COMITY, INTERNATIONAL DISPUTE RESOLUTION AGREEMENTS, AND THE SUPREME COURT

STEVEN R. SWANSON*

INTRODUCTION

The massive expansion of global contacts in the twentieth century has mandated the creation of dispute resolution mechanisms for international business conflicts. During this period, the judicial systems of many nations have customarily protected the interests of their own citizens in international disputes by resolving in their favor the procedural conflicts which often arise in these cases. The effect of such favoritism has been to disadvantage parties situated outside of the forum’s physical control and within another state’s territory. Consequently, significant conflicts have developed between forum states and nations offended by what they perceive as the forum’s callous intrusions on their sovereignty.

Multilateral “conventions” have attempted to manage these delicate international conflicts. Under these agreements, certain concessions are made in order to smooth the way for the operation of international dispute resolution mechanisms. Three of the most important agreements to which the United States is a party are the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Arbitral Convention),  
the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents (Service Convention), and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention). In its own way, each of these accords was intended to

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* Associate Professor of Law, Hamline University School of Law. A.B., Bowdoin College; J.D., Vanderbilt University; L.L.M., Yale University. The author wishes to express his appreciation to Professor Carol Swanson for her helpful comments and suggestions, and to Jodean Thronson, Hamline University School of Law ’90, for her tireless research efforts.


facilitate transnational litigation without creating international discord.

Since 1985, the Supreme Court has interpreted the provisions of all three multilateral Conventions as they apply to litigation in U.S. courts. In each case, the Court was in a position either to facilitate the development of peaceful dispute resolution mechanisms or to impede it. Collectively, the cases gave the Court an opportunity to create a coherent jurisprudential framework on which to base decisions relating to international dispute resolution.

Each of these cases implicated the doctrine of comity, a well-accepted principle, the goal of which is to further the interests of international cooperation by recognizing the "systemic value of reciprocal goodwill." The Court could have applied the comity doctrine in each case to encourage the growth of international cooperation. Instead, the Supreme Court's results were mixed, even schizophrenic.

This article will trace the development of the comity doctrine by examining the three Conventions and the cases which interpret them. It first offers a brief historical background of the problems faced by international litigators prior to the existence of international dispute resolution mechanisms, and then examines how the three Conventions addressed these problems. The article next looks at the Supreme Court cases that challenged each Convention. It then criticizes the Supreme Court's lack of analytical consistency in deciding these cases, and goes on to discuss the advantages of the comity doctrine, ultimately applying the doctrine to each of the cases as the author believes the Supreme Court should have applied it. It is hoped that this study will assist the courts in creating a healthier environment for the further development of international dispute resolution mechanisms.

HISTORICAL BACKGROUND

Before nations attempted to formulate agreements on various forms of judicial cooperation, the civil litigator was faced with a myriad of procedural difficulties. Service of process, discovery, and enforcement of arbi-


7. For two excellent discussions of the problems faced by a U.S. lawyer in litigating claims against foreign nationals, see Jones, International Judicial Assistance: Procedural Chaos and a Pro-
tral judgments all posed major hurdles. First, when attempting to serve foreign parties, U.S. litigators had to examine the law of the country where service was sought. Many times, service requirements were contrary to U.S. procedure and often required the assistance of foreign officials. Unfortunately, the help of U.S. consular officials was generally unavailable. These difficulties in effecting proper service became particularly important when the civil litigator attempted to enforce the resulting American judgment in the foreign country where service was made, since many countries would not recognize a judgment if they believed service was faulty.

Second, efforts to obtain evidence abroad were even more difficult. Since the U.S. legal system is known worldwide for allowing plaintiffs to use discovery as a fishing expedition, a number of countries passed statutes blocking liberal discovery attempts by U.S. plaintiffs. Even in the absence of blocking statutes, obtaining evidence abroad was nevertheless problematic. For example, lawyers attempting to take depositions from foreign countries often encountered hostile local officials. Although bilateral agreement to various treaties provided some relief by allowing U.S. consular officials to take depositions of American citizens under certain conditions, practice from country to country varied greatly, thereby seri-


8. See Jones, supra note 7, at 536. Jones gives an example of the type of problem that can be created:

[O]ur law generally requires verification of proof of service, a requirement unknown to the civil law. Officials in civilian countries look askance at swearing an oath in connection with such a routine matter; foreign process servers may refuse—as have Danish process servers—to do more than “subscribe” their proof of service. This abridged proof of service apparently has been considered insufficient by some of our courts, even though no other proof was possible under foreign law.

Id. at 537 (footnotes omitted).

9. Id. at 536.

10. Id. at 537. For a list of factors to consider in serving process abroad, see 1 B. Ristau, International Judicial Assistance (Civil and Commercial) § 3-6 (1986).


13. See B. Ristau, supra note 10, § 3-27.

14. For a humorous, but somewhat shocking, story about such troubles, see Jones, supra note 7, at 520.

15. See Jones, supra note 7, at 523-24 n.18 and accompanying text. Another method available was the use of Letters Rogatory, formal requests by one court for judicial assistance from a foreign court. In practice, this method can be quite unsatisfactory, since it is time consuming and often pro-
ously limiting the utility of such treaties.\textsuperscript{16} Thus, U.S. parties experienced enormous difficulties when evidence crucial to a claim was located abroad.

Finally, lawyers often encountered problems with enforcement of arbitral judgments. Specifically, if a U.S. lawyer thought ahead and attempted to circumvent some of the problems discussed above through arbitration, she often found the courts to be hostile. Claiming that arbitration agreements amount to a usurpation of judicial power or that they violate public policy, U.S. courts often refused to enforce such agreements.\textsuperscript{17}

In sum, lawyers involved in international transactions faced bleak prospects. The great need for dispute resolution mechanisms to facilitate international trade was readily apparent. The development of such mechanisms is the topic of the next section.

\textbf{Conventional Wisdom}

\textit{Arbitral Convention}

Rather than easing the burden on those forced to litigate in foreign courts, the Arbitral Convention sought to allow parties to avoid foreign courts altogether through arbitration.\textsuperscript{18} Nations which subscribe to the Arbitral Convention are bound to recognize written agreements between transacting parties which mandate that differences between the parties "in respect of a defined legal relationship, whether contractual or not," should be submitted to arbitration.\textsuperscript{19}

While the Arbitral Convention provides that signatories shall recognize arbitral awards,\textsuperscript{20} it also details circumstances under which they need not recognize or enforce awards. These circumstances include incapacity of...
the parties, invalidity of the agreement under the law, lack of notice, an award beyond what the agreement anticipated, an improperly empaneled arbitral authority, improper use of procedure, and a lack of finality of the award. More generally, recognition and enforcement can be refused if:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of [the] country [in which recognition and enforcement is sought]; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Such exceptions leave obvious holes in the Arbitral Convention, allowing parties that are so inclined to argue that the court should decline to enforce an arbitral decision. In practice, however, courts rarely accept such arguments.

**Service Convention**

The Service Convention eased certain service problems associated with international litigation. Its purpose is to provide a signatory state with clear procedures which, when followed, perfect service in another signatory state. The terms of the Convention apply "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."

