Granting Comity its Due: A Proposal to Revive the Comity-Based Approach to Transnational Antisuit Injunctions

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NOTE

GRANTING COMITY ITS DUE: A PROPOSAL TO REVIVE THE COMITY-BASED APPROACH TO TRANSNATIONAL ANTISUIT INJUNCTIONS

The power of United States courts to control the activities of foreign entities subject to their in personam jurisdiction has long been recognized in the American judicial system. This extraterritorial exercise of jurisdiction is grounded in the doctrine of comity. Comity, in its essence, is a recognition of the inherent power of a nation to control the activities of another nation in its jurisdiction. It is a principle of international law that acknowledges the sovereignty of foreign states and the need to respect their jurisdiction.

1 Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984); Peck v. Jenness, 48 U.S. (7 How.) 612, 624-25 (1849) (once court has jurisdiction, it has plenary authority to rule on all questions involved in case); Philp v. Macri, 261 F.2d 945, 947 (9th Cir. 1958) ("In a proper case, a court which has jurisdiction of the parties has the power to enjoin them from proceeding with an action or enforcing a judgment in a court of another state or country.") (citation omitted). See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987), which provides:

(1) A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.

(2) In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time the jurisdiction is asserted:

... (g) the person, whether natural or juridical, has consented to the exercise of jurisdiction;
(h) the person, whether natural or juridical, regularly carries on business in the state;
(i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;
(j) the person, whether natural or juridical, had carried on outside the state an activity having substantial, direct, and foreseeable effect within the state, but only in respect of such activity.

Id.; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 (1971) ("A state has power to exercise judicial jurisdiction to order a person, who is subject to its judicial jurisdiction, to do an act, or to refrain from doing an act, in another state."); see also 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1224 (1918) ("Authority to control all persons and things within their own territorial limits" permits courts of equity to restrict litigation between foreign citizens over whom they have jurisdiction.); Ernest J. Messner, The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State, 14 MINN. L. REV. 494, 495
torial authority has both constitutional\textsuperscript{2} and legislative\textsuperscript{3} underpinnings. The extent of this power, however, is often called into question when a U.S. court exercises concurrent jurisdiction with a foreign tribunal over a matter between identical or substantially similar parties.\textsuperscript{4} In such instances of parallel litigation, federal district judges have the equitable power to issue injunctions preventing such parties from proceeding with the foreign litigation.\textsuperscript{5} Although it is generally accepted that federal judges are

\textsuperscript{2} See U.S. CONST. art. III, § 2, cl. 1, which states: "The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

\textsuperscript{3} See 28 U.S.C. § 1330(a) (1988) (providing that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . ."). Courts will have personal jurisdiction over all claims against foreign states in which subject matter jurisdiction has been obtained under subsection (a). Id. § 1330(b). In addition,

\[ \text{[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000 . . . and is between} \]

\[ \text{. . .} \]

\[ \text{(2) citizens of a State and citizens or subjects of a foreign state;} \]

\[ \text{(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and} \]

\[ \text{(4) a foreign state . . . as plaintiff and citizens of a State or of different States.} \]

\textit{Id.} § 1332.

\textsuperscript{4} See Baer,\textit{ supra} note 1. When parallel litigation is initiated in a foreign country, the dissatisfied party may move for an injunction against "litigation in the forum that he finds inconvenient." \textit{Id.} at 155. Traditionally, appellate courts have favored parallel proceedings over a trial court's surrender of jurisdiction. See, e.g., Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 ("Abdication of the obligation to decide cases can be justified under [the doctrine of abstention] . . . only in . . . exceptional circumstances . . . .") (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)), \textit{reh'g denied}, 426 U.S. 912 (1976); Alabama Public Serv. Comm'n v. Southern R.R. Co., 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in result) (noting that equity never counseled that federal court should dismiss suit because state court had jurisdiction). For more on the courts' duty to adjudicate the claims brought before them, see generally New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 358-59 (1989) (holding that federal courts lack authority to abstain from jurisdiction conferred upon them); \textit{Colorado River}, 424 U.S. at 813-16 (stating that courts' abstention from exercise of federal jurisdiction is exception, not rule); \textit{Laker}, 731 F.2d at 927 ("Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants.").

\textsuperscript{5} See Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852, 855 (9th Cir. 1981), \textit{cert denied}, 457 U.S. 1105 (1982); \textit{In re Unterweser Reederei}, GMBH., 428 F.2d 888, 891 (5th Cir. 1970), \textit{aff'd on reh'g per curiam}, 446 F.2d 907 (5th
empowered to grant an “antisuit injunction” based on the existence of certain conditions, courts are split regarding the criteria that must be satisfied in order to justify the injunction. Some jurisdictions will affirm the injunction only under a narrow set of circumstances, while others are more permissive and will uphold the injunction if only one of various criteria is met.

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6 See Richard W. Raushenbush, Note, Antisuit Injunctions and International Comity, 71 VA. L. Rev. 1039, 1040 n.6 (1985) ("An 'antisuit injunction' is a court order prohibiting or conditioning the maintenance of a suit in another court. The order is addressed to a party within the personal jurisdiction of the issuing court..."). Often a defendant in a pending action seeks declaratory relief on the same matter in some other forum. Id. at 1041. One of the parties, and sometimes both, will move to enjoin the other suit. Id.

7 Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1353-54 (6th Cir. 1992) (recognizing that Fifth and Ninth Circuits follow "laxer" standard, while Second and District of Columbia Circuits have adopted more stringent view); Lawrence W. Newman & Michael Burrows, Antisuit Injunctions and the Race to Judgment, N.Y. L.J., June 17, 1993, at 3 (same).

8 See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984) (ruling that antisuit injunction is warranted only under most "compelling of circumstances," namely, to protect enjoining court's jurisdiction and "to prevent the litigant's evasion of the important public policies of the forum"); China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987) (stating that factors of protection of forum's jurisdiction and enforcement of forum's public policy are essential to granting antisuit injunction); see also Mutual Serv. Casualty Ins. Co. v. Frit Indust., Inc., 805 F. Supp. 919, 921-23 (M.D. Ala. 1992) (favoring stricter standard), aff'd, 3 F.3d 442 (11th Cir. 1993).

