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Essay

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Under the principle of sovereign equality of nations, nation states are entitled to equal dignity (evidenced by conventions like their voting rights in the United Nations), have the identical capacity to contract (evidenced by their ability to enter into treaties), and are not subject to a superior sovereign (evidenced by the lack of a global leviathan). This principle also has had an important effect in the field of international civil litigation, in areas such as judicial jurisdiction or sovereign immunity. As that principle has weakened over the twentieth century, risks of aggravation to comity have risen, resulting in the development of other doctrines to re-enforce comity values. Yet ironically, to the extent these comity re-enforcing doctrines invite (or require) courts of one state to sit in judgment of another state's court or legal system they have the potential to undermine the very values they seek to promote. This Article offers a fresh approach to harnessing the advantages of those doctrines while avoiding the pitfalls they can entail for comity and the sovereign equality principle.

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"This perfect equality and absolute independence of sovereigns, and this common interest impeling them to mutual intercourse, and interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation . . . One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory."[1]

INTRODUCTION

The springboard for this session of the symposium, the *Lago Agrio* litigation, presents a perfect storm for scholars of international civil litigation.[2] On the one hand, the case contains allegations of plaintiffs' counsel corrupting a country's judicial system — arguably its entire legal apparatus — to procure a multibillion dollar judgment to be used by plaintiffs to lock up Chevron's assets around the world.[3] On the other hand, the case contains efforts by Texaco to export the lawsuit from United States shores, followed by Chevron's effort to return to a United States court in an attempt to block enforcement of the *Lago Agrio* judgment.[4]

Seen through this lens, the case raises important questions concerning the extent to which one sovereign's courts can — and should — question another sovereign's actions or, more generally, the system producing those actions. The *Lago Agrio* litigation triggered these concerns in various ways. First, at the earliest stage of the litigation, the case called upon a U.S. court

1. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

2. The litigation has generated numerous reported decisions and commentary. *See, e.g.*, Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012); Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994); *see also* Lucien J. Dhooge, *Aguinda v. ChevronTexaco: Discretionary Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 28 VA. ENVTL L.J. 241 (2010); Lucien J. Dhooge, *Aguinda v. ChevronTexaco: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 19 J. TRANSNAT'L L. & POL'Y 1 (2009); Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456 (2011); Chris Jochnick & Nina Rabaeus, *Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon*, 33 SUFFOLK TRANSNAT'L L. REV. 413 (2010); Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413 (2006).

3. *See* Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *rev'd sub nom.* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012).

4. *See id.*

to evaluate the "adequacy" of the Ecuadoran legal system in the context of Texaco's motion to dismiss on grounds of *forum non conveniens*.[5] In this instance, the court was being asked to predict how Ecuador's judiciary would treat the *Lago Agrio* plaintiffs' claims if they were brought in Ecuador. Second, after the *Lago Agrio* judgment was rendered, Chevron sought a declaration from a U.S. court that the judgment was unenforceable based on alleged corruption in Ecuador's judicial system.[6] Here, the court was being asked to make a backward-looking judgment about how the Ecuadoran system in fact treated the plaintiffs' claims, and the compatibility of that system with the court's (specifically, the Southern District of New York's) judgment enforcement standards. Lastly, Chevron sought (and temporarily obtained) an antisuit injunction barring enforcement of the *Lago Agrio* judgment.[7] Here, it was asking the court to balance Ecuador's interests in seeing one of its judgments satisfied against the United States' interests in ensuring that an American-based company was not wrongly deprived of its property as a result of an allegedly fraudulently obtained judgment.

These three examples share certain common features but also differ in important respects. At some level, they all entail some series of factual findings about the Ecuadoran legal system, and require the court to lay those findings against a normative-laden standard (adequacy in the case of *forum non conveniens*, integrity of the judicial system in the case of judgment enforcement, and the interest balance in the case of the antisuit injunction). Beyond these surface similarities, however, the three inquiries differ in potentially salient respects. As already noted, the *forum non conveniens* inquiry entails a forward-looking prediction about how the Ecuadoran legal system would treat a set of claims; by contrast, the judgment enforcement and antisuit injunction inquiries entail a backward-looking assessment about what, in fact, happened in Ecuador. Furthermore, the *forum non conveniens* inquiry occurs at a time when the Ecuadoran legal system has not invested substantial resources into adjudication of the case; by contrast, the judgment enforcement inquiry occurs after those resources have been invested; the antisuit injunction (when sought) occurs at a time when other third-country enforcement forums have not dedicated any resources to the enforcement of the *Lago Agrio* judgment.

While the *Lago Agrio* litigation presents perhaps an especially colorful example, it is hardly the first time such questions have arisen. Indeed, a comprehensive survey of the field of international civil litigation reveals

5. *See Jota*, 157 F.3d 153; *Sequihua*, 847 F. Supp. 61.
6. *See Donziger*, 768 F. Supp. 2d 581.
7. *See id.*

that these questions, examined at a sufficiently high level of generality, arise with surprising regularity.[8] To identify just a few examples:

- These issues can arise at the front-end of a dispute when a U.S. court, confronted with a *forum non conveniens* motion, must decide whether the proposed foreign forum is "adequate."[9]
- These issues can arise in the middle of a dispute when a U.S. court must decide whether to order discovery in the face of a foreign blocking statute.[10]
- Finally, these issues can arise at the end of a dispute when a court must rule on a petition to enforce a foreign judgment in the face of claims that the foreign judgment is the product of a corrupt legal system.[11]

These examples represent just a few of the myriad doctrines requiring a federal court to pass judgment on the acts (or systems) of a foreign sovereign.