To accomplish this goal, the Service Convention requires that each state create a central authority to receive service requests and to ensure that those requests are carried out under either the receiving country's law or another compatible method requested by the applicant. Service is also

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21. *Id.* art. V(1).
22. *Id.* art. V(2).
24. See generally Service Convention, supra note 3.
25. Specifically, the preamble to the Service Convention states:

The States signatory to the present Convention,
Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect.

*Id.* preamble.
26. *Id.* art. 1.
27. See *id.* arts. 2, 5.
flexibly permitted through consular officials, through other consular channels, and most broadly through the use of postal channels or judicial officers of the destination state, provided there is no objection by the destination state. If the applicant follows the appropriate procedures, the destination state may refuse to serve the document "only if it deems that compliance would infringe [upon] its sovereignty or security." In practice, the Convention has provided a relatively efficient means of assuring that service is properly accomplished.

Evidence Convention

The Evidence Convention represents another significant attempt to make transnational litigation more functional. The drafters formulated a compromise between the common law system of discovery, which is left to the parties, and the civil law system of discovery, generally left to the judiciary. Specifically, the Evidence Convention provides that "a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Con-

28. Id. art. 8. Article 8 states:

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Id.

29. Id. art. 9.
30. Id. art. 10.
31. Id. art. 13. Article 13 continues:

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Id.

32. See generally Evidence Convention, supra note 4. The Preamble specifically provides:

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect...

Id. preamble.

33. For a brief discussion of civil law discovery, see SCHLESINGER, supra note 11, at 399-403.
INTERNATIONAL DISPUTE RESOLUTION

tracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act." With U.S. discovery in mind, however, the Convention allows a state to declare, at the time it becomes a party to the Convention, that letters of request relating to pre-trial discovery of documents will not be executed.

The Convention requires that each signatory state create a central authority in charge of receiving letters of request and transmitting them to the appropriate local authority for execution. The content requirements for a letter of request are somewhat more complicated than those under the Service Convention. The Evidence Convention also provides details on notice, procedure, enforcement in the state receiving the request, and the circumstances when denial of a request is appropriate. Under

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34. Evidence Convention, supra note 4, art. 1. Service of process, execution of judgments and orders, and enforcement of protective orders are excluded by the article. Id.

35. See id. art. 23. Article 23 allows a signatory state to "declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries." There has been some dispute about the meaning of this reservation. See generally Collins, The Hague Evidence Convention and Discovery: A Serious Misunderstanding?, 35 Int'l & Comp. L.Q. 765 (1986).

36. Evidence Convention, supra note 4, art. 2.

37. See id. art. 3. Article 3 of the Evidence Convention provides:

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained, or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

Id.

38. See id. art. 7.

39. See id. art. 9.

40. See id. art. 10.

41. See id. arts. 5, 12.
the Evidence Convention's terms, a request can be resisted only if the
execution falls outside judicial or sovereign functions or if it prejudices
state security. Under certain limited circumstances, the Convention per-
mits the use of a consular agent, diplomatic officer, or a commissioner to
obtain evidence. Thus, the Convention provides a relatively painless
mechanism for obtaining evidence abroad.

THE SUPREME COURT SPEAKS

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*

The first of the three recent Supreme Court decisions to address the
topic of judicial cooperation as a means of facilitating international dis-
pute resolution came in *Mitsubishi Motors Corp. v. Soler Chrysler-Ply-
mouth, Inc.* The primary question in this case was whether a general
arbitration clause in an international sales agreement compelled the arbi-
tration of alleged Sherman Antitrust Act violations.

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42. See id. art. 12. Article 12 continues:

Execution may not be refused solely on the ground that under its internal law the State
of execution claims exclusive jurisdiction over the subject-matter of the action or that its
internal law would not admit a right of action on it.

Id.

43. See id. arts. 15-22.


45. This case has been the subject of much commentary. See, e.g., Note, *International Arbitra-
tion and the Comity of Error: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 19 CONN.
of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059 (1987); Carboneau,
The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi, 19 VAND.
J. TRANSNAT'L L. 265 (1986); Cloud, Mitsubishi and the Arbitrability of Antitrust Claims: Did the
Supreme Court Throw the Baby Out with the Bathwater?, 18 LAW & POL'Y INT'L BUS. 341 (1986);
Recent Development, Arbitration: Arbitrability of Antitrust Claims in International Tribunals—
227 (1986); Allison, supra note 17; Comment, Enforcing International Commercial Arbitration

46. See 473 U.S. at 616. The case involved an agreement between Chrysler International S.A.
(CISA, a Swiss subsidiary of Chrysler Corporation), Mitsubishi (a joint venture between CISA and
Mitsubishi Heavy Industries Inc., a Japanese corporation), and Soler Chrysler-Plymouth, Inc. (a
Puerto Rican auto dealer). The agreement provided that Mitsubishi would make direct sales to Soler
which would, in turn, market the vehicles to the public in Puerto Rico. After a particularly good year,
Soler's quota was increased. The following year new car sales dropped. Soler cancelled orders and
requested permission to sell part of its quota in another market. Mitsubishi refused permission, and
no vehicles were marketed elsewhere. Mitsubishi brought suit to compel arbitration under the Arbi-
tration Act and the Convention. Soler denied Mitsubishi's allegations and brought numerous coun-
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INTERNATIONAL DISPUTE RESOLUTION

In order to understand the *Mitsubishi* decision, a review of previous cases is helpful. In 1953, the Supreme Court decided in *Wilko v. Swan*\(^\text{47}\) that an arbitration agreement could not circumvent a federal lawsuit brought under the Securities Act of 1933.\(^\text{48}\) Section 14 of that act voids "[a]ny condition, stipulation, or provision binding any person . . . to waive compliance with any provision of this subchapter . . . ."\(^\text{49}\) Since the act permits parties to select a judicial forum,\(^\text{50}\) the court found that the arbitration provision was an unlawful stipulation under section 14. Despite the presumption in favor of arbitration contained in the Arbitral Convention and its statutory equivalent, the Arbitration Act, the court concluded that Congress had intended to protect investors by refusing to allow them to waive their rights under the Securities Act.\(^\text{51}\) Thus, since the two statutes were in conflict, the Court held that the Securities Act's substantive protections prevailed over the Arbitration Act's procedural values.

Following the Supreme Court's lead, in 1968 the Second Circuit Court of Appeals found antitrust issues to be non-arbitrable in *American Safety Equipment Corp. v. J.P. Maguire & Co.*\(^\text{52}\) In that case, a licensee alleged that its license agreement, which contained an arbitration provision, was void *ab initio* because the agreement violated the Sherman Act.\(^\text{53}\) The court based its decision on the important national interest of securing a competitive economy, an interest which the court believed the judicial system must manage.\(^\text{54}\) In reaching its decision, the court made four main points: 1) deference to arbitration agreements would lessen the contributions of the private plaintiff, who plays an important role in aiding governmental enforcement of the antitrust laws through private actions; 2) Congress could not have intended that contracts of adhesion, many of which contain arbitration clauses, be resolved outside of the courts; 3) the enforcement of antitrust laws may be too complicated for arbitrators; and 4) arbitrators who are businesspersons should not be allowed to decide antitrust disputes.\(^\text{55}\)

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*claims, including those at issue here based on alleged violations of the Sherman Act. Id. at 616-20.*

47. 346 U.S. 427 (1953).
48. See id. at 438.
50. See id § 77l (1981).
51. See 346 U.S. at 434-35.
52. 391 F.2d 821 (2d Cir. 1968).
53. Id. at 823.
54. See id. at 826-27.
55. See id.
The detrimental effect of the Wilko and American Safety decisions on U.S. trade was, and is, readily apparent. Those involved in foreign trade were often required to subject themselves to U.S. courts rather than to designated arbitration authorities. Consequently, they were denied the substantial business advantages arising from freely choosing a neutral forum for dispute resolution.

