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Taryn M. Fry

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COMMENTS

INJUNCTION JUNCTION, WHAT'S YOUR FUNCTION? RESOLVING THE SPLIT OVER ANTISUIT INJUNCTION DEFERENCE IN FAVOR OF INTERNATIONAL COMITY

Taryn M. Fry⁺

Two companies—one American, one French—enter into a business contract for the sale of widgets. A term of the contract requires the parties to settle contract-related disputes in a third country, Switzerland, under Swiss law. The parties perform under the contract until a dispute arises. The French company, following the terms of the contract, brings suit in Switzerland. The American company also files suit; however, it does so in a U.S. district court, petitioning for an antisuit injunction.¹ What happens next?²

The answer depends on the jurisdiction in which the American company chooses to bring suit. In a majority of circuits that have addressed antisuit injunctions, the court will issue an antisuit injunction in only two instances: to protect its own jurisdiction or for reasons of public policy.³ These courts are interested in promoting international good will, otherwise known as comity.⁴

⁺ J. D. Candidate, May 2010, The Catholic University of America, Columbus School of Law. B.A. Archaeology, B.S. Geology, 2002, The George Washington University; M.A. Geoarchaeology, 2004, Boston University. First and foremost, the author would like to thank her husband Linden for his emotional support, his advice, and above all, his unending patience. The author would also like to thank Professor Peter B. Rutledge for his expert opinion, Professor Roger C. Hartley for his advice and guidance, Matthew Roche for his time and effort during the writing process, and the staff of Volume 58 for all the hard work they put in to make this a better paper. Finally, the author would like to thank her parents, Dave and Dale, for all their love and support, without which she would not be here today.

1. An antisuit injunction is an “order[] forbidding a party from imitating or participating in judicial proceedings in foreign forums.” GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 540 (4th ed. 2007).

2. A typical situation leading up to an antisuit injunction in parallel foreign litigation is as follows: the plaintiff files suit in one court while the defendant brings an action in a different court; one party then petitions the court it is before to issue an antisuit injunction to prohibit the other party from proceeding with its action. See Jose I. Astigarraga & Scott A. Burr, *Antisuit Injunctions, Anti-Antisuit Injunctions, and Other Worldly Wonders*, in *INTERNATIONAL LITIGATION STRATEGIES AND PRACTICES* 89, 90 (Barton Legum ed., 2005).

3. BORN & RUTLEDGE, *supra* note 1, at 542.

4. *Id.* Comity “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

If, on the other hand, this suit were brought in a jurisdiction following the minority approach, the court would issue the injunction simply if the parties and issues were the same in both proceedings.⁵ These courts are more apt to issue an injunction because they prefer to avoid “unnecessary delay, inconvenience, . . . expense . . . [and] inconsistent rulings.”⁶

In *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, the Eighth Circuit joined the majority of jurisdictions applying the more conservative test for issuing an antisuit injunction.⁷ In this case, Goss brought a civil suit under the Antidumping Act of 1916 against Tokyo Kikai Seisakusho, Ltd. (TKS) for dumping⁸ printing presses and press additions in the U.S. market.⁹ Japan subsequently enacted the “Special

protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). See also Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT’L L. & ECON. 1, 2 n.5 (1996) (“Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. It presupposes friendship. It assumes the prevalence of equity and justice. Experience points to the expediency of recognizing the legislative, executive, and judicial acts of other powers. We do justice that justice may be done in return.” (quoting *Russian Socialist Federated Soviet Republic v. Cibrario*, 139 N.E. 259, 260 (N.Y. 1923))). Comity is also defined as “[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.” BLACK’S LAW DICTIONARY 284 (8th ed. 2004).

5. BORN & RUTLEDGE, *supra* note 1, at 542.

6. *Id.* at 542–43 (quoting *Cargill, Inc. v. Hartford Accident & Indemnity Co.*, 531 F. Supp. 710, 715 (D. Minn. 1982)).

7. *Goss Int’l Corp. v. Man Roland Drucksmaschinen Aktiengesellschaft*, 491 F.3d 355, 361 (8th Cir. 2007) *cert. denied sub nom. Goss Int’l Corp. v. Tokyo Kikai Seisakusho*, 128 S. Ct. 2957 (2008).

8. “Dumping” is the sale of imported goods at ‘less than fair value’ (LTFV) or the difference between the product’s export price or constructed export price and its ‘normal value.’ ‘Normal value’ . . . is usually determined by the amount charged for the goods in the exporter’s domestic market (the ‘home market’).” RALPH H. FOLSOM, MICHAEL WALLACE GORDON & JOHN A. SPANOGLE, *INTERNATIONAL TRADE AND ECONOMIC RELATIONS* 127 (4th ed. 2009) (emphasis in original). Thus, antidumping duties

are a trade response to what is considered to be a “dumping” of items into the country of importation at a price which is less than the price or value charged for comparable commodities in the country of origin, usually termed “less than fair value” (LTFV). In other words, antidumping is all about price discrimination.

Id. at 122.

9. *Goss*, 491 F.3d at 356–57. Goss was the dominant printing press manufacturer in the United States for over a hundred years. *Id.* at 357. However, Goss’s market share fell when, in 1991, TKS began dumping in the United States and its share hit rock bottom in 2000, when the company did not make a single sale. *Id.* “In March 2000, Goss brought a civil action against TKS alleging violations of the [Antidumping Act of 1916]”; the jury found for Goss and awarded damages, which were trebled pursuant to the 1916 Act. *Id.* at 357–58. The Antidumping Act of 1916 was subsequently repealed; however, the repeal only applied prospectively, and therefore did not affect Goss’s award. *Id.* at 358. Prior to the repeal, Japan and the European Communities brought an action to the WTO claiming that the 1916 Act violated the United States’ WTO obligations. *Id.* at 358 n.3.

Measures Law”, which states that “any wholly-owned parent companies and subsidiaries of the party that prevailed under the 1916 Act [are] jointly and severally liable for [a] clawback judgment.”¹⁰ TKS agreed to forgo pursuing a claim under the Special Measures Law until its antidumping appeal was decided and also agreed to notify Goss fourteen days before bringing any such action.¹¹ After the Eighth Circuit affirmed the damages award granted by the jury, “TKS notified Goss of its intent to file suit under the Special Measures Law.”¹² “Goss [then] filed a motion for preliminary and permanent antisuit injunction,” and the district court temporarily enjoined TKS from filing the clawback action in a Japanese court.¹³ The Eighth Circuit ultimately vacated the district court’s injunction,¹⁴ agreeing with the majority that the conservative standard was the proper approach.¹⁵

In light of the importance of international relations in the world today, Congress should follow the Eighth Circuit’s suggestion and take the lead in adopting the conservative approach to resolve the current circuit split.¹⁶ As it stands now, six circuits follow the conservative approach,¹⁷ three circuits

10. *Id.* at 358. The Special Measures Law is “a clawback statute [that] authorize[s] Japanese corporations and/or Japanese nationals to sue in Japanese courts for recovery of the full amount of any judgment, plus interest, attorney fees and costs, awarded under the 1916 Act.” *Id.* A clawback statute allows defendants to recover from the plaintiff a portion of a multiple damage judgment awarded in a foreign country. *Id.* at 357 n.2.

11. *Id.* at 358–59.

12. *Id.* at 359. This came on “[t]he same day the Supreme Court denied TKS’s [certiorari] petition.” *Id.*

13. *Id.* After the district court issued the preliminary injunction, TKS paid the award, satisfying the initial judgment. *Id.* Whether to issue the injunction was a question of first impression in the Eighth Circuit. *Id.* at 361. The district court relied on the D.C. Circuit’s opinion in *Laker Airways, Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984), *see* discussion *infra* notes 96–112 and accompanying text, determining that comity is not as strong a factor to be considered in this case, because a judgment was already rendered. *Goss*, 491 F.3d at 361.

14. *Id.* at 368–69. The court was not persuaded that either of the two factors applied in the conservative approach—protection of the issuing court’s jurisdiction over the matter or important public policy in the issuing court—existed within the facts of this case. *Id.* at 367; *see also* discussion *infra* Part I.C.3.

15. *Goss*, 491 F.3d at 361. The court agreed with the Sixth Circuit’s support of the conservative approach in order to prevent what may be seen as disrespect for the jurisdiction and proceedings of foreign courts. *Id.* at 360 (quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992)). The court also supported the First Circuit’s observations regarding the favorable aspects of the conservative approach. *Id.* (quoting *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004)).

16. *Goss*, 491 F.3d at 361.

17. *Id.* at 359–61; *see also* Kathryn E. Vertigan, Note, *Foreign Antisuit Injunctions: Taking a Lesson from the Act of State Doctrine*, 76 GEO. WASH. L. REV. 155, 164–65 (2007) (noting that the First, Second, Third, Sixth, Eighth, and the District of Columbia Circuits have adopted some variation of the conservative approach).

follow the liberal approach,¹⁸ and three circuits have not yet had the opportunity to decide the issue.¹⁹ Neither Congress nor the Supreme Court has addressed the issue of when antisuit injunctions should be granted.²⁰ As the *Goss* court noted, because comity is necessary for international commerce, the question of when antisuit injunctions should be issued is important to the global economy.²¹ Furthermore, foreign affairs belong in the realm of the executive and legislative branches, not the judiciary.²²

This Comment discusses the two approaches used by the United States courts of appeals in deciding whether or not to issue an antisuit injunction to stay proceedings in a foreign court. Part I discusses parallel judicial proceedings in general; more specifically, it discusses antisuit injunctions and the five most common situations in which antisuit injunctions are issued. Next, it presents the different tests employed by these circuits. Finally, Part I discusses the Eighth Circuit's recent decision in *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, a case of first impression in which the court adopted the conservative approach.

Part II of this Comment analyzes the conservative and liberal approaches to issuing antisuit injunctions, as well as the Eighth Circuit's decision to follow the conservative approach. Finally, Part III proposes that the circuit split be resolved in favor of the conservative approach for reasons of international comity and confining the judiciary to its proper role. This Comment concludes by arguing that Congress should resolve this split by passing legislation mandating the conservative approach, because this issue falls within the sphere of foreign affairs, which is governed by both the legislative and executive branches. In the meantime, however, the Supreme Court should grant certiorari and resolve the split in favor of the conservative approach to end the confusion among the circuits.

18. *Goss*, 491 F.3d at 360 (noting that the Fifth, Seventh, and Ninth Circuits have adopted the liberal approach); Vertigan, *supra* note 17, at 164.

19. Vertigan, *supra* note 17, at 164–65 (noting that the Fourth, Tenth, and Eleventh Circuits have not yet decided the issue).

20. See *Goss*, 491 F.3d at 361; BORN & RUTLEDGE, *supra* note 1, at 522 (noting that no statutory guidance has been enacted in the United States to deal with parallel foreign proceedings generally, out of which antisuit injunction issues arise).