Despite the frequency with which these issues arise, they remain remarkably undertheorized. While much scholarship may have focused on particular doctrines or nibbled at the edges of this topic,[12] there has been far too little effort toward the construction of unified theories, whether positive or normative. This symposium represents a laudable step toward constructing such theories, regarding both what courts do and what they ought to do.

This Article seeks to help fill that void. Historically, doctrines such as the absolute theory of sovereign immunity and strict territorialist notions of jurisdiction (what I term "formalist" doctrines) effectively restrained domestic courts from regularly sitting in judgment of the acts or systems of a foreign sovereign. As those doctrines broke down and were replaced by doctrines like the restrictive theory of sovereign immunity or "effects" based standards for prescriptive or judicial jurisdictions, opportunities for jurisdictional conflict — and clash — emerged. As these doctrines raised

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8. *See generally* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (5th ed. 2011).

9. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253–54 (1981).

10. *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51 (E.D.N.Y. 2010).

11. *See, e.g.*, Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000).

12. *See, e.g.*, Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147 (2006); Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559 (2007); Joel H. Samuels, *When is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059 (2010); Steven R. Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 TUL. L. REV. 395 (2006); Christopher A. Whytock, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011).

the risks of intersovereign conflict, others, such as *forum non conveniens*, exhaustion, and comity, sought to temper these clashes.

While well-intended, this latter group of doctrines contained its own challenge to the sovereign equality principle. It invited domestic courts to sit in judgment of the acts or systems of a foreign sovereign. This could occur when, for example, a U.S. court must consider whether a foreign sovereign's interests counsel against the exercise of judicial jurisdiction or whether a foreign sovereign's judicial system is so corrupt as to warrant denying enforcement to a judgment rendered within it.

Consequently, the need for an alternative approach arises. I defend here a functional approach. By functional approach, I mean one that focuses on the judicial capacity of domestic courts to undertake these sorts of inquiries about their foreign counterparts and their legal systems; such undertakings can entail significant risks for the sovereign equality principle. Unpacking in functional terms what precisely motivates concerns about domestic courts sitting in judgment of a foreign sovereign's acts or decisions — and considering the extent to which one can mitigate those concerns — helps reconcile the sovereign equality principle with the jurisdictional competition that has marked the modern era of international civil litigation.

This Article develops those themes in three parts. Part I articulates a definition of sovereign equality, sketches out the doctrines in which issues of sovereign equality arise, and categorizes those doctrines. Part II develops a functional theory in which to examine these issues. Part III examines the implications of the functional theory for the doctrinal puzzles.

I. SOVEREIGN EQUALITY AND DOCTRINE

The concept at issue in this panel of the symposium, "the sovereign equality of nations," has received extensive treatment in the academic literature.[13] Famously embraced in the UN Charter,[14] the principle emerged from the post-Westphalian consensus that gave primacy to

13. *See, e.g.*, Charles W. Powers, *Ethics and United States Trade Policy*, *in* 5 COMM'N ON CRITICAL CHOICES FOR AMS., CRITICAL CHOICES FOR AMERICANS: TRADE, INFLATION & ETHICS 253, 261 (1976); Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 751 (1993); John H. Jackson, *The Changing Fundamentals of International Law and Ten Years of the WTO*, 8 J. INT'L ECON. L. 3 (2005); Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT'L L. 231 (2010); Carlos M. Vásquez, *Withdrawing from International Custom: Terrible Food, Small Portions*, 120 YALE L.J. ONLINE 269 (2011). For a good, if slightly dated, collection of literature, see John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 784 nn.8–9 (2003).

14. U.N. Charter art. 2, para. 1.

nation-states and, in the words of the International Court of Justice, serves as "one of the fundamental principles of the national legal order."[15]

As John Jackson has explained, the sovereign equality principle "has many dimensions."[16] One dimension of this principle focuses on sovereignty. The concept entails the complete and unfettered exercise of jurisdiction of a sovereign within its boundaries. A corollary is one of noninterference: one sovereign cannot assert jurisdiction (whether legislative or judicial) within another sovereign's territory. Finally, the concept lays the intellectual foundation for the principle of immunity — that one sovereign (or its diplomatic representatives or property) remains immune from suit in another sovereign's courts. In the words of Chief Justice Marshall from *Schooner Exchange v. McFaddon*,[17] one sovereign was implicitly waiving a small part of its absolute authority over conduct within its territory.[18]

The other dimension centers on "equality." Sovereigns became the relevant agents at the level of international law; for instance, they can consent to matters (in the case of treaties). Their conduct supplies the basis for the identification of custom in international law. No entity enjoys an authority superior to sovereign nation-states.