Such advantages were preserved, however, by the Supreme Court in the 1974 case of Scherk v. Alberto-Culver Co. The case involved a U.S. corporation's purchase of foreign business entities from a European businessman. The question presented was whether the arbitration provision of the purchase contract was void as to claims based on the Securities Exchange Act of 1934 (You will recall that Wilko dealt with the 1933 act). In Scherk, the first important case involving arbitration following the Convention's passage, the Court upheld the parties' desire to resolve disputes by arbitration. While the Court noted the differences between the 1933 and 1934 acts, it based its decision on an entirely separate point—the importance of global commerce.

Specifically, the Court found that the international nature of the transaction in Scherk raised fundamentally different considerations than those presented in Wilko; that is, in Wilko U.S. law clearly applied, while in Scherk there was great uncertainty as to the applicable law. Accordingly, the Court stated:

56. 417 U.S. 506 (1974). Alberto Culver Co., a U.S. corporation wishing to expand overseas, entered into an agreement to purchase Scherk's holdings in several European corporations. Under the terms of the agreement, certain trademarks were transferred from Scherk to Culver. The agreement included warranties whereby Scherk guaranteed the sole and unencumbered ownership of these trademarks. When Alberto-Culver discovered that the trademarks were encumbered, it brought suit in U.S. district court. Scherk moved to dismiss on the grounds that the court lacked jurisdiction and that forum non conveniens applied. Alternatively, Scherk argued that the proceedings should be stayed until the arbitration was complete. Id. at 508-09.

57. Id. at 508.
58. Id. at 509-10.
59. See supra text accompanying note 49.
60. McClendon, Subject-Matter Arbitrability in International Cases: Mitsubishi Motors Closes the Circle, 11 N.C.J. Int'l. & COM. REG. 81, 86 (1986).
61. See 417 U.S. at 513. The Court stated that the Wilko decision dealt with the 1933 Act, which contained a provision giving a "defrauded purchaser...the 'special right' of a private remedy for civil liability" (citation omitted). Id. The Court pointed out that the 1934 Act had no similar provision and that there is no private remedy mentioned in § 10 nor in Rule 10b-5. Id. In addition, the Court found it relevant that the claimant's choice of forum is much more limited under the 1934 Act. Id. at 514.
62. Id. at 515-16. The Court opined:

In Wilko, quite apart from the arbitration provision, there was no question but that the laws of the United States...would govern disputes... The parties, the negotiations,
INTERNATIONAL DISPUTE RESOLUTION

A contractual provision specifying in advance the forum in which disputes should be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.63

Recognizing the necessity of maximizing flexibility for U.S. businesspeople wanting to be competitive in world trade, the court added:

A parochial refusal by the courts of one country to enforce an international arbitration agreement would . . . invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages . . . . Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man’s-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.64

Finally, the Court recognized that to require the use of “American standards of fairness” demeans other countries by suggesting that U.S. law is somehow superior.65 Such a provincial view would be counterproductive. After Scherk, it was uncertain whether the case’s broad reasoning applied to all international contracts and claims arising therefrom or was limited to the Securities Exchange Act of 1934. Eventually, the Supreme Court’s 1985 decision in the Mitsubishi case provided some guidance.

In Mitsubishi, an automobile manufacturer sued a dealer for breach of

and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict-of-laws problems would arise. In this case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.

Id.

63. Id. at 516.
64. Id. at 516-17.
65. Id. at 517 n.11.
the dealership agreement, which provided for arbitration. The dealer counterclaimed alleging, among other things, that the manufacturer violated the Sherman Act. The district court, relying on Scherk, ordered that the antitrust claims be arbitrated. The First Circuit Court of Appeals reversed, relying on American Safety, and the Supreme Court granted certiorari.

Writing for the majority, Justice Blackmun found that the Scherk rationale applied equally to cases involving violations of antitrust law:

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

According to Blackmun, federal policy favoring arbitration applied with "special force" in the international context in light of the U.S. accession in 1970 to the Arbitral Convention.

The Court believed that this important policy goal outweighed the arguments posited in American Safety. First, the Court rejected the argu-

66. See 473 U.S. at 617. Paragraph VI of the Sales Agreement provided:

All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association (brackets in the original).

Id.

67. Id. at 619-20. The dealer also:


Id. (footnotes omitted).

68. Id. at 620-21.


70. 473 U.S. at 629. The dealer had argued that the arbitration clause did not include an agreement to arbitrate statutory claims enacted to protect one of the parties unless that statute was specifically mentioned in the arbitration agreement. The Court rejected this argument as well, finding a federal policy favoring arbitration, whether that arbitration deals with statutorily created rights or not. Id. at 624-28.

71. Id. at 631.
ment that since many contracts which give rise to antitrust disputes are adhesion contracts, the forum determining provision should not be used. The Court felt that the party resisting arbitration can always argue that the arbitration agreement was obtained inappropriately. 72 Second, the Court denied that the complexity of antitrust claims warrants resolution of the dispute in court, since antitrust claims are not always too large to arbitrate; and even if they are complex, it is this very complexity that causes some parties to choose arbitration over more cumbersome court proceedings in the first place. 78 Next, the Court was not willing to accept the argument that it is inappropriate to use arbitrators chosen from the business community. Arbitrators are lawyers, as well as businesspeople, and the Court felt that the parties would choose those qualified to handle their disputes. 74 Finally, the Court was not convinced that a private damages remedy is the only way to uphold the important American values embodied in the antitrust laws. After all, the primary purpose of the private remedy is to provide compensation, and international arbitration may be equally efficacious in providing a remedy. 75

The breadth of the Court’s language can only lead one to conclude that the Court believed that international arbitration agreements should be enforced in all but the most sensitive areas of national concern. This decision suggests that the Court would be quite open to attempts to unify international dispute resolution mechanisms. The Court appeared to be taking a major step to encourage international dispute resolution by rejecting parochial notions that justice can only be found in a U.S. court. 76

In view of the enlightened Mitsubishi approach, one might have thought that the Court would have similarly construed the Service Convention and the Evidence Convention so as to facilitate international dis-

72. See id. at 632-33.
73. See id. at 633-34.
74. See id. at 634.
75. Id. at 634-37.
76. In dissent, Justice Stevens argued that:

(1) a fair construction of the language in the arbitration clause in the parties' contract does not encompass a claim that auto manufacturers entered into a conspiracy in violation of the antitrust laws; (2) an arbitration clause should not normally be construed to cover a statutory remedy that it does not expressly identify; (3) Congress did not intend § 2 of the Federal Arbitration Act to apply to antitrust claims; and (4) Congress did not intend the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to apply to disputes that are not covered by the Federal Arbitration Act.