9 See, e.g., Unterweser, 428 F.2d at 890 (Fifth Circuit listing four instances in which granting injunction would be appropriate); Seattle Totems, 652 F.2d at 855 (Ninth Circuit adopting criteria used in Unterweser, concluding that injunction would forestall "inequitable hardship" resulting from parallel proceeding in distant foreign forum) (quoting Unterweser, 428 F.2d at 896); see also Philips Medical Sys. Int'l, B.V. v. Brueeman, 8 F.3d 600, 605 (7th Cir. 1993) (favoring laxer standard); Sperry Rand Corp. v. Sunbeam Corp., 285 F.2d 542 (7th Cir. 1961) (same).
The Court of Appeals for the Seventh Circuit recently addressed the competing interests that fostered this split in *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.* [10] Allendale involved a European computer manufacturer, Groupe Bull, which was owned by a French corporation, Compagnie des Machines Bull ("CMB"), which in turn was largely owned by the French government. [11] While contemplating a takeover of another computer company, Bull Data Systems ("BDS"), CMB's American subsidiary, purchased a worldwide property insurance policy from an American insurer, Allendale Mutual Insurance Company ("Allendale Mutual"). [12] When Groupe Bull centralized its European computer inventory in a French warehouse, BDS added the warehouse to the Allendale Mutual policy and later took out a French policy with Allendale Mutual's British subsidiary, Factory Mutual International ("FMI") to cover the warehouse. [13] In June 1991 the computers stored at the French warehouse were destroyed by fire and BDS subsequently filed claims under both insurance policies. [14] Shortly thereafter, Allendale Mutual and FMI commenced an action in the United States District Court for the Northern District of Illinois seeking a declaration that the fire had been caused by arson on the part of the insured and, therefore, was not covered by the policies. [15] BDS then filed two suits seeking to recover on its insurance policies—one against Allendale Mutual in the Northern District of Illinois, [16] and a second against FMI in the Commercial Court of Lille, France. [17]

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[12] Id. BDS obtained the policy through an American broker, and negotiated and signed the contract in the United States. Id.
[13] Id. at 426-27.
[14] Id.
[15] Allendale, 10 F.3d at 426-27. Alternatively, the insurers sought a declaration that their liability was limited. Id.
[16] Id. The American suits were then consolidated, and BDS filed a counterclaim in the district court. Id. at 427.
[17] Id. The insurers had urged the French authorities to conduct a criminal investigation of the fire. Id. At the insurers' request, despite objection by BDS, the French court stayed BDS's action while the investigation was pending. Id. The parties to the district court action commenced discovery, and in February 1993 BDS moved in the French court to have the stay lifted and the French action tried. Id. Allendale Mutual then obtained a preliminary injunction in the district court precluding litigation of the French action until the American suit reached a judgment. Id.
Both the Illinois district court and the Commercial Court of Lille claimed jurisdiction over the matter, yet the district court granted an injunction precluding BDS from suing on its insurance policy in France. BDS maintained that the ruling constituted a breach of international comity, to which the court responded, "[t]he only concern with international comity is a purely theoreti-

18 Id. at 427. Federal jurisdiction was upheld because the litigation was between United States citizens of completely diverse citizenship, with foreign citizens as additional parties. See 28 U.S.C. § 1332(a)(3). Supporting the assertion of such jurisdiction in Illinois was the fact that "the principal insurance policy [between plaintiff insurer and defendant insured] was written in the United States following negotiations among a U.S. insurer, a U.S. broker, and a U.S. insured (BDS)." Allendale, 10 F.3d at 430. Furthermore, BDS's headquarters were in Chicago and negotiations were handled in Allendale's Chicago office. Id. at 432.

Claim of jurisdiction in the Commercial Court of Lille was based on a French statute which purported to confer upon French courts exclusive jurisdiction over claims to "enforce insurance policies governed by the French insurance code .... " Id. at 427. Judge Posner remarked that it had yet to be determined whether French law in fact conferred such exclusive jurisdiction, id. at 427, 432, and he questioned whether such a rule would preclude an American court from hearing a case of this nature in which American interests were implicated. See id. at 432.

19 Allendale, 10 F.3d at 433. The court reasoned that if Allendale Mutual succeeded on its claim in the federal district court, the French court might not give res judicata effect to the judgment. Id. Moreover, if the district court denied the injunction, and if the French court ruled against the plaintiff, Allendale would be deprived of its day in court in the proper United States forum, namely, the Northern District of Illinois. See id. at 432.

20 Id. at 431. See Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (defining comity). "Comity," in the legal sense, is neither a matter of absolute obligation ... nor of mere courtesy and good will .... But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-64; Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 543 n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."); see also Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972). The Third Circuit stated that comity is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.

Id.; see Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969). In vacating an antisuit injunction, the First Circuit stated:

The issue is not one of jurisdiction, but one, almost as important when a foreign sovereign is involved, of comity. The presence of the parties confers on the district court jurisdiction to act, but the direct effect of the district
The court ultimately concluded that the possibility that BDS would defy a U.S. judgment against it and proceed with its litigation in the Commercial Court of Lille\textsuperscript{22} was sufficient grounds to enjoin the French action altogether.\textsuperscript{23}

Chief Judge Posner’s analysis of the competing standards for granting antisuit injunctions provides insight into how future motions for such injunctions should be analyzed and resolved. This Note will address the discrepancies in the rationales of the federal courts that precipitated the split in authority, and will offer a solution to the problem. Part One analyzes the merits of both the “lenient” and “stricter” standards which district courts apply when ruling on motions for antisuit injunctions. Part Two discusses the Allendale decision, taking a critical view of Judge Posner’s approach to the problem, as well as his contemplation of the role of international comity in adjudicating such cases. Part Three suggests that federal courts should adopt a guideline for resolution of these motions based loosely on that set forth in the Foreign Sovereign Immunities Act, devoting particular attention to the need for consistency and adherence to custom when dealing with foreign court’s action on the jurisdiction of a foreign sovereign requires that such action be taken only with care and great restraint.\textsuperscript{21}

*Id.* at 578 (citations omitted).

For a glimpse of the doctrine of comity among nations that predates *Hilton* as well as U.S. common law, see Emory v. Grenough, 3 U.S. (3 Dall.) 369, 370 n.* (1797). “By the courtefy [sic] of nations, whatever laws are carried into execution, within the limits of any government, are confidered [sic] as having the fame [sic] effect every where [sic] fo far [sic], as they do not occafion [sic] a prejudice to the rights of the other governments, or their citizens.” *Id.* (quoting Ulrich Huberus, 2 Vol. B.I. Tit. 3ps 26).

Although unable to pinpoint the meaning or exact obligations of the fluid term “comity,” courts are eloquent in expressing their support for the concept. See, e.g., Hayes Indus., Inc. v. Caribbean Sales Assoc., Inc., 387 F.2d 498, 502 (1st Cir. 1968) (“[C]omity is to be preferred to combat.”); Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354 (6th Cir. 1992) (“Economic interdependence requires cooperation and comity between nations.”).

\textsuperscript{21} Allendale, 10 F.3d at 432-33. This conclusion is supported by the district court’s self-proclaimed duty of “protecting its citizens . . . from trumped-up multimillion dollar claims.” *Id.* at 432.


\textsuperscript{23} Allendale, 10 F.3d at 433 (citations omitted).
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sovereigns and their instrumentalities. In its Conclusion, this Note submits that the Seventh Circuit failed to accord due deference to principles of international comity and proffers that, had the court so deferred, it would have supported the trend of the circuits and applied the stricter standard.