For several centuries following the principle's emergence, formalist doctrines adequately sustained it. Strict territorialist doctrines governed the exercise of both judicial jurisdiction and prescriptive jurisdiction by states.[19] Conflict of law rules precluded private parties from avoiding judicial or prescriptive jurisdiction by means of choice-of-law or forum selection clauses.[20] Absolute theories of sovereign immunity precluded nations from exercising jurisdiction over other nations.[21] Even when the nations themselves were not parties to a suit, one sovereign's courts refused to sit in judgment of the validity of acts taken in another sovereign's territory.[22]

In the late nineteenth and especially the twentieth century, these formalist doctrines described in the preceding paragraph began to erode, weakening the sovereign equality principle. Territorialist notions of judicial

15. Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, ¶ 57 (Feb. 3, 2012), *available at* http://tinyurl.com/85wafeo.

16. Jackson, *supra* note 13, at 782.

17. 11 U.S. (7 Cranch) 116 (1812).

18. *Id.* at 136.

19. *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Pennoyer v. Neff, 95 U.S 714 (1877).

20. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (discussing the historical judicial hostility to forum selection agreements); 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1080 (1935) (discussing unenforceability of choice-of-law clauses).

21. *See, e.g.*, Berizzi Bros. Co. v. Pesaro, 271 U.S. 562 (1926); *Schooner Exch.*, 11 U.S. (7 Cranch) at 137.

22. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

and prescriptive jurisdiction were replaced with rules permitting the extraterritorial assertion of jurisdiction over conduct that had an "effect" on the regulating sovereign.[23] Choice-of-law and choice-of-forum clauses were increasingly enforced.[24] A restrictive theory of sovereign immunity, encapsulated most famously in the Tate Letter,[25] replaced more absolutist notions.[26] Limits emerged to the act-of-state doctrine, and the foreign-sovereign-compulsion doctrine faded into obscurity.[27] The net effect of these changes would be to increase jurisdictional competition among sovereigns over the regulation of the same conduct and, consequently, the opportunities for clashes between countries. Despite the re-emergence of some territorialist doctrines in the late twentieth and early twenty-first centuries,[28] the net effect has been a weakening of the formalist notions that once buttressed the sovereign equality principle.

While these doctrinal developments weakened the principle of sovereign equality, other doctrines helped to strengthen it. For example, in the judicial jurisdiction context, the "reasonableness" prong contemplated consideration of the foreign sovereign's interests.[29] "Comity" doctrines constrained the exercise of prescriptive jurisdiction, especially in antitrust cases.[30] *Forum non conveniens* and exhaustion doctrines reduce jurisdictional conflict by channeling some cases to foreign courts even where jurisdiction of the U.S. court is authorized.[31] Finally, while sovereign immunity may be riddled with exceptions, the law still presumes the sovereign's immunity from suit.[32]

While seeking to reduce the risks of jurisdictional competition, each of these limits also had the effect of forcing courts to wade more deeply into the acts or systems of a foreign sovereign and, thus, risk offending the

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23. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (9th Cir. 1982), *vacated*, 460 U.S. 1007 (1983); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

24. *See Bremen*, 407 U.S. 1; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

25. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Philip B. Perlman, Acting U.S. Att'y Gen. (May 19, 1952), *in* 26 Dept. State Bull. 984–985 (1952).

26. *See id.*

27. *See, e.g.*, W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S 400 (1990). *See generally* BORN & RUTLEDGE, *supra* note 8, at ch. 9.

28. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (plurality opinion); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

29. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

30. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (1982) (codified at 15 U.S.C. § 6a (2006)), *as recognized in* McGlinchy v. Shell Chem. Co., 845 F.2d 802 (9th Cir. 1988).

31. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253–54 (1981); Sarei v. Rio Tinto PLC, 550 F.3d 822 (9th Cir. 2008) (en banc).

32. 28 U.S.C. § 1604 (2006).

sovereign equality principle. For example, the "reasonableness" prong of the personal jurisdiction inquiry forced courts to weigh the interests of a foreign sovereign state and, thereby, entailed the risk that some sovereign's interests would be insufficiently weighty.[33] The *forum non conveniens* doctrine required U.S. courts to decide whether a foreign judicial system was "adequate" (setting up the possibility that one sovereign's courts might be more adequate than another's). The exhaustion doctrine, designed in an effort to channel some disputes to a foreign court, forced U.S. courts also to consider whether resort to some foreign forums might be futile.[34] Foreign judgment enforcement doctrines, though founded on principles of comity, forced courts to consider whether the judgment was the product of a corrupt system.[35] Ironically then, in an effort to shore up the sovereign equality principle, these various doctrinal developments threatened to undermine it.

Efforts to moderate erosion of the sovereign equality principle have not developed in a systematic or coherent manner. Instead, they largely have emerged through judicial adaptations on the margins of the doctrine.[36] This incremental form of development ensures that courts must consider, constantly anew, how to preserve the core of the equality principle in a world of constantly conflicting assertions of jurisdiction. Consequently, it becomes critical to think systematically about these doctrinal categories and theorize how to reconcile them with the sovereign equality principle.

All doctrines implicating the sovereign equality of nations can, with the exception of some debatable grey areas, be divided into three main categories: (1) sovereign as party; (2) sovereign as adjudicator; and (3) sovereign as regulator. Categorization along these lines permits more theoretically rich consideration of the effects of these doctrines upon the sovereign equality principle.