Id. at 641 (Stevens, J., dissenting).
pute resolution. Unfortunately, the Court’s decisions in those areas have not been as wise.

Société Nationale Industrielle Aérospatiale v. United States
District Court

The Supreme Court addressed the application of the Evidence Convention in Société Nationale Industrielle Aérospatiale v. United States District Court. Previous court decisions were split on the Convention’s mandatory nature. Some had said that first resort to the Evidence Convention was required, while others had found that first resort was not required when the party was subject to the court’s personal jurisdiction.

Aérospatiale was brought by an injured pilot and passengers against a French plane manufacturer. In response to the plaintiffs’ document request, the French defendant moved for a protective order, arguing that the plaintiffs were required to follow the procedures mandated by the Evidence Convention. The defendant maintained that compliance with the discovery request would also violate French penal law.

The Magistrate denied the defendant’s motion because to grant a protective order would frustrate the court’s interest in protecting U.S. citizens.

81. See 482 U.S. at 524-25.
82. Id. at 525-26.
83. Id. at 526.
from harmful products. In addition, the Magistrate rejected the defendant’s argument that compliance would violate French penal law, because such law had been specifically created to “impede the enforcement of United States antitrust laws.” In reaching his conclusion, the Magistrate balanced the U.S. interest in protecting its citizens under products liability laws against the French interest in protecting its citizens from invasive discovery requests.

On appeal, the Eighth Circuit found the Evidence Convention to be inapplicable to foreign parties over whom the district court has jurisdiction. The appellate court felt that the Convention is only applicable to non-parties. Thus, the plaintiff was not required to use the Evidence Convention’s discovery procedures.

The Supreme Court, in addressing the applicability of the Evidence Convention, began its analysis of the case by outlining the four possible interpretations of the Convention’s scope:

Two of these interpretations assume that the Hague [Evidence] Convention by its terms dictates the extent to which it supplants normal discovery rules. First, the Hague Convention might be read as requiring its use to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court. Second, the Hague Convention might be interpreted to require first, but not exclusive, use of its procedures. Two other interpretations assume that international comity, rather than the obligations created by the treaty, should guide judicial resort to the Hague Convention. Third, then, the Convention might be viewed as establishing a supplemental set of discovery procedures, strictly optional under treaty law, to which concerns of comity nevertheless require first resort by American courts in all cases. Fourth, the treaty may be viewed as an undertaking among sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate, after considering the situations of the parties before it as well as the interests of the concerned foreign state.

The Court immediately rejected the first two options as excluded by the

84. Id. at 526-27.
85. Id. at 527.
86. Id.
87. See In re Société Nationale Industrielle Aérospatiale, 782 F.2d 120, 124 (8th Cir. 1986).
88. See id. at 125.
89. 482 U.S. at 533.
Convention's language. According to the Court, the Convention's use of permissive words such as "may" rather than mandatory words like "shall" clearly establish that the Convention's procedures are not mandatory.⁹⁰ The Court found that this position was buttressed by Article 23 of the Convention, which allows a contracting state to refuse to execute a request for pretrial discovery of documents in a common-law country.⁹¹ The Court was convinced that common law countries like the United States would never have agreed to such a provision had the Convention been intended to serve as the sole vehicle for discovery.⁹² In any event, the Court was not going to find the Convention mandatory without "explicit textual support."⁹³

The decision also mentioned that "asymmetries" would be created by finding the Evidence Convention's provisions to be mandatory.⁹⁴ In an action between a U.S. national and a foreign citizen, the foreigner could use the liberal Federal Rules of Civil Procedure, while the U.S. national would be required to resort first to the Convention. As a result of this "asymmetry," competition between U.S. and foreign companies would be skewed to the detriment of U.S. companies in American courts. Moreover, requiring the Convention's use would disadvantage any U.S. plaintiff suing someone in a signatory country, as opposed to suing someone in a non-signatory country.⁹⁶

Although he found that the Convention is not mandatory, Justice Stevens nevertheless concluded that it is not altogether inapplicable to foreign litigants over whom the court has jurisdiction. Instead, he held that the Evidence Convention, by its own terms, does in fact apply in obtaining evidence from anyone abroad, party or non-party.⁹⁸

In continuing, however, Stevens then dismissed the defendant's argument that courts should always attempt to apply the Convention's procedures as a matter of first resort.⁹⁷ First, Stevens noted that the treaty itself does not specifically mention such a duty.⁹⁸ Second, Stevens reasoned that U.S. litigants should not be automatically required to use the Convention since its procedures "would be unduly time-consuming and expensive, as well as less certain to produce needed evidence than direct use of the Fed-

⁹⁰ See id. at 534-35.
⁹¹ See Evidence Convention, supra note 4, art. 23.
⁹² See id. at 536-37.
⁹³ Id. at 537.
⁹⁴ See id. at 540 n.25.
⁹⁵ Id.
⁹⁶ See id. at 541.
⁹⁷ See id. at 541-42.
⁹⁸ See id. at 543-44.
eral Rules. Third, Stevens believed that comity requires "a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners’ proposed general rule would generate." In conclusion, Stevens found that comity may require the Convention’s use in an individual case, but not as a general rule.

In order to make that individual determination, the Court suggested looking to the "particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective." Although the Court refused to provide a comprehensive "laundry list" of significant considerations, it did reference the Restatement of Foreign Relations Law of the United States (Revised) section 437(1)(c) as listing factors relevant to the comity analysis. Noting numerous foreign complaints about the intrusiveness of U.S. discovery requests, the Court also urged particular caution on the part of lower courts to use "special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position."

Oddly, Stevens’ opinion ignored arguments made by the governments of France, the Federal Republic of Germany, Switzerland, and the United Kingdom, all of whom filed amicus briefs in support of the petitioner. France, in particular, believed that the Evidence Convention is "the only legal means of obtaining evidence in civil or commercial matters for the requirements of a judicial procedure."

Justice Blackmun, concurring in part and dissenting in part, criticized the majority for several reasons. First, the majority opinion relegated the Convention to an optional status. The practical effect of this determination would find the Convention rarely used, since if not intended as the normal method for discovery, other countries would have no reason to

99. Id. at 542.
100. Id. at 543-44.
101. See id. at 544.
102. Id.
103. See id. at 544 n.28.
104. Id. at 546.
107. 482 U.S. at 548 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun was joined in his opinion by Justices Brennan, Marshall, and O’Connor. Id. at 547.