21. *Goss*, 491 F.3d at 360–61 (quoting *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004)). The court—recognizing the importance of comity in a globally connected economy—stated that trading partners need to be aware of the possible consequences of their actions. *Id.*

22. See *id.* at 361. “[T]he Congress and the President possess greater experience with, knowledge of, and expertise in international trade and economics than does the Judiciary. The two other branches, not the Judiciary, bear the constitutional duties related to foreign affairs.” *Id.*

I. THE GREAT DIVIDE: THE CIRCUIT SPLIT OVER ANTISUIT INJUNCTION DEFERENCE

A. Parallel Tracks: An Overview of Parallel Proceedings in Foreign Litigation

An antisuit injunction is one of four approaches, along with *forum non conveniens*²³ and *lis alibi pendens*,²⁴ that U.S. courts employ to deal with parallel proceedings.²⁵ An antisuit injunction permits a U.S. court to enjoin a litigant from commencing or continuing litigation in a foreign forum.²⁶ There are a variety of reasons for petitioning a court to issue an antisuit injunction, including the belief that there is a “home field advantage,”²⁷ as well as the broad discovery process in U.S. courts as compared to most foreign forums.²⁸

23. See discussion *infra* Part I.A.1.

24. See discussion *infra* Part I.A.2.

25. BORN & RUTLEDGE, *supra* note 1, at 521–22 (noting that parallel proceedings occur when parties simultaneously file suit in two courts that seek the same outcome). The *forum non conveniens* doctrine permits dismissal of an action in a U.S. court so that foreign proceedings may go forward. *Id.* at 522. *Lis alibi pendens* gives deference to the foreign proceedings by allowing the U.S. court to stay its actions until the foreign proceeding is complete; however, the scope and application of *lis pendens* is unclear because circuits are split over what test to apply in granting a *lis pendens* motion. *Id.* at 522–23. The final approach to parallel proceedings taken by U.S. courts is to allow both actions to go forward, and whichever judgment is rendered first can then be used as *res judicata* in the second forum to prevent re-litigation of the same issues. *Id.* at 522. For example, if courts in multiple nations have valid jurisdiction over a claim, each action should continue until one suit reaches judgment; once that occurs, any other court with jurisdiction should recognize and enforce any judgment rendered. RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION* 108 (4th ed. 2003). One attractive aspect of this approach is that one party may win the “race to judgment.” John Fellas and David Warne, *Choice of Forum Under United States and English Law*, in *TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION* 333, 352–53 (John Fellas ed., 2004). A variety of factors are used to determine if a prior judgment should be given preclusive effect. These factors include: actual duplication of issues; whether there was a “full and fair opportunity” to litigate; the existence of a decision on the merits in the prior proceeding; waste; the protection of the successful litigant from harassment; policy reasons; “stability and unity in international litigation;” and whether “the rendering court was the more appropriate forum.” *Id.* at 353.

26. BORN & RUTLEDGE, *supra* note 1, at 522.

27. GEORGE A. BERMANN, *TRANSNATIONAL LITIGATION* 86 (2003); see also BORN & RUTLEDGE, *supra* note 1, at 521 (noting that a court may offer a more favorable forum, law or judgment to a litigant that is a citizen of that country). For example, advantages of the U.S. legal system include contingency fees, punitive damages, jury trials, “the absence of rules making an unsuccessful party liable for the attorneys’ fees and costs of the successful party,” class action, and special causes of action. Fellas & Warne, *supra* note 25, at 333–34.

28. See, e.g., BORN & RUTLEDGE, *supra* note 1, at 907–15, 919–23, 934, 941–43 (discussing discovery methods and evidence-collecting in foreign jurisdictions). For example, the hypothetical American and French companies noted in the introduction have specified in their contract that any disputes would be settled in Swiss courts under Swiss law. Suppose the American company knows that some aspect of Swiss law will be less favorable to them; therefore, they wish to proceed in the U.S. courts regardless of the previous agreement between

As some commentators have noted, "parallel proceedings are on the rise . . . partly because of the increase in international business transactions";²⁹ thus these cases will become increasingly common in U.S. courts.

1. *Forum Non Conveniens*

A petition for a stay or dismissal under the *forum non conveniens* doctrine allows a court to determine it is not the most appropriate forum in which to bring the action.³⁰ However, a *forum non conveniens* motion will generally fail if the action is brought in the forum previously agreed upon by the parties.³¹ At the heart of many *forum non conveniens* claims is the party's fear that a foreign legal system will not give it "a fair and adequate opportunity to make out their claim or defense."³² Courts will consider a number of factors when deciding whether to grant a motion to dismiss under the *forum non conveniens* doctrine.³³ These factors include "the degree of deference to accord the plaintiff's choice of forum," "the availability of an alternative forum," convenience, and whether justice is served by choosing an alternative forum.³⁴

the parties. These less favorable laws weigh into the American company's decision to disregard the contract terms and seek an antisuit injunction from the U.S. courts. *See, e.g.,* Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir. 1998) (illustrating a situation in which a company sought to avoid application of a forum selection clause through a U.S. court); *see also* Astigarraga & Burr, *supra* note 2, at 89-90 (noting "strategic reasons why a defendant may want to file a parallel action," including defeating plaintiff's forum choice, increasing cost to force a settlement, and strengthening additional arguments for dismissal of the claim).

29. Astigarraga & Burr, *supra* note 2, at 89.

30. BERMANN, *supra* note 27, at 87. In some civil law jurisdictions, this doctrine does not see much use because "the availability of a more appropriate forum elsewhere . . . is simply not a valid ground for declining to exercise jurisdiction over a dispute." *Id.*

31. *Id.* at 93. However, if a foreign forum is selected in a choice-of-forum clause, a court is more likely to stay or dismiss the action under *forum non conveniens*. *Id.*; *see also* BORN & RUTLEDGE, *supra* note 1, at 436-37 (differentiating between exclusive and non-exclusive forum selection agreements).

32. BERMANN, *supra* note 27, at 95; *see, e.g.,* *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842, 847-52 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987) (illustrating plaintiff's concern over adequate relief in the chosen foreign forum and ultimately concluding that the Indian court will provide the plaintiffs adequate relief).

33. Fellas & Warne, *supra* note 25, at 337-38; *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947) (listing factors to be considered when implementing the *forum non conveniens* doctrine); Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 410-15 (1947) (discussing "[f]actors [j]ustifying the [e]xercise of [d]iscretion to [d]ecline [j]urisdiction" under *forum non conveniens*). Although often invoked in motions to dismiss, a stay may also be issued under the *forum non conveniens* doctrine. *See* BERMANN, *supra* note 27, at 87.

34. Fellas & Warne, *supra* note 25, at 337-38; *see also* Gulf Oil, 330 U.S. at 508; Barrett, *supra* note 33, at 410-15.

2. *Lis Alibi Pendens*

Lis pendens motions arise when identical or nearly identical claims have been brought in two or more jurisdictions.³⁵ Under this doctrine, courts should defer jurisdiction to the first court where the action is brought.³⁶ In the United States, this approach is viewed as discretionary and has created its own split among the federal circuits.³⁷

3. *Antisuit Injunctions*

Antisuit injunction cases are seen by some as “‘reverse’ *forum non conveniens* case[s]” in which a U.S. court believes that it is the most appropriate forum to resolve the dispute and therefore “enjoin[s] the defendant in that action from even attempting to have that case heard elsewhere.”³⁸ In a majority of antisuit injunction cases, the plaintiff takes the initiative by asking the court in which it brought the suit “to enjoin the defendant from instituting ‘mirror-image’ litigation in the courts of another country.”³⁹ However, because of courts’ deference to principles of international comity, “antisuit injunctions . . . are unique in the context of international litigation.”⁴⁰

35. BORN & RUTLEDGE, *supra* note 1, at 522.

36. BERMANN, *supra* note 27, at 88. *Lis pendens* aims to avoid parallel proceedings in favor of judicial economy, avoid wasting of resources, and prevent inconsistent rulings. Thus, it “presupposes that priority in the timing of the filing of litigation merits decisive consideration.” *Id.*

37. *Id.* at 107–09. Courts will sometimes refrain from exercising jurisdiction when similar or related causes of action are proceeding in a foreign court; however, this restraint is discretionary, often depending on whether the U.S. court “find[s] [a] good reason to persist in the exercise of jurisdiction . . .” *Id.* at 107. The split among the circuits, at least in terms of approaches, somewhat mirrors the antisuit injunction split in that some courts are inclined to exercise jurisdiction over a matter pending in another jurisdiction, “insisting that they are presumptively under an obligation to exercise the jurisdiction conferred on them by Congress.” *Id.* at 108. Other courts “prefer[] to treat prior-filed foreign proceedings much like actions previously filed in another federal district, . . . without any predisposition against the issuance of a stay under the *lis pendens* doctrine.” *Id.* at 108–09; *see also* BORN & RUTLEDGE, *supra* note 1, at 522–26.

38. BERMANN, *supra* note 27, at 111.

39. *Id.* at 112. If the court grants the plaintiff’s motion for an antisuit injunction “the parties over whom the court has jurisdiction [would be barred] from litigating outside that court any claims arising out of the same matters as the suit before it.” Astigarraga & Burr, *supra* note 2, at 90.

40. David J. Levy, *Antisuit Injunctions in Multinational Cases*, in INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 163, 163 (David J. Levy ed., 2003).

B. Five Common Antisuit Injunction Scenarios

Antisuit injunctions are typically sought in five situations.⁴¹ First, a litigant in the United States can seek to prevent the opposing party from bringing or continuing the same dispute in a foreign court.⁴² Second, related claims may be “consolidate[d] . . . in the moving party’s preferred forum.”⁴³ Third, a party may initiate an action in the U.S. court, requesting both an antisuit injunction and a “declaration of nonliability,” if it fears impending foreign litigation.⁴⁴ Fourth, upon completion of an action in a U.S. court, the prevailing party can prevent re-litigation of the same dispute in a foreign court.⁴⁵ Fifth, the court may prevent a party from obtaining an antisuit injunction in a foreign court.⁴⁶

C. *Splitsville: Division Among the Circuits About When to Issue an Antisuit Injunction*

United States courts have historically claimed—as part of their general power over parties subject to the court’s jurisdiction—the power to grant antisuit injunctions.⁴⁷ In the United States, the Anti-Injunction Act prohibits federal courts from staying state court actions.⁴⁸ However, no equivalent

41. BORN & RUTLEDGE, *supra* note 1, at 540–41. Antisuit injunctions are common in contract actions; for example, “courts may enjoin a party from pursuing an action in a foreign court where bringing the foreign action violated an undertaking not to sue, or to sue exclusively in a different court, . . . or to refer the dispute in question exclusively to an arbitral tribunal.” BERMANN, *supra* note 27, at 113.

42. BORN & RUTLEDGE, *supra* note 1, at 540.

43. *Id.* at 540–41.

44. *Id.* at 541.

45. *Id.*

46. *Id.* For example, the court may feel it is the most convenient or appropriate forum, as opposed to a foreign court, and thus no other court should exercise jurisdiction. BERMANN, *supra* note 27, at 88. Furthermore, a U.S. court may believe that a foreign court would decline to exercise jurisdiction under *forum non conveniens* or *lis pendens*, and thus issue an order to prevent litigation in the foreign court. *Id.* at 88–89.

47. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996); BERMANN, *supra* note 27, at 111 (“Courts have issued [antisuit injunctions] in consideration of their own general equitable powers over persons subject to their jurisdiction”). In domestic litigation, U.S. courts have issued preliminary injunctions as an equitable remedy to prevent one party from initiating litigation. In these situations, “the plaintiff [must] show that in the absence of its issuance he will suffer irreparable injury.” JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE CASES AND MATERIALS* 1040 (9th ed. 2005) (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). Thus, the party must show that no alternative remedies would provide adequate relief. *Id.* When courts are deciding whether to issue a preliminary injunction, they take into account the following factors: “1) the movant’s likelihood of success on the merits; 2) the likelihood of irreparable harm if the injunction is not issued; 3) the relative hardships faced by the parties; and 4) any relevant public policy or public interest concerns.” *Id.*

48. See CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 47 (6th ed. 2002); see also Anti-Injunction Act, 28 U.S.C. §§ 1341, 2283–84 (2006). Congress’s intent in enacting this statute was to prevent tension in the dual federal and state court system. WRIGHT &

statutory authorization governs the interplay between federal and international litigation.⁴⁹ Disagreement exists among the circuits as to what standard should apply when deciding whether to issue an antisuit injunction.⁵⁰ Essentially, this split results from a difference regarding the importance of international comity in U.S. litigation.⁵¹

1. *The Minority Approach: Flexible in Favor of Avoiding Duplicity*

The Fifth,⁵² Seventh,⁵³ and Ninth⁵⁴ Circuits have adopted a liberal approach to issuing antisuit injunctions.⁵⁵ These courts generally find that a duplication of parties and/or issues is sufficient to grant an antisuit injunction,⁵⁶ citing concerns of delay, inconvenience, expense, and the possibility of inconsistent

KANE, *supra*, § 47 at 299 (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988)). Unlike antisuit injunctions, the Anti-Injunction Act does not take comity into account. *Id.* at 302.