I. OVERVIEW OF CONFLICTING AUTHORITY

A. The Lenient Standard

The liberal interpretation of a court's power to enjoin foreign proceedings is best articulated in the landmark case of *In re Unterweser Reederei, GmbH.* Unterweser listed four situations in which granting an antisuit injunction would be appropriate: "where the foreign litigation would: (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations." In *Unterweser,* plaintiff-appellee Zapata moved for an injunction restraining defendant-appellant Unterweser from pursuing its claim on a towing contract in the High Court of Justice in London. The Fifth Circuit relied on the now arcane "first-filed rule," which enables "the court first securing jurisdiction" to "en-

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24 428 F.2d 888 (5th Cir. 1970), aff'd on reh'g per curiam, 446 F.2d 907 (5th Cir. 1971), vacated on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co., 404 U.S. 1 (1972).

25 Id. at 890 (citing 7 J. Moore, *Federal Practice* § 65.19 (2d ed. 1953)). One court recited an additional factor, namely, "adjudication of the same issue in separate actions would result in delay, inconvenience, expense, inconsistency, or race to judgment." American Home Assurance Co. v. Insurance Corp. of Ir., 603 F. Supp. 636, 643 (S.D.N.Y. 1984) (citations omitted); see Louise E. Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 *Int'l L. 21, 36-37 (1992) (recognizing American Home court's use of fifth factor); Raushenbush, *supra* note 6, at 1050 n.63 (same). The Southern District of New York first mentioned the fifth factor in its understanding of *Unterweser.* Recent cases, however, follow only the four original factors. See, e.g., Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1353 (6th Cir. 1992).

26 Unterweser, 428 F.2d at 890.

27 Id. at 891; see Smith v. McIver, 22 U.S. (9 Wheat.) 532, 535 (1824), (holding, quite simply, that "[i]n all cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it."); Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 929-30 (3d Cir. 1941) (citing McIver with approval), cert. denied, 315 U.S. 813 (1942); Gage v. Riverside Trust Co., 86 F. 984, 999 (C.C.S.D. Cal. 1898) (holding that first court to hear case will dispose of controversy); see also Baer, *supra* note 1, at 158 (noting European Economic Community's adherence to first-filed rule for purposes of "developing close political and economic bonds among Member States"). *But see* Baer,
join[ ] the parties . . . from proceeding in another jurisdiction."\textsuperscript{28} It then granted Zapata's motion to proscribe the foreign litigation on the theory that concurrent suits in distant fora would impede the "speedy and efficient determination of the cause."\textsuperscript{29} The court's holding was buttressed by the fact that the litigation abroad would materially affect the domestic litigants' substantive rights.\textsuperscript{30}

More than a decade later, the Ninth Circuit, relying heavily on \textit{Unterweser}, upheld a Washington district court's injunction prohibiting litigation of a contract claim in Canada in \textit{Seattle Totems Hockey Club, Inc. v. National Hockey League.}\textsuperscript{31} In granting the injunction, the lower court weighed such factors as the "convenience to the parties and witnesses," "the efficient administration of justice," and the "potential prejudice" to the parties.\textsuperscript{32} In affirming, the Ninth Circuit expressed concern that resolving the same issues in separate trials could result in a potential race to judgment or inconsistent rulings.\textsuperscript{33} Based on the broad stan-
dards articulated in Unterweser and its progeny, the Ninth Circuit
found that the district court did not abuse its discretion in grant-
ing the injunction.\textsuperscript{34}

What emerges from Unterweser and Seattle Totems is a stan-
dard that is not difficult to satisfy.\textsuperscript{35} In order to achieve this stan-
dard and uphold an injunction, appellate courts need only con-
clude that the foreign litigation involves the same parties and
issues as the domestic suit, a situation which will often result in
potential prejudice to a party.\textsuperscript{36}

B. The Stricter Standard

Some courts place a greater evidentiary burden on litigants
who seek to enjoin parallel foreign proceedings than do the lenient
jurisdictions. These courts will issue an antisuit injunction only
upon proof that failure to do so would either deprive the domestic
court of jurisdiction or result in a breach of the domestic forum’s
public policy. \textit{Laker Airways Ltd. v. Sabena, Belgian World Air-
lines}\textsuperscript{37} highlights the relevant policies underlying this stricter
standard.

Plaintiff Laker Airways (“Laker”), an American corporation,
filed an antitrust suit in the United States District Court for the
District of Columbia against both foreign and domestic defendants
to recover for injuries sustained as a result of alleged predatory
pricing.\textsuperscript{38} Two months later, the four foreign defendants initiated
a suit in the British High Court of Justice\textsuperscript{39} to enjoin Laker from
seeking damages for an alleged violation of U.S. antitrust laws.\textsuperscript{40}

\textsuperscript{34} \textit{See} Seattle Totems, 652 F.2d at 856.
\textsuperscript{35} \textit{See} Newman & Burrows, \textit{supra} note 7, at 3; \textit{see also} Gau Shan, 956 F.2d at
1353 (‘‘[A] duplication of the parties and issues, alone, is sufficient to justify a foreign
antisuit injunction.’’). This more liberal standard has strong roots in the courts’
power to prevent evasion of the forum’s laws. \textit{See} Raushenbush, \textit{supra} note 6, at 1049
n.60 (citing \textit{Cole v. Cunningham}, 133 U.S. 107, 111 (1890), and \textit{Baltimore & O.H. R.R.
Co. v. Kepner}, 314 U.S. 44, 51-52 (1941)). The liberal approach has been criticized for
demonstrating too great a concern for the issuing court and the litigants before it, at
the expense of the foreign court and of the other parties. \textit{See}, \textit{e.g.}, Raushenbush,
\textit{supra} note 6, at 1051.
\textsuperscript{36} Gau Shan, 956 F.2d at 1353.
\textsuperscript{37} 731 F.2d 909 (D.C. Cir. 1984).
\textsuperscript{38} \textit{Id.} at 917.
\textsuperscript{39} \textit{See} British Airways Bd. v. Laker Airways Ltd., 3 All E.R. 375 (Q.B. 1983).
\textsuperscript{40} Laker, 731 F.2d at 918. The foreign action “specifically sought to compel Laker
to dismiss its suit against the foreign defendants . . . and to prohibit Laker from instit-
tuting any other proceedings in any non-English forum . . . .” \textit{Id.} In the Queen’s
Bench Division, Judge Parker refused to issue the injunction, concluding that al-
After the English appellate court granted the injunction, the U.S. district court barred defendants KLM and Sabena from joining the British action and from taking steps in a foreign court that could obstruct its own jurisdiction. In reviewing the “propriety” of the district court’s injunction, the Court of Appeals for the District of Columbia Circuit was persuaded only by the injunction’s ability to protect the district court’s jurisdiction and to ensure the litigants’ observance of the forum’s important public policies. The court felt compelled to uphold the injunction because it was purely defensive in nature and designed for the sole purpose of preserving the forum’s jurisdiction. Judge Wilkey’s opinion has since become the benchmark for numerous courts and scholars that endorse the stricter standard.