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agree to its terms.\textsuperscript{108} In addition, Blackmun believed that the Convention would in fact benefit U.S. citizens since it would help “to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems.”\textsuperscript{109} Furthermore, the Justice pointed out that the majority had no support for its statement that the Convention’s procedures may be too slow and costly.\textsuperscript{110} In response to the concern that Article 23 frequently allows nations to limit certain discovery, Blackmun maintained that such reservations generally pertain only to vague or irrelevant document requests.\textsuperscript{111} Therefore, rather than requiring courts to apply a comity analysis on a case-by-case basis, Blackmun believed they should automatically resort to the Convention, which inherently provides a comprehensive comity analysis.\textsuperscript{112}

Blackmun also denied any “asymmetric” unfairness arising from the requirement that U.S. litigants use the Convention, while foreign litigants use the more expansive methods provided in the Federal Rules of Civil Procedure.\textsuperscript{113} First, the district court can limit discovery when justice requires. Second, the majority wrongly focused on the party’s nationality, rather than the location of the evidence. A U.S. plaintiff may have to use the Convention to gain evidence from a foreign branch of a U.S. corporation. Third, Blackmun saw no unfairness in requiring that a party seeking discovery from a signatory country use the Convention, while proceeding under the Federal Rules for discovery from non-signatories. Blackmun pointed out that the Convention’s purpose is not to make obtaining evidence more difficult, but to make it easier. There may be unequal treatment, but this is inherent in any multilateral Convention not ratified by all the world’s nations. In any case, Blackmun felt that the party permitted to use the Convention is actually in the better position.\textsuperscript{114}

Blackmun concluded that there should be no rigid first-use requirement, but an attempt to use the Convention should be made because it is the “best way to discover if it will be successful, particularly in the present state of general inexperience with the implementation of its proce-

\textsuperscript{108} Id. at 550.
\textsuperscript{109} Id. In addition, the opinion suggests that by ignoring the executive’s involvement in determining the discovery process, the court could create friction in the handling of foreign affairs; Blackmun argues that the Executive and Congress are in a far better position to make these decisions than the lower courts, who may often have a pro-forum bias. Id. at 551-53.
\textsuperscript{110} See id. at 561.
\textsuperscript{111} See id. at 563-65.
\textsuperscript{112} See id. at 556.
\textsuperscript{113} See id. at 565-66.
\textsuperscript{114} See id.
dures by the various contracting states." Blackmun ended his opinion by stating:

I can only hope that courts faced with discovery requests for materials in foreign countries will avoid the parochial views that too often have characterized the decisions to date. Many of the considerations that lead me to the conclusion that there should be a general presumption favoring use of the Convention should also carry force when courts analyze particular cases. The majority fails to offer guidance in this endeavor, and thus it has missed its opportunity to provide predictable and effective procedures for international litigants in United States courts. It now falls to the lower courts to recognize the needs of the international commercial system and the accommodation of those needs already endorsed by the political branches and embodied in the Convention. To the extent indicated, I respectfully dissent.

_Volkswagen Aktiengesellschaft v. Schlunk_117

The most recent Supreme Court case having a major effect on international judicial cooperation is _Volkswagenwerk Aktiengesellschaft v. Schlunk_. That case involved a wrongful death action brought initially against Volkswagen of America (VWoA) for having designed and sold a defective automobile to the respondent's parents. The respondent alleged that the defects were a factor in their death. VWoA's answer pointed out that it did not design or manufacture the vehicle. In an amended complaint, the respondent added the true designer and manufacturer, Volkswagen Aktiengesellschaft (VWAG), as a defendant.118

VWAG is a corporation organized under the laws of, and doing business in, the Federal Republic of Germany. It wholly owns VWoA. Schlunk served VWAG by serving VWoA as the parent company's agent. VWAG specially appeared to contest such service, arguing that the respondent had to proceed under the Service Convention.119 The Illinois Circuit Court denied the motion, concluding that the close relationship of VWoA and VWAG made the subsidiary its parent's involuntary agent for

115. _Id._ at 566-67.
116. _Id._ at 568.
118. _Id._ at 2106. The suit also alleged negligence on the part of the other automobile's driver. That defendant defaulted, and therefore took no part in the appeal. _Id._
119. _Id._
service of process.120 Because service was possible in the United States, the court reasoned that the Service Convention was not applicable.121 Adopting the same analysis, the appellate court also ruled that the Service Convention was inapplicable.122 The Illinois Supreme Court denied leave to appeal.123 The U.S. Supreme Court granted certiorari to resolve the question concerning the Service Convention’s applicability.124

Justice O’Connor concluded that the Service Convention did not apply.125 Beginning with an analysis of the Convention’s language, she found that by its own terms the Convention applies whenever there is “occasion to transmit a judicial or extrajudicial document for service abroad.”126 Because the Convention does not define “service abroad,” O’Connor looked to the forum state’s internal law to define the term.127 In support of this course of action, O’Connor noted that the negotiating history of the Convention included efforts to add a provision that defined service abroad according to the law of the forum state; however, she added that these changes were rejected since the Convention already implied that the term is to be so defined.128 Thus, the Illinois court’s decision characterizing service on an involuntary agent as local in nature, rather than as service abroad, was deemed conclusive.

O’Connor further addressed the argument that such an interpretation would allow the much maligned notification au parquet.129 Under this method of service, the defendant is deemed served when the complaint is deposited with a forum state official. Although that official is supposed to notify the defendant, no attempt to provide notification to the defendant is

120. Id. at 2106-07. The Illinois court based its decision on “the facts that VWoA is a wholly-owned subsidiary of VWAG, that a majority of the members of the board of directors of VWoA are members of the board of VWAG, and that VWoA is by contract the exclusive importer and distributor of VWAG products sold in the United States.” Id. at 2107.
121. See id. at 2107.
123. See 112 Ill. 2d 595 (1986).
125. See 108 S. Ct. at 2112.
126. See id. at 2108 (quoting Service Convention, supra note 3, art. 1).
127. See id. at 2109.
128. See id.
129. See id. at 2110.
necessary for service to be effective. Arguably, if forum law determines when service abroad is made, notification au parquet could constitute service within the forum state, and the Convention would be inapplicable. O’Connor dismissed this argument as follows:

The parties make conflicting representations about whether foreign laws authorizing notification au parquet command the transmittal of documents for service abroad within the meaning of the Convention. The final report is itself somewhat equivocal. It says that, although the strict language of Article 1 might raise a question as to whether the Convention regulates notification au parquet, the understanding of the drafting Commission, based on the debates, is that the Convention would apply. Although this statement might affect our decision as to whether the Convention applies to notification au parquet, an issue we do not resolve today, there is no comparable evidence in the negotiating history that the Convention was meant to apply to substituted service on a subsidiary like VWoA, which clearly does not require service abroad under the forum’s internal law.130

As for the argument that her decision ignores the Service Convention’s general purpose, O’Connor countered that the Convention’s first stated purposes are to assist service of process and to provide adequate notice.131 O’Connor argued that by allowing service on a subsidiary, she does nothing to interfere with these purposes. She denied the argument that signatory countries would now pass laws to circumvent the Convention’s provisions, and she even argued that parties might voluntarily opt for the Convention’s simple and certain procedures.132 Thus, for O’Connor, service on the domestic subsidiary was complete when made.133

Once again, the Court’s opinion made no mention of the signatory states’ reaction to the lower courts’ decisions. Germany, the United Kingdom, France, and Japan all had filed diplomatic protests with the State Department.134 Despite their apparent unanimity, the Court decided that

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130. Id. (citation omitted).
131. See id.
132. See id. at 2110-11.
133. O’Connor’s opinion adopts the reasoning of the United States in its amicus brief, which argues that “[t]he policies favoring use of the Convention do not justify imposing it, as a mandatory and exclusive regime, in every situation.” Brief for the United States as Amicus Curiae Supporting Respondent at 10, Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988) (No. 86-1052).
134. See id. at addenda A-D. The German government explained in its amicus brief that a
the Convention was inapplicable to this situation.