I will begin with the easiest case — the sovereign as party. This was the type of situation envisioned by the Supreme Court of the United States in *Schooner Exchange*.[37] Such issues obviously come up in cases against foreign sovereigns under the Foreign Sovereign Immunities Act (FSIA).[38] They

33. *See, e.g.*, Afram Exp. Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1362 (7th Cir.1985).

34. *See, e.g.*, Abiola v. Abubakar, 435 F. Supp. 2d 830 (N.D. Ill. 2006).

35. *See, e.g.*, Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000).

36. To be sure, there are exceptions where Congress has spoken directly, such as the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2006 & Supp. V 2011)),the Second Hickenlooper Amendment, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (1964) (codified as amended at 22 U.S.C. § 2370(e)(2) (2006)), and the Helms-Burton Act, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified as amended at 22 U.S.C. §§ 1643l, 1643m, 6021–6024, 6031–6046, 6061–6067, 6081–6085, 6091 (2006 & Supp. V 2011)). I return to these examples *infra* Part III.

37. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

38. 28 U.S.C. §§ 1602–1611 (2006 & Supp. V 2011).

also appear in cases where an individual is being sued in his or her capacity as a representative of a foreign sovereign, such as cases involving claims of diplomatic immunity, head-of-state immunity, and official immunity.[39] Each of these cases potentially implicates the sovereign equality principle. To the extent immunity does not warrant dismissal of the suit, one sovereign's courts are sitting in judgment of the conduct of another sovereign (or that sovereign's agent). Maintenance of the suit imposes costs on the sovereign — whether in the form of litigation costs or in the form of a judgment that might be enforced in jurisdictions where the sovereign has assets. Maintenance of the suit also can ruffle the foreign relations of the United States, evidenced for example by the diplomatic protests that have been filed by sovereign governments sued as defendants.[40]

The second set of doctrines involves the state as adjudicator. The *Lago Agrio* litigation raises several such doctrines — *forum non conveniens*, judgment enforcement, and antisuit injunctions. Other doctrines falling into this category include the enforcement of arbitral awards (particularly the question whether to enforce awards set aside in the arbitral forum),[41] exhaustion,[42] and the decision whether to issue a stay *lis alibi pendens*.[43] Like the cases involving the state as a party, they too can undermine the foreign relations of the United States or the activities of the political branches. Unlike cases involving the state as a party, they do not necessarily entail the same litigation or judgment compliance costs. Nonetheless, these suits may entail some costs, depending on the degree to which the foreign judicial system already has invested in the suit. For example, cases involving doctrines such as *forum non conveniens* dismissals, exhaustion requirements (coupled with futility exceptions), and possibly personal jurisdiction dismissals, may involve relatively low costs because the foreign sovereign judicial system generally has not invested in the suit. By contrast, costs may be much higher in cases involving doctrines like judgment enforcement due to the investment of resources by the foreign sovereign.[44]

Finally, some doctrines involve cases of the state as regulator. Unlike the preceding set of doctrines, these cases do not necessarily involve a U.S. court passing judgment on the act of a foreign judiciary (or a foreign judicial system's capacity to undertake that act). Nonetheless, they entail

39. *See, e.g.*, Samantar v. Yousuf, 130 S. Ct. 2278 (2010). *See generally* BORN & RUTLEDGE, *supra* note 7, at ch. 3.

40. *See* BORN & RUTLEDGE, *supra* note 8, at ch. 3.

41. *See In re* Chromalloy Aeroservices, 939 F. Supp. 907 (D.D.C. 1996).

42. *See* Sarei v. Rio Tinto PLC, 550 F.3d 822 (9th Cir. 2008) (en banc).

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

44. Doctrines involving parallel proceedings, like antisuit injunctions and stays *lis alibi pendens*, fall between these two poles.

review of other acts, often legislative ones. For example, the act-of-state doctrine precludes U.S. courts from sitting in judgment of the validity of foreign acts of state taking place on the foreign sovereign's territory.[45] Similarly, the foreign-sovereign-compulsion doctrine precludes a U.S. court from requiring conduct that would be illegal in another state.[46] Other doctrines do not have quite the same categorical bite, but nonetheless require consideration of a foreign sovereign's legislative acts. Resolving discovery conflicts in the face of blocking statutes and public policy exceptions to the enforcement of choice-of-law clauses all require courts to balance the competing interests of the court's own sovereign and those of the foreign sovereign lawmaking body.[47] Finally, territoriality rules governing prescriptive jurisdiction can indirectly affect a foreign state as regulator to the extent the U.S. rule regulates overseas conduct in a manner different than the state in whose territory the conduct is occurring.[48]

The following table summarizes the basic framework set forth in this Part:

TABLE 1

Function of State	**Example of Doctrines Implicating the Sovereign Equality Principle**
State as Party	Sovereign immunity and exceptions
State as Regulator	Extraterritoriality; Act of State Doctrine; Foreign Sovereign Compulsion Doctrine; Choice-of-Law Rules; Discovery Disputes
State as Adjudicator	Judicial Jurisdiction; *Forum Non Conveniens*; *Lis Alibi Pendens*; Antisuit Injunctions; Judgment Enforcement Rules

45. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

46. *See, e.g.*, *In re* Vitamin C Antitrust Litig., 279 F.R.D. 90 (E.D.N.Y. 2012); Animal Sci. Prod., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 702 F. Supp. 2d 320 (D.N.J. 2010), *vacated*, 654 F.3d 462 (3d Cir. 2011); Interamerican Ref. Corp. v. Tex. Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

47. *See* BORN & RUTLEDGE, *supra* note 7, at chs. 5, 11.