41 On appeal, Judge Parker’s decision was reversed, and the injunction was granted, based on the determination that discovery in the American action would be unduly burdensome to the foreign defendants. 3 All E.R. at 409-10. This injunction “restrain[ed] Laker from taking any steps against British Airways ... in the United States action, and ... direct[ed] Laker to use its best efforts to have British Airways ... dismissed from the United States action.” Laker, 731 F.2d at 920.

42 Laker, 731 F.2d at 921.

43 Id. at 927. The Laker court did not treat Unterweser as persuasive authority.

44 Id. at 938. In contrast, the British court’s injunction was “purely offensive” and aimed at preventing the U.S. court from levying a judgment on parties clearly subject to its jurisdiction. Id.

A court may issue three types of injunctions: defensive, offensive, and counter-injunctive. Raushenbush, supra note 6, at 1043. Defensive injunctions are narrowly drawn, and serve to prevent interdictory proceedings. Id. They “allow parallel actions to proceed but restrain a party from seeking relief abroad that would interfere with the issuing court’s ability to try the case before it.” Id. Offensive injunctions are broadly drawn and prevent parallel actions abroad. Id.
In *China Trade & Development Corp. v. M.V. Choong Yong*, the Second Circuit followed the *Laker* rationale, yet arrived at a different conclusion. Employing the lenient standard, which had been adopted by some judges in the Southern District of New York, the lower court maintained that equity counselled in favor of the injunction, in that the parties and claims were identical and met one of the *Unterweser* factors. On appeal, it was held that the mere duplication of litigants and their claims, followed by satisfaction of one or more of the *Unterweser* factors, was insufficient to warrant enjoining the plaintiff from pursuing the foreign action. The circuit court reasoned that "the need for due regard to principles of international comity" must be considered where an antisuit injunction operates to "restrict[ ] the jurisdiction of the court of a foreign sovereign." As a result, notions of comity intervened and were deemed more weighty than the "equitable factors" stressed by the district court. Thus, *Laker*’s stricter standard prevailed.

II. ANALYSIS OF *ALLENDALE* AND THE ROLE OF INTERNATIONAL COMITY

In *Allendale*, Judge Posner showed concern for the inconvenience that would result to Allendale Mutual from concurrent litigations in the United States and France. He also questioned whether the Commercial Court of Lille, which is actually a panel

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46 837 F.2d 33 (2d Cir. 1987).
47 Id. at 37. The court concluded that the foreign litigation “pose[d] no threat to the jurisdiction of the district court or to any important public policy of the forum,” and therefore denied the injunction. Id.
48 Id. at 35. The court used the rationale developed in American Home Assurance Co. v. Insurance Corp. of Ir., 603 F. Supp. 636 (S.D.N.Y. 1984). In *American Home*, the court had adopted two questions for considering a motion to stop foreign proceedings: first, whether the parties were the same, and second, whether resolution of the first action would dispose of the action sought to be enjoined. 603 F. Supp. at 643 (citing Gorpek, Ltd. v. United States, 583 F. Supp. 789, 798 (S.D.N.Y. 1984)). Since both of these questions were answered in the affirmative, the *Unterweser* test was then applied. Id.; see In re *Unterweser Reederei*, GmbH., 428 F.2d 888, 890 (5th Cir. 1970), aff’d on reh’g per curiam, 446 F.2d 907 (5th Cir. 1971), vacated on other grounds sub nom. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).
49 *China Trade*, 837 F.2d at 36. An injunction supported by these factors alone “would tend to undermine the policy that allows parallel proceedings to continue and disfavors anti-suit injunctions.” Id.
50 Id. at 36 (citations omitted).
51 Id. (citing United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985)).
52 *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 430-31, 433 (7th Cir. 1993). The court felt that Allendale Mutual would suffer irreparable harm from
of businessmen serving as arbitrators,\textsuperscript{53} possessed the administrative capability to adjudicate Allendale's arson defense to BDS's countersuit on its insurance policy.\textsuperscript{54} However, the court did not justify the injunction merely on the grounds of inconvenience to Allendale and the institutional shortcomings of the French court.\textsuperscript{55} The implications of comity were then considered.\textsuperscript{56}

A. Posner's Approach to International Comity

The core of Allendale's approach to international comity is based on its interpretation of the conflicting standards.\textsuperscript{57} Although Judge Posner maintained that comity was a relevant component of the court's analysis, the court in effect upheld the injunction because "every practical consideration support[ed]" it,\textsuperscript{58} and because it saw no evidence that foreign relations were likely to be impaired.\textsuperscript{59} Judge Posner drew this same conclusion one week prior to Allendale in Philips Medical Systems International B.V. v. Bruetman,\textsuperscript{60} expressing doubt that an injunction would "jeopardize amicable relations between" the United States and Ar-

\textsuperscript{53} Id. at 429.

\textsuperscript{54} Id. at 429-30. The members of the Commercial Court have no "masters, magistrates, law clerks, externs, or other staff that might enable them to assimilate the voluminous materials that have been collected in the district court." \textit{Id.} at 429. Pre-trial discovery had "generat[ed] hundreds of depositions and hundreds of thousands of documents" in the insured's attempt to reveal arson. \textit{Id.} at 427. It would be virtually impossible for Allendale Mutual to assert its arson defense through this "massive document action" in a tribunal that lacks the resources to manage such a task. \textit{Id.} at 429.

\textsuperscript{55} See id. at 431. The court was also cognizant of the insured's apparent intent to deprive the district court of jurisdiction, and the desire to avoid any evidence of arson obtained through discovery by resuming its French suit. \textit{Id.} at 429. Judge Posner also recognized the duty of federal courts to adjudicate matters over which they have jurisdiction. \textit{Id.} at 430.

\textsuperscript{56} Id. at 431-33.

\textsuperscript{57} See Allendale, 10 F.3d at 431-33. Judge Posner observed that "the strict cases presume a threat to international comity" whereas the lenient cases "demand evidence . . . that comity is likely to be impaired . . . ." \textit{Id.} at 431.

\textsuperscript{58} Id.

\textsuperscript{59} Id. The court suggested that an amicus curiae representation by the State Department would be helpful in assessing the reality of such a threat. \textit{Id.} at 431. Absent some type of showing that the injunction would "ruffle the smooth surface of our relations with France," any claim that the injunction violates comity is "purely theoretical." \textit{Id.} at 432-33.

\textsuperscript{60} 8 F.3d 600 (7th Cir. 1993).
The Philips court opined that even international cases should not be immune from a court’s ability to reduce duplicative litigation. Reading these cases together, it appears that the Seventh Circuit’s deference to international comity, perhaps even its judgment as to whether comity should be a factor in precluding concurrent litigations abroad, hinges on an affirmative showing that foreign relations will somehow be adversely affected.