In his concurrence, Justice Brennan agreed that the Service Convention did not cover service to a subsidiary, but expressed concern about how the Court reached this result. Brennan did not think it appropriate to have the forum state's internal law determine what constitutes service abroad. He found that the Convention's negotiating history provided a specific substantive standard of inquiry: whether the form of process is designed to "be brought to the notice of the addressee in sufficient time." Thus, while notification au parquet is not necessarily designed to assure notification (and accordingly might not meet Brennan's substantive standard), the service in the instant case was. Brennan was particu-

German court would not be allowed to act as the Illinois court was acting in this case:

German law does not recognize the concept of an "involuntary agent" for service of process as developed by the Illinois court. Service upon an agent is invalid when such agent has not been authorized by its principal or by statute to accept service of process. Since service of process subjects a person to the adjudicatory power of the court it may be initiated and carried out only by the court. Neither the attorney, the plaintiff, nor any other private person, may serve the complaint and summons. Service of process is therefore a judicial and sovereign act. The Federal Republic of Germany accepts the fundamental principle of international law that its sovereignty ends at its borders and that it cannot perform sovereign acts abroad, except pursuant to a treaty or by permission of the foreign sovereign.

The highest German Court for Civil Matters (Bundesgerichtshof) held that service on an "involuntary agent" in Germany is invalid service upon its foreign principal and actual receipt of the complaint by the foreign defendant does not cure otherwise defective service.

The German court reasoned that the receipt of a complaint by a defendant residing abroad is not sufficient to create the legal relationship of plaintiff and defendant because: "The judicial system of the foreign country would be disregarded if informal service of process on a party residing there would suffice to create the relation of plaintiff and defendant based on and governed by German law."

Therefore, under German law a defendant's actual receipt of a complaint does not cure defective service in transnational litigation.

While German citizens are required by German law to use the Convention, U.S. citizens could avoid Convention procedures by serving a domestic "involuntary agent," if the reasoning of the Illinois court were adopted. German parties would not be notified of litigation abroad in the German language and would be required to obtain translations, which might not be feasible within the time provided for an answer. The Convention was negotiated to eliminate these problems.


135. See 108 S. Ct. at 2112 (Brennan, J., concurring). He was joined by Justice Marshall and Justice Blackmun. Id.

136. See id.

137. Id. at 2113 (quoting Service Convention, supra note 3, preamble).
INTERNATIONAL DISPUTE RESOLUTION

larly concerned about the plight of U.S. citizens involved in litigation abroad. If other countries were allowed to circumvent the Convention, Brennan felt that U.S. citizens might themselves be subject to abusive forms of process.138

COMITY AND THE CASE LAW

No Consistent Comity Analysis

The Supreme Court gave three quite different answers to the questions presented by the three Conventions. The Arbitral Convention was given a whole-hearted pledge of support from the U.S. Supreme Court in Mitsubishi, based on the needs of international comity. The Evidence Convention fared less well in Aérospatiale, as the Court threw its weight behind a case-by-case comity determination. Finally, the Court completely ignored notions of comity in Schlunk, and instead allowed state courts to circumvent the Service Convention's laudable purposes. In these three cases, the Supreme Court sends out different messages regarding the role of the comity doctrine in interpreting multilateral dispute resolution treaties. A closer look at the comity doctrine may assist in understanding how the Court went wrong.

The Comity Doctrine

International civil litigation presents problems revealing the intersection of public and private international law. Although these have often been characterized as separate areas, they are clearly interrelated.139 On the one hand, the three Supreme Court cases discussed above implicate public international law by raising the possibility that one nation's courts will offend another nation's sovereignty. Should that happen, the relationship between those nations may be gravely affected. On the other hand, the necessity of choosing the law to govern global business transactions implicates private international law. The comity doctrine attempts to accommodate both sets of interests.140

The Supreme Court has invoked comity on a number of occasions, most famously in Hilton v. Guyot:

138. See id. at 2117.
“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws.\textsuperscript{141}

At least one scholar traces the doctrine’s modern origin to Ulrik Huber,\textsuperscript{142} who posited three axioms on the law’s applicability:

I. The laws of each state are valid within the boundaries of this state and bind all of its subjects, but not beyond. \ldots II. All persons who are found within the boundaries of a state are held to be its subjects, whether they dwell there permanently or temporarily. \ldots III. The rulers of states arrange it by comity that the laws of each nation which are enforced within its boundaries maintain their validity everywhere, to the extent that the power or the laws of the other state and its citizens are not prejudiced.\textsuperscript{143}

Justice Story focused on the third principle in bringing the notion into American jurisprudence,\textsuperscript{144} stating:

[Comity of nations] is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter; and is inadmissible, when it is contrary to its known policy, or prejudicial to its interests.\textsuperscript{145}

Comity is based on the systemic value of cooperation. As one noted scholar has written:

\begin{itemize}
\item \textsuperscript{141} 159 U.S. 113, 163-164. See also Note, Comity, 12 VA. L. REV. 353 (1926). Black’s Law Dictionary defines comity as “[c]ourtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will.” BLACK’S LAW DICTIONARY 242 (5th ed. 1979).
\item \textsuperscript{142} See Yntema, supra note 140, at 9.
\item \textsuperscript{143} Id. at 26 n.52.
\item \textsuperscript{144} For a critical discussion of Story’s role in bringing the comity doctrine to American conflicts law, see Nadelmann, Joseph Story’s Contribution to American Conflicts Law: A Comment, 5 AM. J. LEGAL HIST. 230 (1961); see also Davies, The Influence of Huber’s De Confictu Legum on English Private International Law, 18 BRIT. Y.B. INT’L L. 49 (1937).
\item \textsuperscript{145} STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (6th ed. 1865) (footnotes omitted). For more on Story’s contribution to conflicts analysis, see Lorenzen, Story’s Commentaries on the Conflict of Laws—One Hundred Years After, 48 HARV. L. REV. 15 (1934).
\end{itemize}
INTERNATIONAL DISPUTE RESOLUTION

Employing the comity concept merely calls into play the fundamentally pragmatic principle that nations need to treat each other as they themselves would be treated in the same or similar circumstances. Cooperation and reciprocal acts of goodwill not only prevent international friction in specific instances but, more importantly, are essential to the long-term functioning of the international legal system. That system is a consensual system whose principal energizing force must necessarily be the self-interest of its members in nurturing and preserving a legal framework for effective interaction.146

The key to understanding comity, and accordingly the three Supreme Court cases discussed above, is an appreciation of the important systemic value in recognizing other states' interests. A court facing the interpretation of a dispute resolution treaty should keep in mind that the treaty’s purpose can best be effectuated by interpreting the treaty in light of international comity. In short, the treaty should further reciprocal goodwill. If the treaty is ambiguous, courts should favor the interpretation most likely to facilitate international litigation.

Using this approach, U.S. courts would further their own strong interest in a smoothly functioning litigation system. United States companies and citizens are involved in projects all over the world, making it certain that Americans are brought before other nations’ courts, just as they bring foreign parties into U.S. courts. In both cases, the existing multilateral conventions, in addition to any that may come about in the future, increase the likelihood that disputes will be resolved fairly and expeditiously. United States parties will benefit from better-functioning courts at home and abroad. In sum, a smoothly functioning system will facilitate the international ventures of American interests and improve the U.S. position in international trade.