49. BORN & RUTLEDGE, *supra* note 1, at 522 ("There is no federal statutory or constitutional provision governing parallel proceedings in U.S. and foreign courts. Similarly, state legislation generally does not address the subject of parallel proceedings. In the absence of statutory direction, U.S. courts have fashioned several common law devices for dealing with parallel proceedings."); *see also* BERMANN, *supra* note 27, at 111 (comparing antisuit injunctions to *lis pendens*, and noting that "the use of anti-suit injunctions tends not to be addressed by statute either at the federal or state level").

50. BORN & RUTLEDGE, *supra* note 1, at 541.

51. *Id.*; *see also* *Hilton v. Guyot*, 159 U.S. 113, 164–65 (1895) (defining comity).

52. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626–27 (5th Cir. 1996); *cf.* *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1146 (5th Cir. 1989) (dismissing on *forum non conveniens* grounds after weighing public and private interest factors). *See generally* Margarita Treviño de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT'L L.J. 79, 96–99 (1999) (discussing Fifth Circuit case law involving foreign parallel litigation).

53. *See Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425, 431 (7th Cir. 1993); *see also* *Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (finding that "the district judge's injunction has [not] jeopardized amicable relations" between the United States and Argentina); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 682, 684–85 (7th Cir. 1987) (affirming stay in U.S. litigation during pendency of appeal in Belgian court). *See generally* Treviño de Coale, *supra* note 52, at 99–100 (discussing Seventh Circuit case law involving foreign parallel litigation).

54. *See Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981). *But see* *Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1195 (9th Cir. 1991) (holding the district court erred in issuing an injunction, based on abstention, because there were no "exceptional circumstances"). *See generally* Treviño de Coale, *supra* note 52, at 101–03 (discussing Ninth Circuit law involving foreign parallel litigation).

55. BORN & RUTLEDGE, *supra* note 1, at 542. This approach is also referred to as the permissive approach. Vertigan, *supra* note 17, at 164.

56. BORN & RUTLEDGE, *supra* note 1, at 542. One commentator considers the entire concept of antisuit injunctions "problematic." George A. Bermann, *The Use of Antisuit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 590 (1990) ("[T]here is something singularly problematic about injunctions prohibiting the commencement or continuation of foreign judicial proceedings.").

rulings.⁵⁷ While this approach increases the number of antisuit injunctions issued—compared to the conservative approach—it by no means guarantees that the requested injunction will be granted.⁵⁸

The Fifth Circuit used *Kaepa, Inc. v. Achilles Corp.*—which involved a dispute between an American athletic shoe company and a Japanese distributor—to announce its adoption of the liberal test.⁵⁹ The distributorship agreement formed by the companies granted Achilles “exclusive rights to market Kaepa’s footwear in Japan” and “expressly provided” that Texas law would govern the contract’s interpretation; further, the contract would be enforceable in Texas and Achilles consented to the jurisdiction of the Texas court.⁶⁰ When Kaepa became “dissatisfied with Achilles’s performance,” it filed suit in Texas for fraud and breach of contract; seven months later, Achilles brought suit in Japan for the same claims.⁶¹ Kaepa subsequently filed for an antisuit injunction to prevent Achilles’ Japanese suit, while Achilles filed for dismissal of Kaepa’s claims in the Texas district court on *forum non conveniens* grounds.⁶² The district court granted Kaepa’s motion and denied Achilles’ motion.⁶³

The Fifth Circuit began its discussion with an analysis of two prior cases,⁶⁴ *In re Unterweser Reederei GMBH*⁶⁵ and *Bethell v. Peace*.⁶⁶ The court held in

57. BORN & RUTLEDGE, *supra* note 1, at 542–43 (quoting Cargill, Inc. v. Hartford Accident & Indem. Co., 531 F. Supp. 710, 715 (D. Minn. 1982)).

58. Vertigan, *supra* note 17, at 165–66. *But see* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 375–76 (5th Cir. 2003) (reversing, using the liberal approach, a district court’s decision to issue an antisuit injunction).

59. Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626–27 (5th Cir. 1996).

60. *Id.* at 625–26.

61. *Id.* at 626. Specifically, the parties both alleged “(1) fraud and negligent misrepresentation by [the other party] to induce [the complaining party] to enter into the distributorship agreement, and (2) breach of contract by [the other party].” *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 626–27 (noting the historical power of federal courts to grant antisuit injunctions).

65. 428 F.2d 888 (5th Cir. 1970), *vacated on other grounds sub nom.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). The dispute in *Unterweser* arose out of a contract for towing services from Louisiana to Italy; en route, the barge was damaged and headed to the nearest port, which was Tampa Bay, Florida. *Id.* at 889. The forum selection clause in the parties’ contract provided that any litigation would be in London, “before the High Court of Justice.” *Id.* While an action initiated in London proceeded, Unterweser also filed suit in a U.S. district court. *Id.* at 889–90. The Fifth Circuit affirmed the district court’s stay of the English proceedings; noting that the United States had more of an interest in the litigation than England and that litigating the dispute in England would cause “inequitable hardship.” *Id.* at 894–95, 896. After further appeals, the Supreme Court vacated and remanded the case for giving “too little weight and effect” to the forum selection clause agreed to by the parties. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2, 8 (1972).

66. 441 F.2d 495 (5th Cir. 1971). *Bethell* involved a suit in Florida in which the plaintiff sought to enjoin actions in the Bahamas to enforce real estate contracts and quiet title to six pieces

both cases that an antisuit injunction is properly issued when concurrent litigation of the same claim in a foreign court would “result in ‘inequitable hardship’ and ‘tend to frustrate and delay the speedy and efficient determination of the cause.’”⁶⁷ The court also noted that antisuit injunctions are proper when litigation in a foreign court violates a policy of the issuing forum, is “vexatious or oppressive,” threatens the issuing court’s jurisdiction, or creates prejudice.⁶⁸

The court next addressed Achilles’ plea for international comity, noting that while comity is not excluded from consideration under this approach, it is not a dispositive factor in the court’s analysis.⁶⁹ The court held that:

[A] district court does not abuse its discretion by issuing an antisuit injunction when it has determined “that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in ‘inequitable hardship’ and ‘tend to frustrate and delay the speedy and efficient determination of the cause.’”⁷⁰

The court found in favor of Kaepa and affirmed the district court’s issuance of the antisuit injunction because allowing Achilles to proceed in Japan would be inconvenient and expensive, cause unnecessary delay, and be duplicitous only for purposes of harassment.⁷¹

of property. *Id.* at 496. The Fifth Circuit affirmed the district court’s decision to grant the injunction, preventing Peace from relying on the previous contract and continuing legal action in the Bahamas. *Id.* The court agreed that there were sufficient contacts to grant jurisdiction to the Florida courts, and noted two situations in which a U.S. court should enjoin foreign proceedings: “where the foreign suit was brought by a resident of the forum state against another resident of the state to evade a protection provided for the latter under forum law . . . or where the foreign suit would be vexatious in other respects” *Id.* at 497, 498 (quoting ALBERT A. EHRENZWEIG, *CONFLICTS OF LAWS* 129–30 (1962)).

67. *Kaepa*, 76 F.3d at 626–27 (quoting *In re Unterweser*, 428 F.2d at 896).

68. *Id.* at 627 n.9 (citing *In re Unterweser*, 428 F.2d at 890, 896).

69. *Id.* at 627. Specifically, the court “decline[d] . . . to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.” *Id.* The dissent, on the other hand, followed the conservative approach, citing concerns of international comity, foreign enforcement of domestic awards, and effects on international commerce. *Id.* at 630 (Garza, J., dissenting). Applying the conservative test, the dissent concluded that the district court should not have issued the injunction. *Id.* at 632–34.

70. *Id.* at 627 (majority opinion) (quoting *In re Unterweser*, 428 F.2d at 896).

71. *Id.* at 627–28. The court found that there would be no threat to American–Japanese relations because both parties were private companies and the dispute was contractual. *Id.* at 627. Furthermore, Achilles voluntarily undertook every action related to this lawsuit in the state of Texas: it consented to the jurisdiction of the Texas court and to applying Texas law to resolve contract disputes, it appeared in the action when first brought in the Texas court, it removed the suit to federal court, and it conducted discovery in furtherance of the trial in Texas. *Id.* Only after completing these steps did Achilles file claims in Japan. *Id.*

Both the Seventh⁷² and Ninth⁷³ Circuits have adopted the liberal approach, although each circuit uses a slight variation of the *Kaepa* test. In *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, a Seventh Circuit case, an action arose after a fire destroyed Bull Data's (BDS) microcomputer inventory in a warehouse insured by Allendale through its British subsidiary Factory Mutual International (FMI).⁷⁴ A U.S. district court issued a preliminary injunction against BDS's proceedings in the French commercial court,⁷⁵ and the Seventh Circuit affirmed.⁷⁶ In doing so, the court adopted the liberal

72. See *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431-33 (7th Cir. 1993) (claiming to consider international comity along with the other factors of the liberal approach). One commentator has noted that "[t]he Seventh Circuit has not completely adopted the Fifth Circuit's standard, but in two cases—*Philips Medical Systems International B.V. v. Bruetman* and *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*—it has shown that it 'inclines' towards the more liberal standard." Levy, *supra* note 40, at 167 (citation omitted).

73. See *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981).

74. *Allendale*, 10 F.3d at 426-27. BDS is the U.S. subsidiary of a French parent company that makes computers and computer software. *Id.* at 426. The French government is a majority shareholder in the parent company. *Id.* BDS purchased global property insurance from Allendale, a U.S. company, through Alexander & Alexander, an American broker. *Id.* After acquiring a microcomputer business, the parent company leased a warehouse in order to consolidate all of its microcomputer inventory; this warehouse was added to the insurance policy purchased from Allendale. *Id.* After BDS submitted a claim to Allendale for its losses from the fire, Allendale and FMI filed suit in the United States seeking declaratory judgment that BDS caused the fire, or, in the alternative, arguing for a limit on their liability. *Id.* at 427. In response, BDS sued Allendale and Alexander & Alexander, the American broker that sold BDS the Allendale policy. *Id.* Additionally, BDS filed suit against FMI in the French commercial court, which "may have exclusive jurisdiction over suits to enforce insurance policies governed by the French insurance code." *Id.* Allendale also "pressed for a criminal investigation" in France and asked the French commercial court to stay the litigation against FMI until the criminal investigation was over; the commercial court agreed to do so. *Id.*

75. *Id.* Discovery commenced in the U.S. suit; when the case was ready to proceed to trial, BDS filed a motion to proceed to trial in the French commercial court, although the French criminal investigation had not concluded. *Id.*

76. *Id.* at 433. The Seventh Circuit reasoned that, while the French government was a major stockholder in BDS, the case should be decided as if BDS was a private company since the French government was no more than a "passive investor." *Id.* at 428. The court also noted that BDS preferred to litigate its claims in the United States, despite bringing suit in France, because of the limit in its insurance policy with FMI. *Id.* at 429. Discovery had proceeded in the U.S. suit while the French action was on hold due to the slow pace of the criminal investigation. *Id.* at 428. Furthermore, the fact that BDS filed separate claims against Allendale and Alexander & Alexander in the United States at the same time as it filed against FMI in France indicated to the court that BDS was concerned about not getting adequate relief in its home court. *Id.* at 429. These facts led the court to conclude that BDS preferred to litigate in the United States as opposed to France. *Id.* The court further explained that there is a presumption against a U.S. court abstaining in favor of foreign proceedings because "a federal court has a duty to exercise the jurisdiction that Congress has given it." *Id.* at 430. The presumption is especially strong where it "is reinforced rather than rebutted by practical considerations bearing on the choice of

approach though it claimed to give weight to international comity in its analysis, stating:

[W]e do not mean that international comity should have no weight in the balance; we do not interpret the “lax” cases as assigning it no weight. The difference between the two lines of case [sic] . . . [is that] [t]he strict cases presume a threat to international comity whenever an injunction is sought . . . [whereas the lax cases] do not deny that comity could be impaired by such an injunction but they demand evidence . . . that comity is likely to be impaired in *this* case.⁷⁷

In *Seattle Totems Hockey Club, Inc. v. National Hockey League*,⁷⁸ a Ninth Circuit case, the plaintiffs, seeking equitable relief, brought an antitrust action alleging that the National Hockey League (NHL) monopolized the sport of ice hockey in North America.⁷⁹ Specifically, the Seattle Totems Hockey Club requested that the court declare certain constraints against it unenforceable.⁸⁰ The Ninth Circuit agreed with the district court’s finding that the injunction prohibiting the Canadian suit should be issued;⁸¹ the court cited delay, inconvenience, and expense, as well as the potential for inconsistent rulings as its reasons for granting the injunction.⁸² The court also feared a “race to judgment” if the two suits were allowed to proceed simultaneously.⁸³

2. *The Majority Approach: Conservative in Favor of International Comity*

Six circuits have adopted the conservative approach, and are reluctant to issue antisuit injunctions.⁸⁴ These courts believe that, despite being issued

which court to proceed in,” such as “how far advanced the litigation is in one court and which court can by virtue of its jurisdiction or structure render the more complete justice.” *Id.*

77. *Id.* at 431. The court noted a showing of significant harm to U.S. interests—such as protecting citizens from “trumped-up multi-million dollar claims” and upholding U.S. insurance law—which allows an insurer to prove a fraudulent claim by a preponderance of the evidence. *Id.* at 432.