Such a ruling gives short shrift to the authority that established comity as a guiding principle of American jurisprudence. Although the injunction’s asserted purpose is to restrain the activ-

61 Id. at 605. As in Allendale, the court stressed the absence of any input from the State Department or from the foreign government. Id. Although the court inclined toward the lenient standard, it made no definitive choice. Id. In fact, the court went so far as to suggest that perhaps the “differences between the standards are [no] more than verbal” and questioned “whether they even dictate different outcomes.” Id. The court held that the injunction passed both the lenient and stricter standards. Id.

62 Id.


64 See Hilton v. Guyot, 159 U.S. 113, 202-03 (1895); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984). In Laker, Judge Wilkey observed that:

[C]omity serves our international system like the mortar which cements together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure. . . . [T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations.

United States courts “have always expounded and executed” the laws of foreign nations as they are interpreted in the place of origin. See Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589 (1839). In so doing, courts administer the “comity of nation[s].” Id. (citing JOSEPH STORY, CONFLICT OF LAWS § 38 (1834)). Justice Story remarked that “courts of justice presume the tacit adoption” of foreign laws, “unless they are repugnant to [their] policy or prejudicial to [their] interests.” STORY, supra, § 38, at 37; see Baer, supra note 1, at 164-65 (stating that American courts’ recognition of foreign judgments has much to do with importance of international comity); see also Peck v. Jenness, 48 U.S. (7 How.) 612, 625 (1849) (arguing that simply because injunctions are issued against parties to litigation and not against foreign courts does not undermine need for deference to comity).

Proponents of the laxer standard focus on pragmatism and equity, while those favoring the stricter test maintain that international comity should be an overriding concern. See Teitz, supra note 25, at 38. In fact, this “basic clash in underlying philosophies structure[s] both the test selected and the factors chosen for emphasis.” Id.; see also Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1296 (3d Cir. 1979) (noting that in cases involving foreign nations “it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are [relevant] considerations”).
ity of a litigant abroad, it essentially acts to curtail the jurisdiction of a foreign tribunal by withdrawing a case from its review.\textsuperscript{65} Moreover, if foreign courts granted similar injunctions, and domestic courts enforced them, it is conceivable that no party would be able to obtain a remedy.\textsuperscript{66} In order to diminish the likelihood of both foreign and domestic courts granting antisuit injunctions, thereby “seiz[ing] exclusive jurisdiction” for themselves, some writers propose that the injunctions be ignored altogether.\textsuperscript{67}

B. Sixth Circuit’s View of Comity

In \textit{Gau Shan Co. v. Bankers Trust Co.},\textsuperscript{68} the Sixth Circuit was particularly sensitive to the effect that U.S. litigations might have

\textsuperscript{65} See United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985) (antisuit injunctions “effectively restrict[ ] the jurisdiction of the foreign tribunal”); Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 887 (3d Cir. 1981) (“[T]here is no difference between addressing an injunction to the parties and addressing it to the foreign court itself.”), aff’d on other grounds sub nom. Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982); \textit{Laker}, 731 F.2d at 927; Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969) (recognizing effect of injunction on foreign court’s jurisdiction); see also Medtronic, Inc. v. Catalyst Research Corp., 518 F. Supp. 946, 954 (D. Minn.) (noting that injunctive relief will indirectly affect powers of foreign courts), aff’d, 664 F.2d 660 (8th Cir. 1981); 11 \textit{CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE} § 2942, at 377-78 (1973) (same).

\textsuperscript{66} See \textit{Laker}, 731 F.2d at 927; \textit{Baer}, supra note 1, at 165 (“[F]oreign courts might retaliate by enjoining parties from participating in parallel American actions . . . .”). If foreign and domestic courts grant injunctions halting the other’s pending suit, “both actions will be paralyzed and neither party will be able to obtain any relief.” \textit{Gau Shan Co. v. Bankers Trust Co.}, 956 F.2d 1349, 1355 (6th Cir. 1992).

Equating comity with the “golden rule,” the Third Circuit made the following observation in a case in which the defendant sought to enjoin the Philippine government from prescribing and administering its laws within its territorial borders:

[O]ne could imagine the profound legal . . . issues that would arise if the Executive Branch of the United States government were enjoined by a foreign court the way the district court has enjoined the Republic here. Were the shoe on the other foot, we would surely find it intolerable for a court in the Philippines to order the President of the United States to provide immunity for witnesses who had testified in a Philippines proceeding, silence members of Congress who called for an investigation of those witnesses, prevent members of Congress from even speaking in a manner that could be interpreted as harassing of those witnesses, or fire an independent prosecutor who had threatened or initiated proceedings against such witnesses. \textit{Republic of the Phil. v. Westinghouse Elec. Corp.}, 43 F.3d 65, 78 n.15 (3d Cir. 1995).

\textsuperscript{67} See, e.g., \textit{Raushenbush}, supra note 6, at 1066-67. The author believes domestic courts should \textit{never} recognize foreign antisuit injunctions, since they “eliminate the concurrent jurisdiction of the domestic forum and frustrate the public policies that authorize a cause of action in the domestic courts.” \textit{Id.} (emphasis added).

\textsuperscript{68} 956 F.2d 1349 (6th Cir. 1992).
on international relations, especially in the context of a global economy.\textsuperscript{69} In \textit{Gau Shan}, plaintiff Gau Shan Company moved for a temporary restraining order in the United States District Court for the Western District of Tennessee preventing Bankers Trust from suing on a promissory note in Hong Kong.\textsuperscript{70} The district court granted the injunction in part because a Bankers Trust employee had falsely testified at the injunction hearing, creating a "strong likelihood" that Gau Shan could succeed on the merits of the action.\textsuperscript{71} In remanding the case with an order to dissolve the injunction, the court of appeals held that comity will tolerate the banning of a foreign litigation "only in the most compelling circumstances . . . ."\textsuperscript{72} The court observed that due to a growing international market, and the heightened frequency of transactions between citizens of different countries, the possibility of concurrent jurisdiction between foreign and domestic courts is far greater today than in previous years.\textsuperscript{73} The potentially detrimental effect that an inappropriate or capricious use of antisuit injunctions could have on international transactions urges a more conservative approach to their application.\textsuperscript{74}

\footnotesize{\textsuperscript{69} Id. at 1354. The \textit{Gau Shan} court rejected the United States' role as "big brother" in the international business arena. \textit{Id.} It asserted that the United States can no longer "impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could." \textit{Id.; see also id. at 1359-60 (Jones, J., concurring)} (emphasizing offensiveness of national arrogance in today's economic climate).