48. *See id.* at ch. 8.

This Part has illustrated the myriad situations in which doctrines involving the sovereign equality of nations may arise. It also has articulated a potential framework in which to categorize those doctrines. The next Part offers a functional approach to evaluating how courts treat the sovereign equality principle in these various doctrinal categories.

II. TOWARD A FUNCTIONAL APPROACH

The preceding Part offered a working definition of the sovereign equality of nations, identified the various doctrines potentially implicating that principle, and suggested a potentially useful classification of those doctrines. This Part articulates an approach for thinking about the principle of sovereign equality in functional terms.

To be clear, by functional approach, I mean one that rejects "formalist" notions of what courts can (or should) and cannot (or should not) do. Instead, a functional approach examines the *fitness* of courts to play the particular roles that they are sometimes asked to undertake in international disputes.

Of course, at a sufficiently broad level, one can argue that the overarching concern here is one of judicial intervention in the foreign affairs of the United States. Anytime a court ventures into a case involving a foreign sovereign or conduct abroad, those risks arise. For the analysis to be more meaningful, it becomes necessary to unpack this generalized foreign affairs concern and examine the precise ways in which judicial doctrines might tread upon the sovereign equality principle. Here, I identify three specific concerns: (1) institutional; (2) constitutional; and (3) retaliation. In the following Subsections, I explore the constraint and the extent to which mechanisms exist to mitigate the risks.

A. Institutional Constraints

One set of concerns relates to the capacity of federal judges to conduct the inquiry required by these doctrines. Jurists have not come to an agreement concerning their own capacities in this regard.[49]

49. One classic formulation comes from Judge Easterbrook's opinion in the *Reinsurance* case:

> If I thought we had to do such balancing, I would be at sea. If I knew how to balance incommensurables, I would be hard pressed to agree with courts saying (as the district judge did) that a suit by the government is "more important" than private litigation. In a capitalist economy enforcement of contracts is a subject of the first magnitude. The gravity of the nation's interest is no less when it decides to enforce vital rules through private initiative. A court would need to know the "importance" of the substantive rule, which is not well correlated with the enforcement mechanism. (The antitrust laws are "more important" than the littering laws, although the former are largely enforced by private suits and the latter by public prosecutions.)

Some institutional constraints concern the court's ability to make value-laden judgments about seemingly incommensurable values. For example, some discovery disputes or the *Gilbert* factors of the *forum non conveniens* determinations expressly require judges to engage in a normative inquiry balancing the competing interests of sovereigns with a stake in the case.[50] Here, the capacity concern stems from a belief that judges lack the necessary skill and training to ascertain the "strength" of a particular sovereign's interest.

Other institutional constraints instead focus upon the court's lack of access to the relevant information necessary to make an accurate decision, and therefore raises concerns about error costs. Doctrines such as the "adequacy" determination in the *forum non conveniens* doctrine or the "bias" exception to the enforcement of foreign judgments involve different capacity concerns. Can a U.S. court ever accurately assess the Ecuadoran — or any foreign — legal system? Differences in the primary language of the two countries, or limited access to the relevant legal sources may make these concerns particularly acute. Here, the concern goes primarily to error rates rather than some institutional constraint on the court to make a normative determination.

While these institutional concerns are significant, various mechanisms might dampen their effects. For example, as to the former capacity constraint (involving interest balancing), a court can solicit the views of the U.S. Government and, where appropriate, the foreign government. The U.S. Government routinely files such statements in matters of international civil litigation.[51] By contrast, statements by foreign

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Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1284 (7th Cir. 1990) (Easterbrook, J., concurring).

A slightly different perspective comes from Judge Kozinski's opinion for the Ninth Circuit in *Patrickson*:

> Nor do we understand how a court can go about evaluating the foreign policy implications of another government's expression of interest. Assuming that foreign relations are an appropriate consideration at all, the relevant question is not whether the foreign government is pleased or displeased by the litigation, but how the case affects the interests of the United States. That is an inherently political judgment, one that courts – whether state or federal – are not competent to make. If courts were to take the interests of the foreign government into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation, dismiss it on some ground such as forum non conveniens, or deal with it in some other way. Because such political judgments are not within the competence of either state or federal courts, we can see no support for the proposition that federal courts are better equipped than state courts to deal with cases raising such concerns.

Patrickson v. Dole Food Co., 251 F.3d 795, 803–04 (9th Cir., 2001) (citations omitted).

50. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

51. *See, e.g*, Statement of Interest of the U.S., Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (Nos.

governments are less routine, but there certainly are examples of foreign governments addressing how a particular legal question affects their interest; the *Lago Agrio* litigation is a prime example.[52] As to the latter capacity constraint (involving access to relevant information and error rates), a court can (and often does) rely on experts — whether offered by the parties or designated by the court itself — to educate the court about the contours of a legal system. Those expert opinions hold forth the potential of reducing error rates in the court's assessment of a foreign legal system.