78. 652 F.2d 852 (9th Cir. 1981).

79. *Id.* at 853. Mr. Abbey and Mr. Barnes, owners of the Seattle Totems hockey team, brought the suit in the district court in the state of Washington. *Id.*

80. *Id.* After filing this suit, Northwest Sports brought an action in the British Columbia Supreme Court against Seattle Totems for breach of the same agreements; Seattle Totems moved to prohibit the Canadian claim, arguing that it was a compulsory counterclaim that had to be filed in the U.S. antitrust action. *Id.* The district court granted Seattle Totems an antisuit injunction to stay the Canadian proceedings. *Id.*

81. *Id.* at 855. The court discussed the Fifth Circuit’s rulings in *Unterweser* and *Bethell* before reaching its conclusion. *Id.* at 855–56.

82. *Id.* at 856.

83. *Id.*

84. *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 361 (8th Cir. 2007), *cert. denied sub nom. Goss Int’l Corp. v. Tokyo Kikai Seisakusho*, 128 S. Ct. 2957 (2008) (making the Eighth Circuit the most recent court to adopt the conservative

against a party to a lawsuit, injunctions give the impression of constraining the jurisdiction of foreign courts.⁸⁵ The Third,⁸⁶ Sixth,⁸⁷ District of Columbia,⁸⁸ and, most recently, Eighth Circuits⁸⁹ have all adopted this approach; the First⁹⁰ and Second⁹¹ have adopted "slightly modified version[s]."⁹² Applying this approach, duplicate parties or issues are rarely sufficient to justify issuing an injunction.⁹³ Under the conservative approach, antisuit injunctions may only be issued for one of two reasons: "[to] protect a court's own legitimate jurisdiction . . . or . . . [to] prevent 'litigants' evasion of the forum's important public policies.'" ⁹⁴ These courts also find controlling the concept of international comity, preferring to give deference to foreign proceedings.⁹⁵

a. The Traditional Conservative Approach

Regardless of the approach followed, all of the circuits look to *Laker Airways Ltd. v. Sabena* for guidance.⁹⁶ The case arose when Laker Airways

approach); see also BORN & RUTLEDGE, *supra* note 1, at 542; Treviño de Coale, *supra* note 52, at 104. This approach is also referred to as the restrictive approach. Vertigan, *supra* note 17, at 164.

85. BORN & RUTLEDGE, *supra* note 1, at 541; see also BERMANN, *supra* note 27, at 111 ("Notwithstanding the practice of addressing anti-suit injunctions to litigants rather than courts, the remedy is understandably viewed as an act of judicial interference with the power of another court, including the court of another 'sovereign.'").

86. See *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prod. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 76, 77 (3d Cir. 1994); Treviño de Coale, *supra* note 52, at 110–11.

87. See *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1351, 1355 (6th Cir. 1992); Treviño de Coale, *supra* note 52, at 107–08.

88. See *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1207–08 (D.C. Cir. 1989); *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 927–33 (D.C. Cir. 1984); Treviño de Coale, *supra* note 52, at 108–09.

89. See *Goss*, 491 F.3d at 361.

90. See *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578–79 (1st Cir. 1969) (noting the court's ability to issue injunctions, but declining to do so in this action); Treviño de Coale, *supra* note 52, at 111.

91. See *Pravin Banker Assoc., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855–56 (2d Cir. 1997) (denying stay in commercial debt negotiations); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 34, 36–37 (2d Cir. 1987); Treviño de Coale, *supra* note 52, at 104–07.

92. BORN & RUTLEDGE, *supra* note 1, at 542; Vertigan, *supra* note 17, at 165.

93. BORN & RUTLEDGE, *supra* note 1, at 542; see also Vertigan, *supra* note 17, at 168.

94. BORN & RUTLEDGE, *supra* note 1, at 542 (citation omitted); see also BERMANN, *supra* note 27, at 112 ("A US court may come to the conclusion that a compelling public interest recognized by US law will be frustrated if a case is heard in other than a US forum.").

95. BORN & RUTLEDGE, *supra* note 1, at 542.

96. *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984); see, e.g., *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 361–63 (8th Cir. 2007); *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 17–19 (1st Cir. 2004); *Stonington Partners, Inc.*

Ltd., after overcoming resistance from potential competitors, began operating a low cost airline service between London and New York.⁹⁷ Laker's service made a profit for about four years, but then began to struggle and Laker was forced to refinance its debts in 1981.⁹⁸ After Laker initiated an antitrust action in the United States against its competitors, some of the defendant foreign airlines sought an injunction in the United Kingdom to block the U.S. action.⁹⁹ The British court granted the injunction, and Laker filed for its own injunction in the U.S. district court to prevent the other defendants from obtaining the same relief in a foreign court.¹⁰⁰

After noting the reasons for the presumption against ordering antisuit injunctions,¹⁰¹ the court articulated a two-pronged test for determining when an antisuit injunction should be issued: (1) to protect the court's jurisdiction; and (2) to guard any important public policies of the issuing court.¹⁰² The jurisdiction prong involves consideration of "the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings."¹⁰³ However, this prong becomes less important in cases in which a judgment on the merits has already been rendered.¹⁰⁴ The court explained that once a court enters judgment, the second court must respect that judgment, thus minimizing inconsistent rulings.¹⁰⁵ The court also dismissed other factors used by circuits applying the liberal approach—such as inconsistent outcomes and a race to judgment—as not paying sufficient deference to the final judgments of foreign courts.¹⁰⁶ Furthermore, the court

v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118, 125, 128 (3d Cir. 2002); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 n.5 (5th Cir. 1996); *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425, 431–32 (7th Cir. 1993); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1352–54 (6th Cir. 1992); *China Trade*, 837 F.2d at 36–37; *Id.* at 38–40 (Bright, J., dissenting).

97. *Laker Airways*, 731 F.2d at 916.

98. *Id.* at 916–17. Simultaneously, Laker's competitors conspired to lower their already predatory prices and hindered Laker's attempts to refinance its debt. *Id.* at 917. In 1982, Laker was driven to liquidation. *Id.*

99. *Id.* at 915.

100. *Id.* The district court granted the motion, fearing that it would be left with no jurisdiction over the case. *Id.*

101. *Id.* at 926–27. The *Laker* court explained that parallel proceedings should be allowed until one forum has reached a judgment that becomes *res judicata* in the other, and added that injunctions impose on the jurisdiction of foreign courts. *Id.* This second point is illustrated by the situation in which both courts issue an injunction, effectively barring the parties from any relief. *Id.* at 927.

102. *Id.* at 927.

103. *Id.*

104. *Id.* at 927–28. On the other hand, where the request is made before a judgment on the merits, the circuit split becomes readily apparent; in *Laker*, the court determined that identical parties and issues alone are not enough to justify an injunction. *Id.* at 928.

105. *Id.* at 929.

106. *Id.* at 928–29. The court held that the district court's action was proper in light of the need to preserve its jurisdiction. *Id.* at 930–31.

argued that judicial economy and the avoidance of hardship are best achieved by the *forum non conveniens* doctrine.¹⁰⁷

Turning to the public policy factor, the court stated that, because it was a strict standard, judgments were rarely prohibited by it.¹⁰⁸ Courts should grant an antisuit injunction only when recognizing a foreign judgment would destroy the issuing forum's "fundamental interests."¹⁰⁹ Because the public policy prong is a greater "interference" than the protection of jurisdiction, the issuing court should carefully consider the party attempting to evade the particular law of the forum, as well as the importance of that law to that forum.¹¹⁰ The court ultimately upheld the district court's decision to issue the antisuit injunction; this injunction was necessary to both maintain the court's jurisdiction and to protect public policy by preventing the evasion of U.S. antitrust laws.¹¹¹ Additionally, the court held that the injunction did not offend notions of international comity.¹¹²

The Third¹¹³ and Sixth¹¹⁴ Circuits also adopted the conservative approach following the *Laker* decision. In *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prod. N.V.*, the Third Circuit affirmed its shift from the liberal approach to the conservative approach.¹¹⁵ This case involved both bankruptcy

107. *Id.* at 928.

108. *Id.* at 931 & n.72. ("Only in clear-cut cases ought it to avail defendant." (quoting *Tahan v. Hodgson*, 662 F.2d 862, 866 n.17 (D.C. Cir. 1981))). The court noted that "[e]njoining participation in a foreign lawsuit in order to preempt a potential judgment is a much greater interference with an independent country's judicial process." *Id.* at 931; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c (1971) (noting that "enforcement will usually be accorded a judgment except in situations where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought," thus making it rare that judgments will not be enforced).

109. *Laker Airways*, 731 F.2d at 931. An example would be a "litigant's unconscionable evasion of the domestic laws." *Id.* at 931 n.71.

110. *Id.* at 931-32. The court advocates for a totality of the circumstances approach, stating that "[t]he only guideline which emerges is the necessity of evaluating the merits of each claim in light of the particular equitable circumstances surrounding the dual litigation." *Id.* at 931 n.73. In *Laker*, the court found that public policy factors justified the district court's injunction. *Id.* at 932.

111. *Id.* at 932, 956.

112. *Id.* at 956. The dissent argued, however, that principles of comity should trump the factors considered by the majority because this was a private action in which the United States had no sovereign interest. *Id.* (Starr, J., dissenting). Judge Starr went on to observe that the United Kingdom, on the other hand, did have a sovereign interest, and that the injunction, as issued, was "unduly sweeping in light of considerations of comity." *Id.* at 956-57.

113. *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002).

114. *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992).

115. *Gen. Elec. Co. v. Deutz Ag.*, 270 F.3d 144, 161 (3d Cir. 2001) (utilizing the conservative approach).

proceedings and allegations of fraud in Belgium and the United States.¹¹⁶ The Delaware Bankruptcy Court held that Stonington should not be permitted to prosecute its claims in Belgium under Belgian law, citing the conflict between the laws of Belgium and the United States, and the fact that the United States was the “center of gravity” of the lawsuit.¹¹⁷

The Third Circuit reversed, observing that it had previously adopted the conservative standard in *General Electric Co. v. Deutz Ag*,¹¹⁸ and that comity is particularly important in bankruptcy cases.¹¹⁹ It also noted that other courts following this approach narrowly interpret both the protection of the court’s jurisdiction and the effect on public policy.¹²⁰ Ultimately, the court found that neither factor was at issue in this case because the Belgian court had no desire to usurp the U.S. court’s jurisdiction, and the Belgian proceedings would not infringe upon any compelling public policy.¹²¹

116. *Stonington*, 310 F.3d at 122. Defendant Lernout & Hauspie (L&H) filed for bankruptcy in the United States and sought bankruptcy protection in Belgium; Stonington filed fraud claims in both proceedings. *Id.* Stonington, “which manages institutional capital on behalf of various public and private entities,” acquired Dictaphone Corp., which L&H—a Belgian company dealing in speech recognition products—subsequently bought. *Id.* Stonington filed suit in the Chancery Court of Delaware alleging fraud and also that L&H purchased Dictaphone with worthless stock; Stonington procured an order from the Belgian court demanding that L&H relinquish its Dictaphone shares. *Id.*

117. *Id.* at 124.