\textsuperscript{70} Id. at 1352. Gau Shan supplied cotton to the People's Republic of China and imported its cotton from Julien Company, a Tennessee corporation. \textit{Id.} at 1351. On behalf of Julien, Gau Shan had signed a promissory note to Bankers Trust enabling Julien to receive a $20 million loan to pay one of its creditors. \textit{Id.} The creditor was in turn expected to release Julien's "certificated cotton" supply, which would be shipped to Gau Shan for distribution in China. \textit{Id.}

\textsuperscript{71} Id. at 1352.

\textsuperscript{72} Id. at 1357. It was evidently not compelling enough that Gau Shan might suffer "irreparable harm" if Bankers Trust were permitted to sue in China and "exercise[ ] its rights under Hong Kong law to appoint a receiver for Gau Shan." \textit{See id. at 1352.}

\textsuperscript{73} \textit{Gau Shan}, 956 F.2d at 1354.

\textsuperscript{74} \textit{See id. at 1354-55.} The modern era is one of world economic interdependence, and economic interdependence requires cooperation and comity between nations. In an increasingly international market, commercial transactions involving players from multiple nations have become commonplace. Every one of these transactions presents the possibility of concurrent jurisdiction in the courts of the nations of the parties involved . . . . International commerce depends in no small part on the ability of merchants to predict the likely consequences of their conduct in overseas markets. Predictability depends in turn on an atmosphere of cooperation and reciprocity between nations. The issuance of}
In light of Gau Shan's appreciation of the significance of international comity in modern society, it is difficult to understand the Seventh Circuit's perfunctory analysis and subsequent dismissal of this doctrine, as well as its notion that a concrete demonstration of injury is necessary in order to ascertain the relevance of comity. In Allendale, Judge Posner specifically addressed the possibility that Allendale Mutual would not receive full and fair consideration of its arson defense if the litigation in France were to proceed concurrently with the U.S. action. If this turned out to be the case, the court arguably could have followed the more stringent test and arrived at the same result, thereby inflicting less harm on international comity. For a U.S. corporate citizen to be precluded from having a claim with substantial ties to the United States adjudicated in an American court would be contrary to U.S. public policy. It is submitted that these events would warrant issuance of the injunction under the stricter analysis as well. By embracing the lenient standard, the Allendale decision reinforces the split in circuits which the Gau Shan court had tilted in favor of the stricter test.

antisuit injunctions threatens predictability by making cooperation and reciprocity between courts of different nations less likely.

Id. Many courts and commentators are troubled by the ramifications of ignoring principles of comity. See id. at 1355; see also Teitz, supra note 25, at 36 (stating that while injunctive relief is technically directed toward the parties, in reality it is also offensive to foreign sovereigns). Yet courts rarely point to specific instances in which foreign relations have been impaired by an antisuit injunction. But see George A. Bermann, The Use of Anti-Suit Injunctions in International Litigation, 28 COLUM. J. TRANSNAT'L L. 589, 590 (1990) (“[I]nternational injunctive relief by American courts has generated particularly strong protest by foreign governments . . . . One such setting is the order to produce evidence located abroad . . . . [Another] is the order to cease certain overseas practices that . . . . are deemed to affect adversely important American regulatory interests.”).


76 Id. at 429-30. This was due to the commercial court’s likely inability, or perhaps even refusal, to entertain such a defense given the enormous document production and the court’s limited resources. Id. at 429, 433; see also supra notes 22-23 and accompanying text.

77 See id. at 432 (“[United States] has an interest, well recognized in American insurance law . . . . in providing a forum that will enable an insurer to establish by a preponderance of the evidence . . . . that it is being victimized by a fraudulent claim . . . .”). The fact that a judgment for Allendale Mutual in the district court might not be given res judicata effect in the French court, thus “depriv[ing] Allendale of the benefit of its judgment,” is a valid reason for granting the injunction, even under the stricter analysis. Id. at 433.

C. Recent Development in the Third Circuit

Since the Allendale decision, another circuit has impliedly endorsed the stricter test, focusing heavily on international comity to explain its conclusion. In Republic of the Philippines v. Westinghouse Electric Corp.,\textsuperscript{79} the Philippines filed a complaint against Westinghouse and other defendants in the United States District Court for the District of New Jersey alleging, among other things, fraud, breach of contract, bribery, and tortious interference with fiduciary duties in connection with the construction of a nuclear power plant in the Philippines.\textsuperscript{80} Many of these claims were ultimately heard by an international arbitration panel in Geneva.\textsuperscript{81} After a jury verdict was rendered in favor of defendant Westinghouse, the Philippines sought certification to appeal.\textsuperscript{82} The district court indicated that certification was proper, but postponed granting certification upon learning of evidence that the Philippines had harassed witnesses who testified, or would potentially testify, on behalf of Westinghouse.\textsuperscript{83} On defendant Westinghouse’s motion, the district court enjoined the Philippine government from harassing any such witnesses in retaliation for their testimony in the U.S. action or in the arbitration.\textsuperscript{84}

Although the injunction restricted the activities of a foreign executive, and not its judiciary, the Third Circuit seemed to review the order as if it were ruling on a motion to enjoin foreign proceedings.\textsuperscript{85} As a result, it followed the rationale of the stricter circuits

\textsuperscript{79} 43 F.3d 65 (3d Cir. 1995).
\textsuperscript{80} Id. at 67-68.
\textsuperscript{81} Id. at 68. Most of the Philippines’ claims were referred to international arbitration. Id. The claim of tortious interference with fiduciary duties was being prepared for trial in the district court while the remaining counts were arbitrated in Geneva. Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 69.
\textsuperscript{84} Republic of the Phil. v. Westinghouse Elec. Corp., 43 F.3d 65, 70-71 (3d Cir. 1995). Two Westinghouse employees and a professor of law at the University of the Philippines had offered testimony for Westinghouse. Id. at 68. The court issued the injunction because it learned the witnesses “had been ‘the target of vilification in the public press’” and had “faced public censure and lost business opportunities” as a result of government retaliation for their testimony. Id. at 69 (citation omitted).
\textsuperscript{85} See id. at 76-77 (analyzing propriety of injunction). The court devoted substantial attention to the “inherent authority” of a federal court “to control [the conduct of] litigants who come before it.” Id. at 72-73. While the injunction was granted in part to ensure that the U.S. litigation proceed fairly, with all the relevant evidence presented, it essentially would have “supervise[d] and control[led] the law enforcement activities of a foreign sovereign nation against its own citizens on its own soil.
and reached its decision by deferring to principles of comity. The court found that the injunction against the Philippines offended notions of comity. While conceding that comity does not "prevent a district court from having the power to address wrongdoing that impacts a domestic court," it does "force courts in the United States to tailor their remedies carefully to avoid undue interference with the domestic activities of other sovereign nations." The district court did have authority to sanction the Philippines for threatening witnesses through acts performed in the Philippines. The court abused its discretion, however, by imposing a sanction that intruded excessively on the activities of a foreign sovereign.