In addition to protecting private litigants, the United States has a strong national interest in the existence of an international dispute resolution mechanism. After all, private disputes between U.S. and foreign nationals can cause international friction. The availability of judicial mechanisms to resolve these disputes helps remove this irritant from the diplomatic

146. Maier, Extraterritorial Discovery, supra note 6, at 253. See also, Maier, Extraterritorial Jurisdiction, supra note 139, at 283-284. Professor Maier also reviews a group of Supreme Court cases that have recognized the importance of U.S. decisions which further the development of a reciprocally fair system for transnational interaction. Id. at 303-16.
sphere, making international discourse less complicated. A strong international dispute resolution system is especially beneficial to a country like the United States, which has numerous commercial contacts around the world.

Thus, U.S. courts’ fundamental concern in deciding cases relating to the three treaties discussed herein should be: What interpretation will most likely further the smooth functioning of the international system? Decisions that properly invoke the comity doctrine will best answer this question.

**Rewriting the Case Law**

While the Supreme Court recognized the doctrine of comity in *Mitsubishi*, the next two cases on this topic—as stated above—reflect the Court’s failure to understand the importance of consistently applying the comity doctrine to international agreements. This section evaluates these cases as they should have been decided by the Court.

**Mitsubishi**

In the *Mitsubishi* case, Justice Blackmun emphasized the doctrine of comity, pointing to “respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system . . . .” 147 This language and the Court’s conclusion indicate that Blackmun understood the importance of furthering the system’s interests. 148 A decision that requires U.S. litigants to submit to arbitration even in cases involving important U.S. policy concerns tells the world that the United States is a responsible member of the international community, eschewing its narrow interests in order to further international trade and judicial cooperation. The decision allows businesses to arbitrate in lieu of the pitfalls created by using one or another nation’s courts. Consequently, the United States also makes it more likely that its own businesses will reap the benefits of arbitration.

Of particular import is the Court’s willingness to espouse the comity doctrine despite the Arbitral Convention’s public policy exception. The Court could easily have found that the abrogation of U.S. antitrust laws was contrary to public policy, but chose instead to emphasize the importance of maintaining unfettered international trade. This line of thought is in keeping with traditional comity notions.

147. 473 U.S. at 629.
148. Other commentators have been quite critical of the Court’s decision. See, e.g., Note, Comity of Error, supra note 45, at 465. See generally Carbonneau, supra note 45.
INTERNATIONAL DISPUTE RESOLUTION

The *Mitsubishi* case suggests that the Supreme Court understands the importance of the comity doctrine. Had it followed this line of reasoning in the later cases, the Court would have created a consistent and understandable set of norms to be used in interpreting treaties furthering international dispute resolution.

Aérospatiale

The *Aérospatiale* decision is less cognizant of the need to facilitate international transactions. First, by requiring a case-by-case comity analysis, Justice Stevens fails to recognize that such an approach will do little to further the needs of the international dispute resolution process. In addition, the decision fails to provide guidelines for the lower courts in making a comity analysis. Although the Court did reference the considerations contained in the Restatement of Foreign Relations Law of the United States (Revised) section 437(1)(c),¹⁴⁹ now contained in section 442(1)(c) of the Restatement of Foreign Relations Law (Third), it recognized that these standards may not constitute a consensus.¹⁵⁰ Although helpful, the Restatement standards do not require courts to consider the effect of their decisions on the international litigation system. Although courts are asked to consider whether the discovery order in question would effect "important interests of the United States"¹⁵¹ and whether the request would "undermine important interests of the state where the information is located,"¹⁵² no direct language urges the consideration of international interests.

One could argue that these broader interests are protected inherently when considering the individual concerns of the two nations involved. This argument, however, fails to recognize that important international interests may not be represented by either country. For example, the in-

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¹⁴⁹. See 482 U.S. at 544 n.28.
¹⁵⁰. The court cited the factors listed in the Restatement to be considered in determining whether to issue an order requiring the production of documents:

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

Id.

¹⁵¹. Id.
¹⁵². Id.
ternational process has a strong interest in peacefully settling global disputes, whereas individual countries are generally more interested in protecting local concerns. This dilemma is particularly true for the United States with its multiplicity of court systems, many of which are more attuned to local rather than to federal issues. Comity suggests reciprocal tolerance and goodwill, excellent ways of encouraging peaceful dispute settlement. The Aérospatiale Court recognized the individual parties' interests,\textsuperscript{153} and those of other nations,\textsuperscript{154} but included no language suggesting that larger issues may be implicated.

A thoughtful application of comity suggests that courts should use one of the two approaches dismissed by the Aérospatiale court. That is, the Evidence Convention should be seen as the sole means for obtaining discovery from a signatory country or, at the very least, a U.S. court should require first resort to the Convention before trying other methods. This deference would manifest the signatories' desire to create a system of dispute resolution that takes comity into account without proceeding to an additional comity investigation, as did the Aérospatiale court. Such additional investigation would likely lead to inconsistent results, a pro-forum bias and, in the long run, less accessibility of evidence located in other countries.

Application of the approaches discussed in Aérospatiale is also understandable when considering the motivation of the Convention's signatories in the first place; that is, they agreed to the Convention's provisions only because they thought that they were getting something in return. Civil law countries felt they were obtaining some control over abusive discovery requests in return for helping U.S. courts' legitimate attempts to gain evi-

\textsuperscript{153} The Court stated:

American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests.

\textit{Id.} at 546.

\textsuperscript{154} The court continued:

In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. \textit{See Hilton v. Guyot}, 159 U.S. 113 (1895). American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

\textit{Id.}
INTERNATIONAL DISPUTE RESOLUTION

dence from abroad. Unfortunately, after the Aérospatiale decision, these countries may feel betrayed because the United States has failed to keep its part of the bargain. This disappointment may lead to greater attempts to stifle U.S. courts’ actions in obtaining evidence abroad.

Some of the Court’s other arguments can be easily rebutted. First, the Court’s argument that the Evidence Convention is voluntary misreads the language. Although Article 1 states that “a judicial authority of a Contracting State may . . . request the competent authority of another Contracting State . . . to obtain evidence. . . .” the permissive word “may” was used because the Convention itself provides for alternate methods of obtaining evidence.

Second, the Court’s argument that the Convention is clearly not mandatory because common law countries would never have agreed to the inclusion of Article 23—which allows signatory nations to refuse to assist in discovery from a common law country—is equally unpersuasive. In the first place, the United States was unlikely to get a treaty without such a provision. Furthermore, a reasonable reading of Article 23 finds that it applies only when states find U.S. courts’ actions to be offensive fishing expeditions. Indeed, countries making Article 23 objections have indicated that they will only object to U.S. discovery when the U.S. request lacks specificity.

Of greatest interest is Stevens’ rejection of the argument that international comity requires either exclusive or first use of the Convention. Citing no support, Stevens argued that using the Convention is slow and expensive. Given the fact that the Convention is relatively new, there is little historical perspective from which to determine whether it is expensive or time consuming. Keeping in mind, however, that the Convention’s purpose was to facilitate international discovery, the Court should not lightly determine without evidence that the Convention does just the opposite. Even if it were eventually established that compliance with the Convention is cumbersome, it is nevertheless the only way to get the evidence in some cases.