118. *Id.* at 121, 126. The *Stonington* dissent argued that the remand to the Bankruptcy Court was contrary to the purpose of the conservative approach. *Id.* at 135 (Rosenn, J., dissenting); *see also General Electric*, 270 F.3d at 161. *General Electric* was a breach of contract case between General Electric and a German corporation (Moteren-Werke Mannheim AG) for the manufacture of diesel locomotive engines. *Id.* at 149. After irresolvable differences arose between the parties, General Electric filed suit in the U.S. for breach of contract against Deutz Ag, the parent company of Moteren-Werke. *Id.* Deutz sought to dismiss on jurisdictional grounds. Before the action was complete, Deutz initiated arbitration proceedings in London and simultaneously petitioned the High Court in London to issue an injunction. *Id.* The High Court declined to do so, the U.S. district court “enjoined Deutz from resorting to the High Court in the future,” and “the arbitration Panel held that [the parties] had not agreed to arbitrate their contractual disputes.” *Id.* The Third Circuit was not persuaded by the district court’s *res judicata* basis for issuing the injunction, reasoning that “[t]he circumstances here were not so aggravated as to justify interference with the jurisdiction of the courts of another sovereign state, and there is no indication that the English courts would have prevented General Electric from arguing the *res judicata* effect . . .” *Id.* at 159. The Third Circuit went on to discuss the issue of comity, noting the circuit split and aligning itself with the conservative approach. *Id.* at 160–61. The court reversed the district court’s grant of the injunction, finding that neither prong of the conservative test—jurisdiction or public policy—was threatened by this case. *Id.* at 162.

119. *Stonington*, 310 F.3d at 126. The court noted the “challenges posed by transnational insolvencies” and that “Congress specifically listed ‘comity’ as an element to be considered in the context of such insolvencies . . .” *Id.* (citations omitted).

120. *Id.* at 127.

121. *Id.* at 128.

The Sixth Circuit, noting the importance of comity in the world economy, also adopted the conservative approach in *Gau Shan Co. v. Bankers Trust Co.*¹²² The court ultimately embraced the conservative approach—finding that the D.C. and Second Circuits formulated the proper test—based on “protecting the forum’s jurisdiction” and “preventing evasion of the forum’s important public policies.”¹²³ In adopting this conservative standard the court noted that the interdependence prevalent in the world economy requires comity between countries, recognized that many international transactions involve issues of concurrent jurisdiction, and cautioned against sending the wrong message to the international community.¹²⁴ With respect to the two-pronged test announced in *Laker*, the *Gau Shan* court found that neither the jurisdiction prong¹²⁵ nor the public policy prong¹²⁶ was satisfied; therefore, the Sixth

122. 956 F.2d 1349, 1351, 1354–55 (6th Cir. 1992). *Gau Shan* involved a dispute between an American finance company and a Chinese cotton merchant. The parties had entered into an agreement by which Bankers Trust, an American finance company, would provide funds to a third party, which in turn would provide Gau Shan with cotton to sell to the Chinese government. *Id.* at 1351. A promissory note that Gau Shan was forced to sign contained a dispute resolution clause calling for New York law to govern disputes between the parties. *Id.* Because only a portion of the cotton was shipped, Gau Shan could not fulfill its obligations to China; as a result, Gau Shan did not pay the note and Bankers Trust threatened to sue in Hong Kong for payment. *Id.* at 1351–52. Gau Shan subsequently filed suit in the United States for rescission of the promissory note and alleging fraud and negligence. *Id.* at 1352. The district court then issued an injunction that prohibited Bankers Trust from suing Gau Shan in Hong Kong. *Id.*

123. *Id.* at 1354–55. The court began its analysis by recognizing the split in the circuits, discussing the Fifth and Ninth Circuits’ holdings in *Unterweser* and *Seattle Totems*, as well as the Second and D.C. Circuits’ holdings in *China Trade* and *Laker Airways*. *Id.* at 1353–54. The court noted that the “Second and D.C. Circuits . . . accommodate[] the important principles of international comity a federal court should take into account.” *Id.* at 1355.

124. *Id.* at 1354. The court also recognized the danger that issuing antisuit injunctions may “convey[] the message, intended or not, that the issuing court has so little confidence in the foreign court’s ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility.” *Id.* at 1355.

125. *Id.* at 1356. The court found that there was no threat to the jurisdiction of the Tennessee courts despite a provision of Hong Kong law unparalleled in the United States, which would allow Bankers Trust “to appoint a receiver of its choice for Gau Shan without court approval”; this receiver “would have the power to discharge Gau Shan’s employees and to abandon any proceedings concerning Gau Shan’s assets.” *Id.* The court pointed out that only two instances have been recognized as threatening the jurisdiction of the court: cases of in rem or quasi in rem jurisdiction, and in personam cases in which the foreign court “is attempting to carve out exclusive jurisdiction over the action” *Id.* (quoting *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987)). The court also observed:

Where jurisdiction is based on the presence of property within the court’s jurisdictional boundaries, a concurrent proceeding in a foreign jurisdiction poses the danger that the foreign court will order the transfer of the property out of the jurisdictional boundaries of the first court, thus depriving it of jurisdiction over the matter.

Id.

126. *Id.* at 1357–58. Nor was the court persuaded by Gau Shan’s claim that the Tennessee statute providing “treble damages for procurement of breach of contract” was an important public

Circuit held that the district court abused its discretion in ordering the injunction against the Hong Kong proceedings.¹²⁷

b. The Modified Conservative Approach

As discussed above, the First and Second Circuits adhere to a somewhat modified approach to this strict standard.¹²⁸ These circuits found that the application of the conservative approach was incorrect in its exclusive focus on protecting a court's jurisdiction and important public policies.¹²⁹ This does not mean that they have rejected the two-pronged test articulated in *Laker*, but rather that they see jurisdiction and public policy as only two of many factors to consider.¹³⁰ Instead, the First and Second Circuits held that the conservative approach should be realigned with the *Laker* decision, interpreting *Laker* as taking a totality of the circumstances approach rather than strictly adhering to the justifications of jurisdiction and public policy.¹³¹

In *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, the First Circuit affirmed an antisuit injunction prohibiting KPMG-B from pursuing an action in a Belgian court.¹³² Litigation had proceeded simultaneously in the United States and in Belgium,¹³³ until the district court issued the antisuit injunction.¹³⁴

policy consideration. *Id.* Instead, the court held that public policy would come into play only where a judgment would be "so repugnant to fundamental notions of what is decent and just." *Id.* (quoting *Tahan v. Hodgson*, 662 F.2d 862, 866 (D.C. Cir. 1981) (internal quotation marks omitted)).

127. *Id.* at 1358.

128. BORN & RUTLEDGE, *supra* note 1, at 542; Vertigan, *supra* note 17, at 165.

129. *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004); *China Trade*, 837 F.2d at 35; *see also* Vertigan, *supra* note 17, at 172.

130. *Quaak*, 361 F.3d at 19; *China Trade*, 837 F.2d at 36–37 (implying the circuit would consider factors other than jurisdiction protection and public policy in its analysis of the propriety of issuing an antisuit injunction). *See also* Vertigan, *supra* note 17, at 172 (discussing the Second Circuit's methodology). In *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*, 475 F.3d 56 (2d Cir. 2007), the Second Circuit, following *China Trade*, began its analysis by requiring that the parties in the two suits be identical and that "resolution of the case before the enjoining court [was] dispositive of the action to be enjoined." *Id.* at 64 (quoting *China Trade*, 837 F.2d at 35). Once this threshold was satisfied, the Second Circuit considered other factors, namely policy, threat to jurisdiction, and vexatiousness. *Id.* at 64–65. *See also* Vertigan, *supra* note 17, at 172.

131. *Quaak*, 361 F.3d at 18; *China Trade*, 837 F.2d at 36–37; *see also*, Vertigan, *supra* note 17, at 172.

132. *Quaak*, 361 F.3d at 14. The dispute arose out of a series of cases and class action suits, which alleged that securities fraud committed by KPMG-B led to the collapse of L&H, one of the companies KPMG-B audited. *Id.* KPMG-B was also being investigated in Belgium on criminal charges relating to the L&H collapse. *Id.*; *see also* *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 121–22 (3d Cir. 2002).

133. *Quaak*, 361 F.3d at 14–15.

134. *Id.* at 15. KPMG-B moved to dismiss the case on the grounds of *forum non conveniens*, but the U.S. district court denied the motion; discovery then commenced in the U.S. securities

This was a case of first impression, and the First Circuit held that the district court properly granted the injunction against KPMG-B in an effort to protect the court's authority.¹³⁵ Addressing the circuit split,¹³⁶ the court wholly rejected the liberal approach but did not accept a rigid conservative approach that was focused solely on jurisdiction and policy.¹³⁷ Rather, it saw these factors as only two of several that should be considered by an issuing court.¹³⁸ Specifically, the court noted that considerations of international comity "ordinarily establish a rebuttable presumption against the issuance of an order that has the effect of halting foreign judicial proceedings," which may be rebutted by equitable factors pertinent to the grant or denial of an antisuit injunction.¹³⁹ These factors, according to the court, include the nature of the

litigation. *Id.* at 14. KPMG-B refused to comply with document requests, claiming that the information was protected under Belgian law. *Id.* at 14-15. Meanwhile, the plaintiffs assisted the Belgian criminal prosecution and thus were able to view documents previously denied to them; they were unable, however, to copy these documents for their own use in the securities action. *Id.* at 15. KPMG-B subsequently filed a motion in the Belgian court to prohibit the plaintiffs from continuing any action related to the document discovery; the Belgian court refused to do so without first giving notice to the plaintiffs. *Id.* KPMG-B gave notice and "moved to stay the turnover order"; it was at this point that the plaintiffs sought and obtained an antisuit injunction from the U.S. district court prohibiting KPMG-B's Belgian action. *Id.*

135. *Id.* at 22.

136. *Id.* at 17. The court cited the Fifth Circuit's decision in *Kaepa* and the Ninth Circuit's decision in *Seattle Totems* as examples of the liberal approach, and also noted the Seventh Circuit's tendency to follow these two circuits. *Id.* The court observed that the application of this test was based on duplicate parties or issues, as well as concerns of speed and efficiency. *Id.* The court also recognized that comity does play a role in this approach, but it is narrowly defined and not given much weight in the final analysis. *Id.* The court cited *Stonington, Gau Shan, China Trade*, and *Laker* as examples of the conservative approach, which focused on protecting the jurisdiction of the forum court and important public policies. *Id.* Finally, the court noted that comity was given greater weight under the conservative approach than under the liberal approach. *Id.*

137. *Id.* The court believed that comity was not assigned sufficient weight in the liberal approach, and that public policy interests would always weigh in favor of allowing the domestic action to proceed. *Id.* at 17. Ultimately, the court found that a more cautious approach was necessary because both separation of powers and international relations were at stake in these types of cases. *Id.* The court favored the conservative approach because it created a presumption of allowing multiple proceedings to go forward, and because it forced the issuing court to balance the policies of both nations involved in the action. *Id.* at 18. Furthermore, the conservative approach gives proper deference to international comity because injunctions would only issue "with care and great restraint." *Id.* (quoting *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.* 412 F.2d 577, 578 (1st. Cir. 1969) (internal quotation marks omitted)).