Of course, these mechanisms do not completely overcome the institutional constraints. As to the former, assessing the interests of the United States may not always be easy, particularly given the ongoing debates about the shared responsibility of the Executive Branch and Congress for the maintenance of foreign affairs. Moreover, changes in Administration may lead to changes in litigating positions, as recent experience under the Alien Tort Statute[53] or the Foreign Sovereign Immunities Act exemplifies.[54] On the foreign government front, disputes may arise over who "speaks" for the foreign government, as exemplified by the South Africa litigation.[55] As to the latter institutional constraint regarding error costs, reliance on experts merely transfers the error risks to the expert opinion, and sometimes courts must resolve disputes between the parties' experts over matters of methodology and form.

Ultimately, my goal here is not to resolve as a categorical matter whether institutional constraints are severe or capable of mitigation. Rather, my aim here is to unpack precisely what we mean when we express doubts about the capacity of courts in conducting the inquiries and, more importantly, to identify possible modes by which those capacity concerns can be addressed. In Part III we can examine at a more granular level the extent to which particular doctrines lend themselves to these types of devices, which may shape our view about when a particular doctrine threatens the sovereign equality principle.

94-9035, 94-9069); Brief for the U.S. as Amicus Curiae, Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (Nos. 86-2448, 86-15039); Memorandum for the U.S. as Amicus Curiae, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090); Supplemental Statement of Interest of the U.S., Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005) (No. CIV.A.01-1357(LFO)).

52. *See* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

53. 28 U.S.C. § 1350 (2006).

54. *See* Peter B. Rutledge, *Samantar and Executive Power*, 44 VAND. J. TRANSNAT'L L. 885 (2011).

55. *See In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 276–79 (S.D.N.Y. 2009).

B. Constitutional Constraints

Even assuming courts have the capacity to weigh the effect of an action on the sovereign equality principle, separate constitutional concerns may arise on the ground that the very undertaking is inconsistent with separation-of-powers principles. Under this critique, when courts utilize and develop doctrines that tread upon the acts of a foreign sovereign, they intrude upon the prerogatives of the political branches. These branches, so the argument goes, retain control over the foreign affairs power of the United States. Thus, absent express authorization from the political branches, courts should stay their hand. Judicially crafted doctrines such as antisuit injunctions would be inconsistent with this conception of the foreign affairs power, as would aggressive assertions of prescriptive or judicial jurisdiction absent express legislative authorization. A particularly hot-button example in international civil litigation right now is the federal courts' exercise of their residual federal common law lawmaking power under the Alien Tort Statute to impose civil liability for certain violations of the law of nations.[56]

Here too, mechanisms might exist to soften the blow to separation-of-powers principles. Most obviously, courts might solicit — and defer to — the views of the Executive Branch in weighing the effect of an assertion of jurisdiction or exercise of federal common law lawmaking power. Courts have articulated various doctrines directly tied to the Executive Branch's views, such as the policy of case-specific deference to the Executive Branch on the foreign relations implications of entertaining jurisdiction in a particular suit,[57] the *Bernstein* exception to the act-of-state doctrine,[58] and judicial acceptance of the Executive Branch's view on questions of foreign official immunity.[59]

As with the mechanisms examined in the preceding Subpart, these mechanisms are helpful, but hardly foolproof. One should not overlook the cost to the Executive Branch of having to offer its view on a case. Sometimes, the political calculus is weighty on both sides, and turning the case on the views of the Executive Branch may force the government to take a position when it prefers not to do so.[60]

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56. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

57. *See id.*, at 733 n.21; Republic of Austria v. Altmann, 541 U.S. 677, 701–02 & nn.21–22 (2004).

58. *See, e.g.*, Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

59. *See* ; Peter B. Rutledge, *Samantar, Official Immunity and Federal Common Law*, 15 LEWIS & CLARK L. REV. 589 (2011); Rutledge, *supra* note 54.

60. Such concerns animated the State Department's desire to surrender control over foreign sovereign immunity determinations and, instead, have the matter managed under the FSIA's framework.

C. Retaliation

Finally, related to the two foregoing concerns, but warranting distinct treatment, judicial activity in the field of international civil litigation may trigger concerns about retaliation. For example, countries have enacted retaliatory jurisdiction laws permitting the exercise of judicial jurisdiction over a foreign company to the extent the courts of the country where that company is located would exercise jurisdiction.[61] Other countries have enacted blocking statutes in response to assertions of discovery power by U.S. courts.[62] Along the same lines, foreign countries have enacted clawback statutes in response to extraterritorial assertions of prescriptive jurisdiction.[63] These examples certainly illustrate that actual retaliation is possible. The actual incidence of retaliation remains rare, suggesting that the doctrine is being driven more by fears that retaliation *could* occur if courts do not stay their hand in certain cases.

Various doctrines mitigate the risk, including the presumption against extraterritoriality[64] and the presumption not to construe statutes so as to interfere with the legitimate interest of foreign sovereign states.[65] Courts also have adopted rules taking the prospect of foreign sovereign retaliation into account, such as when they craft a sanction for noncompliance with a discovery order due to a foreign blocking statute.[66]

Here too, the mitigating factors are helpful but hardly complete. Canons such as those against extraterritoriality or against interference with foreign sovereign interests are easier to articulate than to apply. They beg the question how a court is to decide whether Congress has overcome the presumption or whether the interference with a foreign sovereign interest is sufficiently weighty. The devil here, as usual, is in the details.