In reaching this conclusion, the court of appeals stated that it was necessary to balance the interests furthered by the domestic court's use of sanctions against the foreign sovereign's interests in prescribing and enforcing laws with respect to its citizenry. The injunction issued by the district court, which "purport[ed] to place the court in the position of supervising the law enforcement activities of a foreign sovereign nation against its own citizens on its own soil," violated the Philippines' sovereignty due to the availability of less disruptive sanctions, such as monetary fines or dismissal. Because the district judge made his ruling without adequately weighing these competing interests, his issuance of the

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..." Id. at 71-73. For this reason, the court of appeals held that the district judge exceeded his discretion. Id. at 73.

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86 See id. at 76. The court remarked:

Consequently, although the courts of appeals have occasionally approved orders issued by district courts enjoining activities or judicial proceedings in foreign countries that would interfere with the proper exercise of district court jurisdiction, they have recognized that such action must be exercised only in rare cases, and must be premised on a thorough analysis of the interests at stake.

Id. The court then referenced with approval two appellate decisions that upheld the stricter standard. See id. at 76-77 (discussing United States v. Davis, 767 F.2d 1025 (2d Cir. 1985), and Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984)).

87 Id. at 75.
88 Id.
89 Westinghouse, 43 F.3d at 75.
90 Id. at 76, 77-79.
91 Id. at 78.
92 Id. at 80. Notwithstanding a sovereign's occasional "exercise [of] jurisdiction to prescribe and enforce laws that reach extraterritorial conduct," it is axiomatic that each nation retains "the sole jurisdiction to prescribe and administer its own laws, in its own country, pertaining to its own citizens, in its own discretion." Id. at 79 (emphasis added).
injunction was an abuse of discretion, and the court of appeals lifted the injunction.\textsuperscript{93} Perhaps it would now be fitting for the Seventh Circuit to rethink its approach to antisuit injunctions in light of the courts' prevailing respect for international comity.

III. USING THE FOREIGN SOVEREIGN IMMUNITIES ACT AS A GUIDE

A. Background of Foreign Sovereign Immunities Act

Traditionally, both foreign and domestic courts followed the doctrine of "absolute" sovereign immunity, declining to assert jurisdiction over foreign states in virtually all cases.\textsuperscript{94} Since its formal inception into the American common law, the theory of sovereign immunity has been deemed to rest on principles of "grace and comity."\textsuperscript{95} The Foreign Sovereign Immunities Act of 1976\textsuperscript{96} ("FSIA") codified the restrictive theory of sovereign immunity adopted by the United States Department of State nearly twenty-five years earlier.\textsuperscript{97} Congress resolved that a narrower applica-

\textsuperscript{93} Id. at 80-81.
\textsuperscript{94} See, e.g., The Schooner Exchange v. M'Taddon, 11 U.S. (7 Cranch) 116 (1812). In Schooner Exchange, Justice Marshall noted that in order to preserve and promote unrestricted intercourse between friendly nations, it was essential that the "perfect equality and absolute independence of sovereigns [be honored]. . . . Every sovereign is [thus] understood to wave [sic] the exercise of a part of [its] complete exclusive territorial jurisdiction by granting immunity to foreign sovereigns for acts committed within its borders." Id. at 137; Jack B. Tate, Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, May 19, 1952, DEPARTMENT ST. BULL., June 1952, at 984 [hereinafter Tate Letter] (naming countries whose courts have historically granted absolute immunity).
\textsuperscript{95} Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 486 (1983); The Stantis-sima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822). These cases rely on Schooner Exchange's fundamental notion that the partial surrender of sovereign power is "traced up to the consent of the nation itself." See Schooner Exchange, 11 U.S. at 136. The "relaxation . . . of that absolute and complete jurisdiction . . . which sovereignty confers," id., is a practice that conforms to the definition of comity set forth nearly eighty years later in Hilton. See Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).
\textsuperscript{97} See Tate Letter, supra note 94, at 984; H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604-07. In accepting the restrictive theory of immunity, the Tate Letter circumscribed traditional notions of absolute sovereign immunity which had been recognized by U.S. courts dating back to the early nineteenth century. Tate Letter, supra note 94, at 985. Three maritime cases, decided after Schooner Exchange, preceded the State Department's issuance of the Tate Letter.

In the first case, decided over a century after Schooner Exchange, the Supreme Court held that the principles adopted in that landmark case applied to all ships "used by a government for a public purpose" and declined to assert jurisdiction over a
tion of immunity "would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."\textsuperscript{98} Thereafter, foreign sovereigns could properly be held liable in U.S. courts for certain types of commercial activities,\textsuperscript{99} as well as for tortious activities conducted within the territorial United States.\textsuperscript{100} Upon a court's finding that subject matter jurisdiction has been conferred by the FSIA,\textsuperscript{101} the foreign sover-
eign may, depending on the extent of its contacts with the forum, be subject to in personam jurisdiction.\(^{102}\)

The restrictive theory of sovereign immunity, first articulated by the executive department in the Tate Letter,\(^{103}\) and subsequently codified by the FSIA, continues to insulate foreign states and their instrumentalities from jurisdiction based on sovereign or public acts (*jure imperii*), but not with respect to private or commercial acts (*jure gestionis*).\(^{104}\) As mentioned before, comity is the underlying principle that supports the United States' observance of sovereign immunity.\(^{105}\) Absent an international treaty or agreement providing otherwise, it logically follows that a foreign sovereign should expect comity to govern its relations with the United States in matters involving the executive or judicial branches of the respective countries.\(^{106}\)

**B. FSIA as a Model for Deference to Comity**

Given its critical role in matters regarding foreign sovereign immunity, and the limited circumstances under which foreign states will be held to answer in U.S. courts,\(^{107}\) comity should like-

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102 Weltover, Inc. v. Republic of Arg., 753 F. Supp. 1201, 1207 (S.D.N.Y.), aff’d, 941 F.2d 145 (2d Cir. 1991), aff’d, 504 U.S. 607 (1992); see Decor by Nikkei Int’l, Inc. v. Federal Republic of Nig., 497 F. Supp. 893, 904 (S.D.N.Y. 1980), aff’d sub nom. Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). In order to uphold jurisdiction, a reviewing court must find “not only that there be an immediate causal effect within the United States... but also that there be sufficient minimum contacts between the matter in controversy and the United States...” Id.

103 See supra note 97 and accompanying text.

104 See 28 U.S.C. § 1605 (limiting immunity of foreign states for certain commercial activities); Tate Letter, supra note 94, at 984; see also Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964) (confining immunity to situations involving foreign state’s internal administrative acts, legislation, armed forces, diplomatic activities and public loans), cert. denied, 381 U.S. 934 (1965).