138. *Id.* The court observed that the circuits promoting the conservative approach viewed jurisdiction and policy as the only justifications for issuing an antisuit injunction. *Id.* It held that this narrow approach was too stringent because it did not allow for proper inquiry into the facts of each case. *Id.* The court then spelled out its own test for this issue: after the initial threshold requirements of duplicate parties and issues are met, the court should look at "all the facts and circumstances," while giving comity "substantial weight." *Id.*

139. *Id.*

actions or proceedings, policies affected by the litigation, the good faith of the parties, and whether the U.S. forum will be able to reach a just result in light of the foreign proceeding.¹⁴⁰

Based on this analysis, the court recognized that KPMG-B's purpose of litigating in Belgium was to prohibit the plaintiffs from seeking their own relief in U.S. courts, which would violate an important policy and duty of the U.S. courts.¹⁴¹ Furthermore, the court noted, KPMG-B brought about its own comity problems, because it was KPMG-B that initiated parallel proceedings in a foreign court.¹⁴² Therefore, the court upheld the district court's injunction against KPMG-B.¹⁴³

The Second Circuit followed the First Circuit with a similar, albeit slightly different, modified conservative approach.¹⁴⁴ This approach was illustrated in *China Trade & Development Corp. v. M.V. Choong Yong*,¹⁴⁵ which involved the loss of a soybean shipment being transported to the United States from China by a Korean shipping company.¹⁴⁶ China Trade filed suit in U.S. district court "for failure to deliver the soybeans," and while discovery for this trial was pending, Ssangyong filed suit in Korea seeking the Korean equivalent of a declaratory judgment that Ssangyong was not liable for China Trade's loss.¹⁴⁷ China Trade subsequently moved for an injunction barring any further Korean proceedings; the district court applied the liberal test and "permanently enjoined . . . the Korean action."¹⁴⁸

The Second Circuit agreed with the district court's statement of the threshold requirements that the parties be identical and "resolution of the case before the

140. *Id.* at 19. This presumption is rooted in the fundamental importance of comity in supporting the growth of the global economy by giving "'merchants [the ability] to predict the likely consequences of their conduct in overseas markets.'" *Id.* (quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992)).

141. *Id.* at 20.

142. *Id.* at 20–21. The court went on to note that KPMG-B had alternative methods it could have pursued to protect the confidentiality of its documents. *Id.* at 21.

143. *Id.* at 22.

144. Compare *id.* at 18–19, with *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35–37 (2d Cir. 1987). See also Vertigan, *supra* note 17, at 172–73.

145. *China Trade*, 837 F.2d at 34.

146. *Id.* China Trade attached a second ship belonging to Ssangyong, the Korean corporation that owned the M.V. Choong Yong. *Id.* The attachment would lift, and the pending action in the California courts would terminate when Ssangyong paid China Trade a security and agreed to litigate in New York. *Id.*

147. *Id.* at 34–35.

148. *Id.* at 35. The district court "articulated two threshold requirements for such an injunction: (1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined." *Id.* Once this threshold was met, the district court looked at five additional factors: policy, vexatiousness of the foreign action, "threat to the issuing court's . . . jurisdiction," prejudice, and "delay, inconvenience, expense, inconsistency, or a race to judgment." *Id.*

enjoining court would be dispositive of the enjoined action,"¹⁴⁹ but found that two of the factors the district court relied upon, vexatiousness and expense, were not as important as the district court perceived them to be.¹⁵⁰ The Second Circuit reversed the district court's decision to issue the antisuit injunction "[b]ecause the Korean litigation pose[d] no threat to the jurisdiction of the district court or to any important public policy of [the domestic] forum."¹⁵¹

c. A Conservative Liberal? The Fifth Circuit's Decision in Karaha Bodas

Although the Fifth Circuit follows the liberal standard, the case of *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* shows that courts following the liberal approach do not always grant an antisuit injunction.¹⁵² In this case, the Fifth Circuit did not overrule its previous ruling in *Kaepa*, but distinguished *Karaha Bodas* based on the agreement between the parties to resolve disputes through international arbitration, and because the dispute in *Karaha Bodas* "implicated public international issues" as opposed to the "contractual dispute between private parties" in *Kaepa*.¹⁵³

149. *Id.* at 36; see also Fellas & Warne, *supra* note 25, at 358 (citing *In re Rationis Enters. of Panama*, 261 F.3d 264, 267 (2d Cir. 2001); *China Trade*, 837 F.2d at 35) ("Three threshold requirements," two of which are identical to those articulated by the Second Circuit, which "must be met before a court will consider issuing an anti-suit injunction" are: "[j]urisdiction over the party to be enjoined must be established," "[t]he parties must be the same in both matters," and "[r]esolution of the case before the enjoining court must be dispositive of the action to be enjoined.").

150. *China Trade*, 837 F.2d at 36 (noting that the policy and jurisdictional justifications for comity should trump considerations of vexatiousness and expense, which are present whenever there are concurrent parallel actions).

151. *Id.* at 37. Judge Bright, in his dissent, agreed with the district court's findings, quoting large portions of the trial judge's opinion. *Id.* at 37–39 (Bright, J., dissenting). Judge Bright went on to note that where commercial litigation does not implicate the principles of comity, the court has a duty to prevent parties from initiating foreign suits in order to frustrate pending litigation in the United States, particularly where the U.S. litigation has been pending for nearly two years. *Id.* at 39–40; see also *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 929 n.63 (D.C. Cir. 1984) ("[W]hen substantial time has elapsed between the commencement of the two actions, . . . equitable principles make it more appropriate to enjoin the second action.").

152. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366, 375–76 (5th Cir. 2003); see also Vertigan, *supra* note 17, at 166. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (Pertamina) is an energy company wholly owned by the Indonesian government and *Karaha Bodas* (KBC) is a private power development company. *Karaha Bodas*, 335 F.3d at 360. The companies competed for two projects—one for the development of geothermal energy from two fields in Indonesia by constructing a geothermal power plant on the island of West Java, the other for the sale of electricity to Pt. PLN, an electric company wholly owned by the Indonesian government. *Id.* However, the projects were put on hold following the Asian financial crisis that hit Indonesia in 1997. *Id.* Ultimately, the projects were suspended indefinitely by Indonesia's president as part of an overall plan to rehabilitate and stabilize the Indonesian economy. *Id.*

153. *Id.* at 360, 366–72, 374 (distinguishing *Karaha Bodas* from *Kaepa*).

In *Karaha Bodas*, a dispute arose over two power plant construction contracts in Indonesia between Karaha Bodas (KBC) and Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina).¹⁵⁴ After stopping performance on its contracts due to a change in financial conditions KBC initiated arbitration proceedings¹⁵⁵ as provided for in the agreement between the two parties, alleging that Pertamina breached its contract.¹⁵⁶ “Pertamina appealed the Award to the Supreme Court of Switzerland. While that appeal was pending, KBC initiated the instant proceedings in federal district court to enforce the award.”¹⁵⁷

154. *Id.* at 359–60.

155. *Id.* at 360 (“KBC declared *force majeure* and ceased performance under the contracts.”). A *force majeure* is “an event . . . that can be neither anticipated nor controlled.” BLACK’S LAW DICTIONARY 674 (8th ed. 2004).

156. *Karaha Bodas*, 335 F.3d at 360. The arbitration agreement between the parties called for disputes to be resolved in Switzerland under the Arbitral Rules of the United Nations Commission on International Trade Law (UNCITRAL). *Id.* “Pertamina opposed arbitration on various grounds, which included a challenge to the composition of the arbitration panel,” however all of its objections were denied. *Id.* The arbitration panel found in favor of KBC and awarded damages for the breach of contract. *Id.* at 360–61.

157. *Id.* at 361. A variety of other motions were filed in various courts before the Fifth Circuit took the appeal to decide whether the injunction should have been issued. *Id.* at 361–63.

Pertamina responded by challenging enforcement [of the arbitral award] on four grounds under Article V of the New York Convention: (1) The arbitral panel was improperly composed; (2) the arbitration procedures were not otherwise in accordance with the agreement; (3) Pertamina was deprived of its right to present its case; and (4) the arbitral award violated public policy.

Id. at 361. “The Swiss court eventually dismissed Pertamina’s appeal on procedural grounds” after the U.S. district court “directed the parties to proceed with summary judgment briefing.” *Id.* The district court granted KBC’s motion for summary judgment to enforce the arbitral award after the Swiss court dismissed Pertamina’s action, and KBC was allowed to seek execution of the judgment in three states in the U.S. as well as Hong Kong, Canada, and Singapore. *Id.* Pertamina then sought an injunction from the Indonesian courts to annul and prevent enforcement of the award; KBC responded by filing for a temporary restraining order in the district court to prevent Pertamina from seeking relief in the Indonesian court. *Id.* “In a telephonic hearing . . . the court determined that KBC would suffer irreparable harm if the Indonesian court issued an injunction to prevent KBC from ‘enforcing or executing’ the Judgment,” and for this reason issued a temporary restraining order prohibiting Pertamina from taking “substantive steps” in the Indonesian proceeding. *Id.* However, Pertamina did not withdraw its claim in the Indonesian court, which issued its own injunction prohibiting KBC from enforcing the award; Pertamina claimed that it would not attempt to enforce this order. *Id.* at 362. The district court found Pertamina to be in contempt of the temporary restraining order after KBC filed a motion alleging non-compliance. “Pertamina notified the Indonesian court of the district court’s order but did not request that the Indonesian court vacate or suspend its injunction.” *Id.* KBC subsequently filed for a preliminary injunction, and Pertamina responded by filing a motion to dismiss the contempt order. *Id.* The district court ruled in favor of KBC and ordered the following: a prohibition of enforcement of the Indonesian injunction and collection of any fines from KBC associated with the injunction; an extension of part of the earlier contempt order dealing with indemnity; a prohibition on substantive steps related to the annulment of the award in the Indonesian court and advisement of the Indonesian court that Pertamina will not take any action related to its

The Fifth Circuit applied the *Kaepa* test, discussing the factors that indicate vexatious litigation, including hardship, delay, and duplication.¹⁵⁸ Because the contract called for arbitration under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),¹⁵⁹ the application of these factors leads to a different outcome than in *Kaepa*.¹⁶⁰ The court found that because the New York Convention allows for simultaneous actions, duplicate proceedings are less of a concern than in antisuit injunction cases.¹⁶¹ In addition, the court found no evidence that the speed and efficiency of the action would be compromised by allowing the foreign proceedings to continue.¹⁶² Finally, the court held that the district court's judgment would not be threatened because the U.S. courts, in deciding whether to enforce the arbitration award, would not be bound by the Indonesian court's decision to annul the award.¹⁶³

annulment action; dissolution of requirements under the temporary restraining order that were inconsistent with the preliminary injunction; and denial of the motion to dismiss the contempt order. *Id.* "[T]he Indonesia court rejected Pertamina's request to suspend the litigation . . . and annulled the Award on grounds that it was contrary to the Convention and Indonesian arbitration law." *Id.* at 362–63. The Fifth Circuit denied Pertamina's motion for a partial stay of the preliminary injunction, and the Hong Kong court enforced the arbitral award. *Id.* at 363.

158. *Id.* at 366. The *Kaepa* factors are "(1) 'inequitable hardship' resulting from the foreign suit; (2) the foreign suit's ability to 'frustrate and delay the speedy and efficient determination of the cause'; and (3) the extent to which the foreign suit is duplicitous of the litigation in the United States." *Id.* (quoting *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996) (footnotes omitted) and citing *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 277 (5th Cir. 2002)).

159. *Id.* at 359–60. The New York Convention is an international agreement on commercial arbitration that "'encourage[s] the recognition and enforcement of commercial arbitration agreements in international contracts and . . . unif[ies] the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'" BORN & RUTLEDGE, *supra* note 1, at 1087 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

160. *See Karaha Bodas*, 335 F.3d at 366. The court noted that because the Convention intended to allow "simultaneous enforcement actions in third countries," the Convention inherently provides for parallel proceedings. *Id.* at 366–67.