Stevens also argued that comity requires an individualized analysis “of the respective interests of the foreign nation and the requesting nation.”

155. Evidence Convention, supra note 4, art. 1.
156. The Convention provides for taking of evidence by diplomatic or consular officers. It also makes provision for the appointment of a commissioner to take evidence. See id. arts. 15-22.
158. 482 U.S. at 544.
Nothing in the comity doctrine suggests such a requirement. As discussed above, the doctrine focuses on the needs of the international system, not the individual state. Although it is possible that the system’s needs might be advanced by a case-by-case analysis, the problems underlying such an approach are apparent. As an initial matter, it is unclear what factors would be balanced. In addition, balancing approaches almost always have an inherent bias favoring the forum state’s laws. The rule also lacks the predictability needed for international trade.

On the other hand, a general rule requiring that the Evidence Convention be utilized does much to further the interests of the international system. It provides a relatively simple and uniform way for a litigant to seek evidence in a signatory country. Such a rule also provides procedural guidelines, making it easier for the involved countries to avoid international friction. Although discovery requests under traditional methods are often regarded as special events, a uniform practice under the Convention could mature and develop so that a routine practice favoring such requests will be created, making evidence ultimately more accessible.

Finally, the Court should have considered that the signatory countries purposefully and expressly memorialized in the treaty a certain method for obtaining evidence abroad. Signatory states commenting on the proceedings in *Aérospatiale* urged that the Convention was the sole method for obtaining evidence in their jurisdiction. The Court had the option of furthering the interests of the international dispute resolution system by choosing mandatory use, or of allowing the host state a great deal of discretion to subvert those interests. The correct choice, the comity choice, would have found the Convention to be the sole method for obtaining evidence in the signatory countries. Not as good, but still better than the Court’s decision, would have been a mandatory first use requirement.

159. Justice Blackmun’s opinion includes a list of Supreme Court cases in which a comity analysis was used to create a general rule:


... *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983) ...

482 U.S. at 554-55 nn.7-9.
which would have allowed the Court to observe how the Convention works for a period of years before making a decision on whether the Evidence Convention should become the sole method for obtaining evidence.

In sum, the Aérospatiale decision did not completely ignore the importance of the comity doctrine in determining the Convention’s meaning. Instead, the Court used comity to provide rather vague standards for how the lower courts should pursue foreign discovery. The Court did not dispose of the comity doctrine; it simply used it in a way that does little to further the interests of the international dispute resolution system.

Schlunk

Unlike the Aérospatiale decision, Justice O’Connor’s opinion in Volkswagenwerk Aktiengesellschaft v. Schlunk does not even mention comity, despite its obvious relevance. There is no doubt that the issue was expressly argued before the Court. In its brief, petitioner argued that the Illinois courts violated notions of international comity,160 while respondent countered that no such violation occurred.161

In searching to define “service abroad,” Justice O’Connor’s opinion ignored reasoned arguments based on the intended elimination of notification au parquet. Although O’Connor willingly admitted that one of the Service Convention’s purposes may have been to eliminate this abusive form of process,162 she refused to see how the case before her implicated such concerns. A decision that the host country has unfettered discretion to determine what constitutes service abroad makes it clear that each state may choose whatever means it wishes to avoid the Convention, which was intended to eliminate notification au parquet and all equally abusive forms of process. In short, the O’Connor opinion permits each state to manipulate its laws to avoid service abroad. Clearly, such a result runs contrary to the intent of the Service Convention and ignores the concerns represented by international comity.

The Service Convention’s primary purposes are to expedite service abroad, to enhance the likelihood that interested parties will receive no-

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tice, and to protect the sovereign interests of the signatory states. The Court should have considered these purposes in a comity analysis. A better decision would have furthered these interests by defining service abroad in an international context. Such an attempt would have considered the interests of U.S. defendants in foreign litigation. Unfortunately, such prospective parties now face the possibility that the Schlunk decision will provide precedent for a foreign court in determining the rights of U.S. defendants without providing service adequate to give notice.

It is unclear whether Justice Brennan’s standard that the process “be designed so that the documents ‘reach the addressee in due time . . . ’” is appropriate. Although this standard eliminates the possibility that the Convention would allow notification au parquet, it does not reflect other important comity concerns. For example, Brennan’s standard does little to protect signatory nations’ sovereign concerns. Under Brennan’s approach, any service abroad that is likely to reach the addressee is considered valid, even when the form of service would offend the addressee’s host country.

Since the Service Convention was intended to provide the exclusive method for service abroad, comity dictates that U.S. courts show deference when applying the treaty. Thus, courts should be slow to find situations in which the Convention’s provisions are not followed. The Schlunk case provided the court with the opportunity to give guidance on when the Service Convention’s procedures must be followed. In defining service abroad, the Court should have looked to the comity doctrine and focused on the needs of the international process.

The Service Convention’s obvious import is to provide the sole method for service of process on defendants in signatory countries. When the ultimate goal of an American court is to serve judicial documents on a party in a signatory state, the Convention is the sole method for service. Comity compels this conclusion. In reaching agreement on how to effect service, the signatory nations took into consideration the litigant’s needs, those of their home countries, and of the international system. This determination should not have been disturbed by the Court’s attempts to circumvent the Convention by cleverly individualized definitions of service abroad.

A Supreme Court decision requiring that all service meant to reach a party in a signatory nation must comply with the Convention would have done much to further the international system’s goals. It would have provided a simple and certain way for American plaintiffs to sue such parties. In addition, the approach would have provided U.S. citizens with greater protection against other countries’ unusual definitions of service abroad. The international system’s interests would have been furthered — after
all, a favorable decision would have encouraged nations to further codify the international dispute resolution process. Instead, the signatory countries may now feel betrayed by the U.S. decision, and may be unwilling to go further. Thus, the development of the international system is likely to stall now that one of the world's major trading nations has refused to consider international interests in interpreting its international obligations.

CONCLUSION

The three Supreme Court cases relating to international dispute resolution gave the Court the opportunity to create a coherent scheme for encouraging international dispute resolution mechanisms. In the Mitsubishi case, the Court showed great sensitivity to the policies underlying the comity doctrine by requiring parties to arbitrate matters of great public concern in the name of international comity. Less laudable was the Court's decision in Aérospatiale, which suggested a case-by-case comity analysis. Such an approach is subject to a great deal of abuse by local courts. The Aérospatiale decision is particularly troublesome because the Court failed to provide specific guidelines for the comity determination. Worst of all, the Schlunk decision rejects comity notions in favor of the parochial view that the international system's needs are irrelevant in interpreting a dispute resolution convention.

Taken together, these three decisions do little to further the interests of the international dispute resolution process. Although the Court's earliest decision adopts rational comity reasoning, the latter two reflect a misunderstanding of the doctrine's importance. A better result would have had the Court requiring the use of the Conventions' procedures for obtaining evidence and for service. This would have furthered the international community's interests by making it more likely that disputes would be settled peacefully. It would also encourage those countries involved in these efforts to continue. Unfortunately, the Supreme Court chose to value local concerns over the international system's needs.