105 See supra note 95 and accompanying text.

106 See Joel R. Paul, *Comity in International Law*, 32 Harvard Int’l L.J. 1, 5-6 (1991) (stating that U.S. courts have avoided friction in foreign relations under “rubric of comity”); see also Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354 (6th Cir. 1992) (asserting that healthy world economy “requires... comity between nations”). Comity has also formed the basis for recognition of foreign judgments and foreign arbitral awards. See Mark Janis, *An Introduction to International Law* 250 (1988) (cited in Paul, supra, at 1 n.2). See generally Black’s Law Dictionary 816 (6th ed. 1990) (defining “international law” as “[b]ody of consensual principles which have evolved from customs and practices... International customs and treaties are generally considered to be the two most important sources of international law.”).

wise compel judges to exercise restraint when ruling on motions to enjoin foreign proceedings. Because Congress has implemented a narrow framework within which the judiciary may review acts of a foreign state, judges should accept their limited power to interfere with a foreign tribunal's ability to interpret and apply its own laws. This may be achieved in part by a policy which grants antisuit injunctions only when failure to do so would either deprive a court of its jurisdiction or flout a legitimate public policy of the enjoining forum.

Both the federal government and the individual states have acknowledged that an effective foreign policy depends upon a pattern of consistency in the United States' relations with foreign states. In a recent address before the American Society of International Law, Justice Blackmun stated that "[w]here no treaty or other legal authority is controlling, resort must be had to the customs of nations." An indiscriminate use of antisuit injunctions would alert foreign governments that U.S. courts are prepared to divest their tribunals of jurisdiction to adjudicate in any matter where the parties or issues in a concurrent action are

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108 See Baer, supra note 1, at 164-65. "Comity should be an American court's key concern in deciding whether to enjoin parties from proceeding abroad." Id. at 164 (emphasis added). Baer offers three reasons for acknowledging comity in the injunction context: the potential for foreign states to react to an injunction by declining to recognize U.S. judgments; the inherent reservations surrounding the extent of an American court's extraterritorial authority; and the incompetence of domestic courts to handle foreign affairs, resulting in embarrassment to the executive branch. See id. at 164-67.


110 See supra note 43 and accompanying text.


113 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1986).
This seems entirely inconsistent with our general tendency to refrain from interfering with the domestic affairs of foreign governments. Since judicial proceedings are public in nature, and are exercises of sovereignty, they should be extended comity, just as public acts of a foreign state are granted immunity under the FSIA. Use of the stricter test when reviewing motions to enjoin foreign proceedings will permit foreign courts to dispense their adjudicatory power unless doing so would strip a U.S. court of its jurisdiction or violate U.S. public policy.

Considering the United States' proclivity for recognizing foreign judgments, the latter approach seems better suited to ensure the coequal status of American and foreign judicial systems. Just as the FSIA functions to protect foreign litigants and foreign states in U.S. courts, a restricted use of foreign antisuit injunctions would ensure that our courts avoid unduly interfering with the domestic activities of other sovereign nations.

Scholars have justified recognition of foreign judgments by observing that an overzealous assertion of "parochial interests" would result in injustice and disruption of "the normal patterns of life ...." Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1603 (June 1968); see Hilton v. Guyot, 159 U.S. 113, 233 (Fuller, J., dissenting) ("[T]he rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state" where enforcement is sought.). But see Andreas F. Lowenfeld, International Litigation and Arbitration 371-72 (1993) (advancing five arguments against foreign judgment recognition).

For a discussion of enforcement of American judgments in a foreign country, see Gerfried Fischer, Recognition and Enforcement of American Tort Judgments in Germany, 68 St. John's L. Rev. 199 (1994). German courts will generally recognize U.S. judgments if "the trial court had jurisdiction and ... due process [was] met," unless the judgment was in clear violation of "German public policy." Id. at 208 (footnotes omitted).

See 28 U.S.C. § 1602 (1988); see also supra notes 94-104 and accompanying text.

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115 See Republic of the Phil. v. Westinghouse Elec. Corp., 43 F.3d 65, 75 (3d Cir. 1995). Principles of comity "force courts in the United States to tailor their remedies carefully to avoid undue interference with the domestic activities of other sovereign nations." Id.
116 See Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (holding that legislative, executive, and judicial acts of foreign government will be honored unless "acceptance would be contrary or prejudicial to the interest of the nation called upon to give [them] effect"), cert. denied, 405 U.S. 1017 (1972).
117 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1986), which states:
   (1) Except as provided in § 482, a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.
Id.; see also id. § 487 (recognizing foreign arbitral agreements and awards).

tions safeguards the integrity of judiciaries abroad by allowing concurrent litigations to proceed until a final judgment has been rendered.\(^\text{119}\) If the domestic court concludes that the decision violates public policy, or otherwise lacks sufficient basis for recognition, it may then refuse to enforce the judgment.\(^\text{120}\)

### Conclusion

The Seventh Circuit's treatment of international comity does little to effectuate reciprocal courtesy among courts of different sovereigns. By holding that a non-moving party must offer evidence of material injury to U.S. foreign relations as a criterion for denying an antisuit injunction, the court essentially failed to assess comity within its proper context. A reviewing court should concede that comity is likely to be undermined in every instance in which a party to concurrent litigations requests a district judge to enjoin the foreign proceeding, by virtue of the fact that the injunction deprives the foreign court of jurisdiction. The proper inquiry should then be whether certain equitable factors are so strong as to militate in favor of the injunction, despite its negative effect on diplomatic relations. The *Gau Shan* and *Westinghouse* courts did precisely this by adhering to the stricter standard. Insofar as it is narrowly tailored to protect the jurisdiction of U.S. courts and domestic public policy, the stricter standard acts as a self-regulatory doctrine. Unless the foreign litigation is patently offensive to U.S. jurisdiction over a case, or to U.S. public policy, the injunction will be denied and both tribunals will be free to administer their adjudicatory powers. Reviewing courts that exercise this discretion

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\(^{119}\) Raushenbush, *supra* note 6, at 1067. The author asserts that use of the injunctions must be kept to a minimum so as to avoid "eroding the basis of the international legal system." *Id.* at 1070; *see also* Bermann, *supra* note 74, at 605-08 (discussing judicial self-restraint in international cases). *See generally* Teitz, *supra* note 25 (proposing solution to dilemma of parallel proceedings through use of Conflict of Jurisdiction Model Act). The Model Act offers a flexible guideline for resolution of concurrent international litigations by enabling one forum to determine the proper forum for all subsequent proceedings. *Id.* at 55. Perhaps the hallmark of the Model Act is its "supranational perspective," which it achieves by "removing parochial national interests . . . ." *Id.*; *see id.* at 56 (text of Model Act).

\(^{120}\) *See supra* note 117 and accompanying text. Neither domestic nor international law will compel a U.S. court to enforce a foreign judgment that is contrary to U.S. public policy. *See Hilton*, 159 U.S. at 164 ("[N]o nation will suffer the laws of another to interfere with her own to the injury of her citizens.").
will protect domestic jurisdiction and advance comity between foreign nations.

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