161. *See id.* at 368, 370. The court found *Karaha Bodas*' claim of hardship difficult to entertain because, after agreeing to arbitrate in Switzerland, *Karaha Bodas* subsequently initiated proceedings in both the United States and Indonesia. *Id.* at 368. Even if the Indonesian court was considered a court of primary jurisdiction, its investigation of the arbitral award would be based on Indonesian law; consequently, the proceedings would not mirror those occurring in the United States. *Id.* at 370.

162. *Id.* at 369. Under the New York Convention, the annulment action proceeding in the Indonesian court had no effect on an enforcement action in any other court. *Id.* That the Swiss court, which had primary jurisdiction, dismissed Pertamina's challenge to the arbitral award strengthened this point. *Id.* at 369–70.

163. *Id.* As a court of secondary jurisdiction, the U.S. court's authority would not be affected "unless [it] decide[d] that the Indonesian annulment is in fact valid *and* that this annulment outweighs the Swiss court's confirmation of the Award." *Id.* at 370. In other words, the Convention's grant of discretion allows U.S. courts to ignore the Indonesian court's decision and enforce the arbitral award regardless. *See id.*

The Fifth Circuit also addressed the importance of comity because, unlike in *Kaepa, Kahana Bodas* involved international law issues.¹⁶⁴ Ultimately the court rested its decision on the following bases: because the Indonesian government owned Pertamina, the dispute was not purely private; the district court's attempt to enjoin Pertamina's Indonesian action was an interference with the Indonesian government; and allowing courts exercising secondary jurisdiction to penalize a party for challenging an arbitral award in other jurisdictions would set a dangerous precedent.¹⁶⁵ Therefore, the court vacated the district court's injunction.¹⁶⁶

3. On the Fence and Recently Committed

The Fourth and Tenth Circuits have yet to examine the matter of antisuit injunctions, while the Eleventh Circuit has merely affirmed without comment a district court decision analyzing antisuit injunctions under the conservative standard.¹⁶⁷ In *Mutual Service Casualty Insurance Co. v. Frit Industries Inc.*, the United States District Court for the Middle District of Alabama rejected the liberal approach, and granted a limited injunction against proceedings in the Isle of Man.¹⁶⁸ The Eleventh Circuit affirmed the decision without comment.¹⁶⁹ Because the Supreme Court has not ruled on the standard for issuing antisuit injunctions, the circuits have been left divided over which standard to apply.¹⁷⁰ The Eighth Circuit recently adopted the conservative

164. *Id.* at 371–72.

165. *Id.* at 372–73.

166. *Id.* at 375–76.

167. Vertigan, *supra* note 17, at 164–65. “While the Eleventh Circuit has not written an opinion directly on point, it affirmed the district court’s decision in *Mutual Service Casualty Insurance Co. v. Frit Indus., Inc.*, which applied the conservative test and rejected the Fifth Circuit’s approach.” Levy, *supra* note 40, at 173.

168. *Mutual Serv. Cas. Ins. Co. v. Frit Indus. Inc.*, 805 F. Supp. 919, 925 (M.D. Ala. 1992), *aff’d without comment*, 3 F.3d 442 (11th Cir. 1993). Mutual Service filed claim under the Declaratory Judgment Act “to determine the rights and duties of all parties in relation to several insurance policies” created for Frit. *Id.* at 920. The court found that the Isle of Man proceedings were merely “an attempt to avoid the jurisdiction of [the district] court.” *Id.* at 924. The court recognized the two threshold requirements that must be satisfied before an injunction should be issued—identical parties and that “resolution of the case before the enjoining court will be dispositive of the action in the foreign court”—and then stated other factors to consider, such as “delay, expense, and inconvenience.” *Id.* at 921. The court reasoned that duplication is not an effective standard for deciding whether to issue an injunction, and that the other factors “do not withstand close scrutiny.” *Id.* at 921–22. The court also found that comity plays a role in deciding whether to issue an antisuit injunction because an injunction restricts the foreign court’s legitimate exercise of its own jurisdiction. *Id.* at 922. Finally, the court noted that courts will ordinarily not restrain proceedings of other courts with concurrent jurisdiction. *Id.* at 923.

169. *Mut. Serv. v. Frit Indus.*, 3 F.3d 442 (11th Cir. 1993).

170. *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 361 (8th Cir. 2007); *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004). There is also

approach in the case of *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*.¹⁷¹ This circuit had previously followed the liberal approach, as illustrated in *Medtronic, Inc. v. Catalyst Research Corp.*, in which it granted a preliminary injunction in a patent dispute over lithium-iodine batteries.¹⁷²

However, the Eighth Circuit altered its approach when it decided *Goss*, which involved an antidumping action brought by Goss, an American printing press company against TKS, its Japanese competitor.¹⁷³ After Congress repealed the Antidumping Act of 1916, under which the claim was brought, Japan enacted the Special Measures Law, allowing for recovery of any judgment collected from Japanese corporations or nationals.¹⁷⁴ The parties stipulated that TKS would not file a claim under the Special Measures Law until its antidumping action was complete and would provide Goss notice when TKS was ready to file under the Special Measure Law.¹⁷⁵ Goss won its antidumping action and TKS gave notice of its intent to proceed under the Special Measures Law.¹⁷⁶ The district court granted a preliminary injunction “enjoining TKS from filing suit under the Special Measures Law” at Goss’s request.¹⁷⁷

no statutory guidance in the United States on the proper standard to apply. BORN & RUTLEDGE, *supra* note 1, at 522.

171. *Goss*, 491 F.3d at 361.

172. *Medtronic, Inc. v. Catalyst Research Corp.*, 664 F.2d 660, 662–63 (8th Cir. 1981). Before deciding *Goss*, the Eighth Circuit had not clearly stated which approach it would follow, but in *Medtronic* the court indicated that it would lean towards the liberal approach. *Id.*; Levy, *supra* note 40, at 164, 168. Medtronic filed for a declaratory judgment on the validity of Catalyst’s patents on the lithium-iodine batteries in question, while Catalyst filed claims for patent infringements against Medtronic’s subsidiaries in Canada and Germany. *Medtronic*, 664 F.2d at 663. The district court granted Medtronic’s motion and the Eighth Circuit affirmed the decision on appeal. *Id.* at 663, 665–66. See Levy, *supra* note 40, at 168 (stating that the Eighth Circuit “emphasiz[ed] a balancing of the equities over a balancing of international relationships”).

173. *Goss*, 491 F.3d at 356–57, 361. Goss was the dominant printing press manufacturer in the United States for over a hundred years; however, Goss’s market share fell significantly when TKS began dumping in the United States. *Id.* at 357. Goss subsequently brought a civil claim against TKS, alleging violation of the Antidumping Act of 1916. The “jury found in Goss’ favor and awarded . . . damages,” which were “statutorily trebled” to bring the award to \$31,619,847, plus interests, costs, and attorney’s fees and expenses. *Id.* at 357–58.

174. *Id.* at 357–58. When the Antidumping Act of 1916 was repealed, Goss’ award was unaffected because the repeal was not applied retroactively. *Id.* at 358. Japan and the European Communities brought separate actions to the WTO claiming that the United States’ failure to completely repeal the Act violated the United States’ WTO obligations. *Id.* at 358 n.3.

175. *Id.* at 358–59.

176. *Id.* at 357–59. The Eighth Circuit affirmed the jury award to Goss on January 26, 2006. *Id.* at 359. TKS notified Goss that it intended to file suit under the Special Measures Law on June 5, 2006, the same day that the Supreme Court denied TKS’s petition for certiorari. *Id.* at 359.

177. *Id.* Subsequent to the district court’s preliminary injunction, TKS paid the award owed to Goss in full, satisfying the initial judgment. *Id.*

On appeal, the court analyzed the current circuit split and noted the lack of instruction from the Supreme Court.¹⁷⁸ It also agreed with the First Circuit's observations concerning the conservative approach, as well as the Sixth Circuit's criticism of the liberal approach.¹⁷⁹ The court then highlighted the important role of comity in the global economy in terms of good working relations between countries and the predictability of consequences of trading partners' conduct.¹⁸⁰ Finally, the court remarked that the judicial branch did not have the requisite expertise to deal with matters of international trade; rather, the executive and legislative branches were responsible for international dealings.¹⁸¹

After accepting the conservative approach, the Eighth Circuit set forth a recap of the decisions in *Laker*, *Gau Shan*, and *Quaak*.¹⁸² It observed, however, that *Goss* was unlike any of these previous antisuit injunction cases and decided that the factors applied in those cases did not warrant issuing an injunction in this case.¹⁸³ Thus, the court vacated the injunction.¹⁸⁴

178. *Id.* at 359–61. The court highlighted the circuits that followed the conservative approach based on the two-pronged test of jurisdiction and policy. *Id.* at 359. It also noted that under the conservative approach antisuit injunctions should be granted sparingly because they restrict a foreign court's jurisdiction. *Id.* at 360. The court then discussed the Fifth and Ninth Circuits' liberal approach, which provides that an antisuit injunction may be issued when litigation is "duplicative and vexatious," and in order to avoid "inconsistent judgments." *Id.* The court observed that comity does not play as important a role under this standard, which looks more towards issues of inequity, delay, efficiency, and expense. *Id.* The court emphasized that both approaches require balancing comity and domestic interests. *Id.*

179. *Id.* Specifically, the court agreed with the First Circuit's observations that:

[T]he conservative approach (1) "recognizes the rebuttable presumption against issuing international antisuit injunctions," (2) "is more respectful of principles of international comity," (3) "compels an inquiring court to balance competing policy considerations," and (4) acknowledges that "issuing an international antisuit injunction is a step that should be taken only with care and great restraint and with the recognition that international comity is a fundamental principle deserving of substantial deference."

Id. (quoting *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004) (internal quotations omitted) (citation omitted)). It also agreed with the Sixth Circuit's comment that "the liberal approach 'conveys the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility.'" *Id.* (quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992)).

180. *Id.* at 360–61.

181. *Id.* at 361. For these reasons, the court joined the plurality of circuits in following the conservative approach. *Id.*

182. *Id.* at 361, 362–64.

183. *Id.* at 364. Specifically, no jurisdictional tensions remained because judgment had been entered and satisfied. *Id.* at 365. Finally, public policy concerns were not at issue because the Special Measures Law was only applicable to *Goss*. *Id.* at 366.

184. *Id.* at 369.

II. PICKING SIDES: THE GOOD, THE BAD, AND THE UGLY—WHY THE EIGHTH CIRCUIT MADE THE CORRECT CHOICE IN *GOSS*

As previously discussed, the circuits have aligned themselves along two axes, one liberal and one conservative.¹⁸⁵ Additionally, the legal community is also split concerning which approach the courts should follow.¹⁸⁶

A. Minority Report: the Liberal Approach Favors Avoiding Delay, Expense, and Inconsistency

The liberal approach allows courts a greater amount of flexibility in deciding whether to issue an antisuit injunction. The circuits following this approach weigh factors including whether the suit is vexatious, frustrates the policy of the issuing forum, threatens the issuing court's jurisdiction, or causes prejudice to the parties.¹⁸⁷ These circuits also consider delay, expense, inconvenience, and the possibility of inconsistent judgments.¹⁸⁸ Relying on such factors gives the issuing courts broad discretion based on the particular facts of the case at hand.

These same factors, however, also demonstrate the liberal approach's ultimate downfall. Without a set standard to follow, courts may actually create the very inconsistencies they set out to avoid.¹⁸⁹ Because each of the three circuits that follow the liberal approach uses a slightly different set of factors, each court could conceivably decide the same case differently.¹⁹⁰ Congressional or Supreme Court action could resolve this inconsistency.

In addition, inconsistency can arise within a single circuit, as illustrated by the Fifth Circuit. In *Karaha Bodas*, the court distinguished the case from its standard-setting precedent based on the parties' particular agreements.¹⁹¹ These discrepancies could lead to a rash of inconsistent rulings as unique facts necessarily distinguish cases from one another. Therefore, the liberal approach may lead to forum shopping.