This Part has articulated a functional framework for evaluating how legal doctrines manage the sovereign equality principle. The focus has been on various concerns that could arise when federal courts apply a particular doctrine, specifically issues of capacity, retaliation, and separation of powers. To varying degrees, escape hatches are available to courts to temper those effects on the sovereign equality principle. The final Part applies this approach to the three categories of cases — sovereign as party,

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61. *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 15 (1987).

62. *See* BORN & RUTLEDGE, *supra* note 8, at 972.

63. *See id.*, at 682.

64. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010); Love v. Associated Newspapers, Ltd., 611 F.3d 601 (2d Cir. 2010); Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29 (2d Cir. 2010).

65. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004).

66. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 442 (1987).

sovereign as adjudicator, and sovereign as legislator — that might implicate the principle.

III. THE FUNCTIONAL FRAMEWORK APPLIED

This Part combines the typology developed in Part I with the functional considerations developed in Part II. My central thesis is that the functional concerns raised in Part II are at their nadir in cases involving the state as a party, are of moderate significance in cases involving the state as regulator, and are at their zenith in cases involving state as adjudicator. The upshot of the thesis is two-fold: (1) that courts should be most sensitive to the sovereign equality principle in cases involving foreign states as adjudicators and (2) policymakers should examine additional means by which U.S. courts can mitigate those risks to the sovereign equality principle in these cases.

A. State as Party

With respect to cases where the foreign state is a party, courts suffer from relatively few capacity constraints. Enactment of the Foreign Sovereign Immunities Act has overcome both forms of capacity constraints. As to first-order capacity constraints, the FSIA has rendered the immunity determination a largely statutory inquiry, something that courts are fully equipped to undertake. As to second-order capacity constraints, both the definitions of the entities in § 1603[67] and the definition of the exceptions in § 1605,[68] do not entail the sort of value-laden determinations that troubled some judges.[69] Thus, insofar as we are concerned about judicial capacity, and whether we are dealing with first-order or second-order concerns, cases involving foreign states as parties present relatively little threat to the sovereign equality principle.

Likewise, cases involving states as parties generally do not entail significant concerns about separation of powers. The grant of jurisdiction set forth in the FSIA indicates congressional comfort with the immunity determination. For similar reasons, to the extent the assertion of jurisdiction over a foreign sovereign risks retaliation by the sovereign, Congress presumably considered this risk in weighing whether to authorize the particular grant of jurisdiction. Even where such a risk was unforeseen or is especially weighty, the Court has left open an escape hatch through

67. 28 U.S.C. § 1603 (2006).

68. 28 U.S.C. § 1605 (2006 & Supp. V 2011).

69. *See supra* note 49. Put another way, judges applying the FSIA merely are making determinations about a party's institutional affiliations and conduct rather than weighing competing interests of sovereign states.

case-by-case deference to the views of the Executive Branch on the diplomatic implications of entertaining a particular suit.[70]

Yet the FSIA also demonstrates that there are various degrees to which the political branches might retain a residual role. § 1605A[71] supplies an important counterpoint. Among other things, this section stipulates that a state can be sued under the terrorism and torture exception only if the Secretary of State has determined that the state is a "state sponsor of terrorism."[72] Conceptually, the FSIA might extend this same model to all the immunity determinations, assuring the Executive Branch a greater role in controlling the extent to which a sister sovereign state is sued.

B. State as Legislator

With respect to capacity constraints, error costs can be mitigated through effective use of party-appointed or court-appointed experts to educate the court about the foreign sovereign's law or legal system. For example, in the foreign sovereign compulsion context, such experts can educate the U.S. court on whether a foreign legal system prohibits a particular course of conduct. Likewise, in the discovery context, experts can educate a court on the penalties that might attach if a foreign party complies with a U.S. court's discovery order.

Where courts must evaluate the legislative acts of a foreign sovereign, here too they have tools to reduce the impact on foreign affairs and to mitigate the risk of retaliation. The presumption against extraterritoriality supplies a good example. Under that presumption, federal courts will presume that Congress has not intended to give a law extraterritorial effect unless it has spoken clearly. The presumption reduces the risk that courts will mistakenly entertain cases predicated on extraterritorial conduct, particularly in situations (such as antitrust) where the foreign sovereign may tolerate or even approve of the conduct.[73] Since the presumption only operates at the level of statutory interpretation however, the doctrine preserves for the political branches the ability to regulate extraterritorial conduct where they see fit (and under particular terms).

Seen against this backdrop, the Supreme Court's recent decision in *Morrison v. National Australia Bank Ltd.*[74] can be understood as an effort to re-enforce the separation-of-powers concerns underpinning the sovereign

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70. *See* Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2004).

71. 28 U.S.C. § 1605A (Supp. V 2011).

72. *See id.*

73. In this regard, the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (1982) (codified at 15 U.S.C. § 6a (2006)) offers an exceptional attempt by the political branches to hem in the assertion of prescriptive jurisdiction over extraterritorial conduct having an effect in the United States. *See* United States v. LSL Biotechnologies, 379 F.3d 672 (9th Cir. 2004).

