory statutes like the antitrust laws, a finding of legislative or prescriptive jurisdiction should usually prevent dismissal under the forum non conveniens doctrine. The choice of law process usually does not operate so as to permit the courts of another country to apply such a law, and even if inquiry as to functional equivalence is permissible when determining whether to honor a forum selection clause, see *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), I am not persuaded that the two questions need be resolved in the same way, although they should be considered together. See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985) (arbitration clause); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (arbitration clause). But see *Capital Currency Exchange, N.V. v. National Westminster Bank plc*, 155 F.3d 603 (2d Cir. 1998), cert. denied, 119 S. Ct. 1459 (1999) (antitrust claims subject to forum non conveniens dismissal, court terming "roughly

Another argument in favor of both uniformity and legislation for international cases involves the foreign relations implications of the doctrine. Although such an argument can be nothing more than theoretical justification for the exercise of federal legislative power, the proposed Hague Convention furnishes concrete evidence that existing American law is perceived to be invidiously discriminatory. Judgments about aspects of doctrine potentially eliciting that response from foreign governments should be made by those charged with the conduct of United States foreign relations, the Congress and the President.¹⁹⁸

Without suggesting that this discussion exhausts the arguments in favor of either uniformity or legislation, its ambit suggests, without even reaching contrary arguments, that any federal legislation should be of limited scope, interstitially setting certain ground rules for the application of this jurisdictional equilibration device in cases where no other domestic court is available. Even one who stresses the strategic value of discretion rather than rules to enhance judicial power¹⁹⁹ must acknowledge the need for some flexibility in making comparative assessments in the pursuit of justice in civil litigation, a need that is greater in international than in wholly domestic cases.²⁰⁰ Moreover, in the absence of a claim under federal law, of evidence that the content of the doctrine can affect foreign relations, or of far more ambitious legislation prescribing federal jurisdictional standards,²⁰¹ the case probably cannot be made for legislation that constrains the freedom of state courts to adjust, or to refuse to adjust, their jurisdictional doctrine through the use of *forum non conveniens*.

V. CONCLUSION

Although there is room for improvement in the treatment of jurisdictional equilibration in the proposed Hague Convention, the cur-

analogous" redress available under Articles 85 and 86 of the Treaty of Rome); Hoffman & Rowley, *supra* n. 42.

With respect to U.S. antitrust laws, note Article 137(1) of the Swiss Private International Law Act, which "takes up the suggestions made by scholars under the choice of law statutes of a number of continental European countries for years by stating that '[c]laims arising from anticompetitive behavior are controlled by the law of the country on whose market the claimant has immediately been affected by that behavior.'" Letter from Samuel P. Baumgartner to Stephen B. Burbank, *supra* n. 97, at 5.

198. See Burbank, *supra* n. 13, at 1337-40.

199. See, e.g., Burbank, *supra* n. 83, at 223-29.

200. Were it thought appropriate to codify the entire doctrine for international cases, I would favor "a narrowly tailored *forum non conveniens* doctrine" of the sort advocated by Professor Robertson. See Robertson, *supra* n. 187, at 378-80. See also Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) ("rather than treating *forum non conveniens* as an exceptional tool to be employed sparingly, the district court perceived it as a doctrine that compels plaintiffs to choose the optimal forum for their claim"); Fawcett, *supra* n. 63, at 12-13 (comparing the English and Australian doctrines of *forum non conveniens*).

201. See Clermont & Huang, *supra* n. 117.

rent draft provisions directed to that end represent an impressive achievement, one that marks substantial progress over comparable doctrine in the United States and under the Brussels Convention.

Treaties are not the only, although in private international law they are the best, means to bridge gaps, and to resolve conflicts, between national laws.²⁰² If a treaty proves impossible at this time, it is perhaps not too much to hope that what we have learned about other legal systems and about means to mediate between them will promote greater understanding and cooperation among the lawmakers of those systems and thus contribute to wise unilateral lawmaking for international civil litigation.

202. See Burbank, *supra* n. 3.