Furthermore, the liberal approach suggests to the world that U.S. courts do not regard foreign courts as capable of rendering fair and efficient judgments,

185. See discussion *supra* Part I.C.1–2.

186. Compare Daniel Tan, *Anti-Suit Injunctions and the Vexing Problem of Comity*, 45 VA. J. INT'L L. 283, 301–12, 354–55 (2005) (criticizing the emphasis the conservative approach places on comity), with Bermann, *supra* note 56, at 631 (“American courts should not only confine the issuance of international anti-suit injunctions to specific cases where the need for such relief is truly urgent and compelling, but also confine relief to those categories of cases that will allow the remedy to remain within manageable and internationally acceptable bounds.”), and Swanson, *supra* note 4, at 36–37 (advocating for the conservative approach).

187. See, e.g., *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996).

188. *Id.* at 627 nn. 9–10.

189. See *Goss*, 491 F.3d at 360.

190. See discussion *supra* Part I.C.1, I.C.2.c.

191. See discussion *supra* Part I.C.2.c.

and that foreign proceedings should be given less respect than their American counterparts.¹⁹² Finally, the liberal approach raises a question of respect for separation of powers because the legislative and the executive are the appropriate branches to deal with foreign affairs issues.¹⁹³ United States courts have interpreted the power to issue antisuit injunctions as part of their general power over parties subject to their jurisdiction,¹⁹⁴ although they have not been given express statutory authority to do so.¹⁹⁵ Thus, until Congress acts to grant the courts this authority, the judiciary is acting beyond its scope.

For these reasons, the minority approach is not the proper standard for courts to apply when deciding whether to issue an antisuit injunction. Uniformity in decision should be a goal of the circuits, and that uniformity will not be found in the liberal approach, since each of these circuits uses a slightly different set of factors in its decision to issue an antisuit injunction.¹⁹⁶

B. Majority Rules: The Conservative Approach Favors International Comity

The conservative approach provides courts with a clearer rule for issuing antisuit injunctions in foreign litigation. By restricting injunctions to cases in which a court's jurisdiction or compelling public policy is threatened, judges have strict guidelines and the uncertainty inherent in the liberal approach's multitude of factors to consider is mitigated.¹⁹⁷ More importantly, the conservative approach prevents the judiciary from intruding into the realm of foreign affairs.¹⁹⁸ Finally, and most importantly, it shows respect to foreign sovereigns by giving the proper level of deference to their courts and proceedings, and increasing the likelihood of U.S. courts being provided the same respect.¹⁹⁹

The downside to the conservative approach is that the existence of only two bases for issuing antisuit injunctions may prohibit courts from doing so when they feel the situation would be otherwise appropriate.²⁰⁰ This bright line rule

192. *Goss*, 491 F.3d at 360 (quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992)).

193. *Id.* at 368.

194. *See supra* note 47 and accompanying text.

195. *See supra* note 49 and accompanying text.

196. *See* discussion *supra* Part I.C.1.

197. *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004) (citing *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127 (3d Cir. 2002); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987)).

198. *See Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 360 (8th Cir. 2007).

199. *Id.* (quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992)); *see also* Swanson, *supra* note 4, at 2 n.5.

200. *See Quaak*, 361 F.3d at 17–19 (discussing a modified approach). The First Circuit looks at whether the suits involve the same issues and parties, and then considers “all the facts and circumstances in order to decide whether an injunction is proper.” *Id.* at 18. Comity is given

could lead to an injunction being denied in cases where a court is unable to find a threat to jurisdiction or a relevant public policy, but an injunction would nonetheless be appropriate. Additionally, the conservative approach also ignores issues of delay, expense, inconvenience, and inconsistency addressed by the minority circuits. The modified approach adopted by the First and Second Circuits, however, does not provide a better solution because it still requires the two-pronged test to be satisfied as a threshold requirement.²⁰¹ Only then do these circuits balance the factors, as discussed in *China Trade*.²⁰²

Despite these criticisms, the conservative approach remains the more appropriate standard when courts must decide whether to issue an antisuit injunction. Due to the direct effects of issuing an antisuit injunction at the international level, comity deserves greater judicial concern than delay and inconvenience. Although the Seventh Circuit examines comity as part of its analysis under the liberal approach, it fails to give comity the weight it deserves. The conservative approach also creates more uniformity, eliminating the confusion inherent in the liberal approach's discretionary factors. Finally, the relative uniformity of the conservative approach minimizes the possibility of litigants engaging in forum shopping.

C. Taking the Right Approach: The Eighth Circuit Adopts the Conservative Approach in Goss

As a case of first impression, *Goss* required the Eighth Circuit to decide which approach to follow; in doing so, it compared both positions, before ultimately adopting the conservative approach.²⁰³ The court first highlighted the First Circuit's four considerations laid out in *Quaak*, applauding the First Circuit's presumption against the issuance of injunctions, respect for comity, competing policies, and restraint in favor of deference.²⁰⁴ The court also agreed with the Sixth Circuit's observation in *Gau Shan* that excessive flexibility in issuing injunctions against foreign proceedings gives the impression that American courts lack faith in the fairness and efficiency of foreign proceedings.²⁰⁵

The court's analysis of the two-pronged conservative test of jurisdiction and public policy warrants some discussion.²⁰⁶ With respect to the jurisdiction prong, the court observed that the All Writs Act does not confer original

"substantial weight," creating "a rebuttable presumption against the issuance of an order that has the effect of halting foreign judicial proceedings." *Id.*

201. *Id.* at 17-19; *China Trade*, 837 F.2d at 36. *But see* Vertigan, *supra* note 17, at 179-80 (advocating for the Second Circuit's approach).

202. *Quaak*, 361 F.3d at 17-19; *China Trade*, 837 F.2d at 35.

203. *Goss*, 491 F.3d at 359-361.

204. *Id.* at 360 (quoting *Quaak*, 361 F.3d at 18).

205. *Id.* (quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992)).

206. *See id.* at 361-68.

jurisdiction;²⁰⁷ rather, the district court initially had proper jurisdiction when TKS failed to pay its requisite damages under the antidumping judgment.²⁰⁸ However, once TKS paid the judgment, no other litigation was pending in the United States; thus, rather than protecting the jurisdiction of U.S. courts, Goss was attempting to prevent TKS from pursuing a remedy only available in the Japanese courts.²⁰⁹ With no jurisdiction left to protect, the case failed the first prong of the *Laker* test, ultimately leading the Eighth Circuit to properly conclude that it lacked a jurisdictional basis for issuing an antisuit injunction.²¹⁰ Second, the dissimilarities between issues in the original litigation and those available to TKS in Japan vitiated the tension over concurrent jurisdiction with the Japanese court.²¹¹ The liberal approach, on the other hand, would lead the court to the improper conclusion that it retained jurisdiction.

With respect to the policy prong, the court analyzed the potential harm the Special Measures Law might inflict on U.S. public policy, concluding that because the statute only affected Goss, the Japanese courts must decide the matter.²¹² Therefore, the court correctly decided that Goss failed to satisfy the public policy prong. To decide otherwise would validate the First Circuit's fear that a public policy exception could be made for any dispute.²¹³ Summarizing its analysis, the court reasoned that no threat to U.S. jurisdiction or policy would result even if the Special Measures Law relief negated Goss' award from the U.S. court.²¹⁴ Accordingly, the court determined that the case lacked any need for an antisuit injunction.²¹⁵

207. *Id.* at 364.

208. *Id.* at 364–65 (noting that “the district court retained ancillary enforcement jurisdiction until satisfaction of the judgment”). Ancillary jurisdiction is defined as “[a] court’s jurisdiction to adjudicate claims and proceedings related to a claim that is properly before the court.” BLACK’S LAW DICTIONARY 868 (8th ed. 2004).

209. *Goss*, 491 F.3d at 365.

210. *Id.* at 366–67.

211. *Id.* at 366. TKS sought a remedy that was only available in Japan under the Special Measures Law; this issue was not litigated in the original antidumping action decided by the lower court. *Id.*

212. *Id.* at 366. Goss’s litigation was the only suit pending under the Antidumping Act of 1916, and the Special Measures Law would not be applicable to any future parties. *Id.* The court also noted that the Japanese courts were better equipped to handle litigation under the Special Measures Law, because their decision would turn on Japanese precedent and policies. *Id.*

213. *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004).

214. *Goss*, 491 F.3d at 367.

215. *Id.* at 368.

III. BRIDGING THE GAP: CREATING A UNIFIED STANDARD USING THE CONSERVATIVE APPROACH THROUGH LEGISLATIVE ACTION

Despite the potential negatives, the current split should unite in favor of the conservative approach for reasons of international comity and judicial restraint. In an increasingly connected world these ideals can greatly affect the global economy; therefore, foreign courts and proceedings require great deference.²¹⁶ It is essential to global economics, as well as international interactions in general, that the United States properly respect the judicial practices of other nations.²¹⁷ Otherwise, there is a risk that foreign courts will not enforce or give deference to U.S. judgments. In addition, consistency in international law is beneficial to business because it will reduce uncertainties between trading partners.²¹⁸

As the Eighth Circuit correctly pointed out in *Goss*, the legislative and executive branches should ultimately resolve this question, not the judiciary.²¹⁹ Congress has statutorily addressed the tension between state and federal courts in domestic litigation;²²⁰ however, under the Anti-Injunction Act, comity does not factor into the decision of whether to issue an injunction.²²¹ Nonetheless, Congress clearly has both the ability and the power to craft similar legislation to address this issue on the international level, and should do so to resolve the current judicial split.

In the end, the liberal approach creates more inconsistencies than it solves, because the circuits that follow it each employ slightly different analyses,²²² resulting in outcomes that vary by jurisdiction.²²³ With no set standard to

216. *Id.* at 360–61.

217. *Id.* at 360 (quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992)).

218. *See Quak*, 361 F.3d at 19 (quoting *Gau Shan*, 956 F.2d at 1355).

219. *Goss*, 491 F.3d at 361.

220. 28 U.S.C. § 1341, 2283–84 (2006). *See generally* WRIGHT & KANE, *supra* note 48, at § 47 (noting that this statute was created to “prevent needless friction between state and federal courts” and “represents Congress’ considered judgment as to how to balance the tensions inherent in” a dual system of courts” (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988))).

221. *Id.* at 302 (noting that the Supreme Court found the statute was “an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions.” (quoting *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970))). The first exception is anything specially authorized by Congress. *Id.* at 303. The second exception allows an injunction when it is necessary to protect the court’s jurisdiction. *Id.* at 304–05. Third, “a federal court can enjoin a later state action involving property in the custody of the federal court . . . [however,] [a]n injunction cannot issue to restrain a state action in personam involving the same subject matter from going on at the same time.” *Id.* at 305.

222. *See* discussion *supra* Part I.C.1.

223. *See* discussion *supra* Part I.C.2.c.

follow, it is within the discretion of the trial judge to decide which factors to apply and how to apply them.

Until the executive or legislative branch takes action to resolve this split, the Supreme Court should enforce the conservative standard as the rule in foreign antisuit injunction cases; the circuits yet to decide the issue should also adopt this approach when the opportunity presents itself. In the long-term, the political branches should aim to preserve the interest of international comity over any equitable domestic consideration the court might use to justify staying foreign proceedings in favor of litigation in the United States.

IV. CONCLUSION

In the current circuit split over the proper factors to consider when issuing an antisuit injunction, the conservative approach should prevail. The Eighth Circuit correctly adopted the conservative standard in order to preserve international comity in the global economy.²²⁴ Furthermore, the *Goss* court correctly concluded that it is up to the legislative and executive branches, not the courts, to ultimately rectify this disparity.²²⁵ In the meantime, however, the Supreme Court should endorse the conservative approach. This will help define the proper role of antisuit injunctions in American judicial practice and promote greater respect for foreign courts and proceedings.

224. *Goss*, 491 F.3d at 360.

225. *Id.* at 361.