74. 130 S. Ct. 2869 (2010).

equality principle. The Court held that the federal securities laws lacked the plain statement of congressional intent to apply to allegedly fraudulent transactions involving foreign plaintiffs taking place on foreign exchanges.[75] In the wake of the Court's decision, however, Congress amended the securities laws to restore extraterritorial application but only as to suits brought by the Justice Department or the Securities and Exchange Commission.[76] This partial overruling of *Morrison* can be understood as a vindication of the Court's decision, because Congress was forced to determine the extent to which it wished — and did not wish — to allow private plaintiffs (as opposed to government officials) to use U.S. securities laws to regulate conduct taking place on foreign soil.

Similar efforts to address separation-of-powers concerns in sovereign *qua* regulator cases can be found in the act-of-state doctrine. That federal common law doctrine, as noted above, precludes courts from sitting in judgment of the validity of the acts of a foreign sovereign taken on its own soil.[77] An underlying purpose for the doctrine is to reduce friction in the foreign relations of the United States. Based on this animating principle, some courts (though never a clear majority of the Supreme Court) have recognized an exception to the doctrine where the Executive Branch indicates that it has no objections to maintenance of the suit.[78] The *Bernstein* exception (so named for a pair of post-World War II cases that presented the issue) serves a purpose quite similar to the presumption against extraterritoriality. To buttress the sovereign equality principle, the Court articulated a doctrine rooted in separation-of-powers concerns but left space for the political branches to eliminate those concerns through a clear statement of its position.[79]

C. State as Adjudicator

With respect to first-order capacity constraints, the analysis of cases involving the state as adjudicator does not differ materially from those involving the state as regulator.

More difficult, however, is figuring out how to overcome the second-order capacity constraints on judges' abilities to balance incommensurables such as competing countries' interests in hearing a case. With respect to

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75. *See id.*, at 2877–83.

76. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–1865 (2010) (to be codified at 15 U.S.C. §§ 77v, 78aa, 80b-14).

77. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

78. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

79. Sometimes the political branches express their tolerance for such suits in an express statement in the litigation (the classic *Bernstein* exception scenario). In other cases, the political branches may express their views through legislative action taken prior to an actual dispute (as in the Second Hickenlooper Amendment or the Helms-Burton Act).

the United States at least, statements of interest provide a vehicle by which to gauge the domestic interest. With respect to foreign interests, countries might express their interests through diplomatic notes, amicus briefs, or even the enactment of legislation.

While these devices help, they are hardly fail-safes. For one thing, they present an information-forcing problem — should a sovereign (whether the United States or foreign) be required to articulate its interest in a case? Experience with sovereign immunity law prior to the FSIA's enactment suggests that governments are not always keen of being put in that position.[80] For another thing, governments change, and consequently so do their interests. The United States' litigating position under the Alien Tort Statute has changed dramatically between the Bush and Obama Administrations: similarly, Ecuador's views on the *Lago Agrio* litigation changed remarkably over the course of the case.[81] Changing governments — and consequent shifts in their litigating positions — complicate the interest balancing inquiry, especially when cases are protracted as international cases often are. Finally, even if the two foregoing problems can be overcome, courts still face the task of balancing, particularly where the sovereigns' interests collide (as they often do, for example, in the discovery context).

Risks of retaliation are especially difficult to monitor. Sovereigns might retaliate by imposing anti-antisuit injunctions or refusing to enforce U.S. judgments. Such retaliation may only materialize after the U.S. court has awarded relief (or refused to do so), requiring the court to engage in a degree of prediction about how the foreign sovereign's courts might act. Often, sovereigns do not make their views known, and instead the court is faced with a private party's representation that a particular judicial act will result in some retaliation by the foreign sovereign. Foreign sovereigns have on occasion made their views known, whether through judicial filings or communications with the State Department, but such airing of the sovereign's view tends not to occur in response to any formal mechanism. Congress might fill an important gap here by amending the United States Code explicitly to authorize courts to invite statements of interest from foreign governments, just as they do from the United States.

CONCLUSION

The *Lago Agrio* litigation supplies a good example of a case highlighting the collision between modern international civil litigation doctrines and the sovereign equality principle. As new doctrines have emerged to mitigate

80. *See* BORN & RUTLEDGE, *supra* note 8, at 233–34.

81. *See, e.g.*, Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 389 (2d Cir. 2011).

the risks of conflict and jurisdictional competition, those doctrines have forced courts to make an increasing array of normative determinations about the weight of a foreign sovereign's interests, the legitimacy of its conduct, or the adequacy of its system. Though perhaps designed to shore up the sovereign equality principle, these doctrines can end up harming it.

A functional approach reduces the risk of such harm. Such an approach trains on the capacity (and limits) of a court to undertake the inquiries demanded by these doctrines. Those capacities and limits differ radically depending on whether the court is evaluating the foreign state as a party, an adjudicator, or a regulator. Of special concern are cases where courts are asked to make prospective assessments about the risk of retaliation by a foreign sovereign and cases where courts are asked to weigh the strength of a foreign sovereign's interest. More formal mechanisms for soliciting the views of foreign governments, akin to requests for statements of interest by the United States, can lower, though not eliminate, those risks.