THE VEXATIOUSNESS OF A VEXATION RULE: INTERNATIONAL COMITY AND ANTISUIT INJUNCTIONS

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I. INTRODUCTION

As the world becomes increasingly interconnected, so must each of the world's legal systems. One problem that vexes courts in the United States and abroad is what to do when a cause of action involving the same parties and issues is brought in two different court systems.1 This dual pendency has endless origins and implications. For example, if the parties file independent suits in two separate jurisdictions in an attempt to obtain favorable law or a more convenient forum, a question arises as to which court will adjudicate the proceedings.2 In other cases, a defendant may sue in an alternate forum after the plaintiff has filed a complaint because the defendant has legitimate concerns or wishes to harass the plaintiff.3 Regardless of how the competing actions arise, one party may seek an antisuit injunction, asking one court to preclude the foreign litigation.4

This clash of dual judicial systems drives many policy issues and practical considerations. Should one system preempt litigation in a foreign jurisdiction when the issues and parties are the same? Should a court defer to a previously commenced action? Should a

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2. See Bermann, supra note 1, at 591-93.

3. See, e.g., infra notes 94-99 and accompanying text.

4. See Bermann, supra note 1, at 604.
court do nothing and allow both cases to proceed? These practical questions implicate larger policy issues concerning the role of comity in the arena of international legal systems. In particular, dual pending cases directly impact the development of an international system for dispute resolution. Court systems of various countries retard the development of a functional international dispute resolution system by refusing to cooperate with one another. The lack of such a system harms world economic and social development and could lead to political friction between nation-states. The international antisuit injunction cases squarely address these interrelated concerns.

In the early 1980s the international antisuit injunction issue received attention when the D.C. Circuit Court of Appeals decided *Laker Airways Ltd. v. Sabena, Belgian World Airlines*. The D.C. Circuit Court of Appeals, the first court to provide a definitive standard considering international comity concerns, held that comity requires competing actions be allowed to continue. An antisuit injunction should be issued only in very limited circumstances. The *Laker* rule, often called the restrictive approach, permits an injunction only when necessary to protect the forum court's jurisdiction over the matter, or when the forum court possesses strong

5. The New York Court of Appeals defined international comity in *Russian Socialist Federated Soviet Republic v. Cibranio*, 139 N.E. 259, 260 (N.Y. 1923): 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.
6. See infra notes 71-85 and accompanying text.
7. See infra notes 82-85 and accompanying text.
8. This Article does not address the approach of the Conflict of Jurisdiction Model Act (Model Act) prepared by a subcommittee of the ABA Section on International Law and Practice. See Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L. L. 21, 39-62 (1992). Under the Model Act, an "adjudicating forum" is chosen by the first court with jurisdiction. Id. at 59. In determining the proper adjudicating forum, the court looks to a multi-factor test that includes issues of convenience, comity, fairness, and international justice. *Id.* Once the adjudicating forum is chosen, the Model Act then requires enforcement of the judgment of that forum. *Id.* Unless the approach is universally adopted, such a system does little to assist with the difficulties presented by parallel proceedings. It could lead to a "race to file," as opposed to the restrictive approach’s race to judgment. *Id.* at 43. Without the agreement of foreign legal systems or a multilateral convention, the Model Act is ineffective. For the text of the Model Act, see id. at 56.
11. *Id.* at 926-34. Under the principle of res judicata, a final judgment rendered in one parallel action would preclude further proceedings in the other action. *Id.* at 926-27.
public policy concerns. By restricting the use of antisuit injunctions, the opinion champions the importance of comity. In so doing, the court seemingly anticipated the needs of an ever-shrinking world that requires U.S. participation in the formation of an international dispute resolution system. The scholarly community and a number of the other circuit courts, agreeing that comity required deference to the parallel action, warmly received the restrictive rule.

Other circuits developed and support the competing perspective, the liberal approach, which has gained considerable strength in recent years. This approach places less importance on international comity in deciding international civil disputes; rather, the primary concern is whether duplicative litigation is vexatious. In determining vexatiousness, the liberal analysis determines whether there are additional costs or duplicative efforts. Liberal courts enjoin foreign litigation only if the courts deem the foreign action vexatious. Liberal courts apparently feel that international comity concerns suggested by the restrictive theory are insubstantial and that the real purpose of duplicative litigation is harassment. Most liberal courts, therefore, deem foreign actions vexatious and are more likely to issue antisuit injunctions.

Given this split among the circuit courts, this issue is ripe for a Supreme Court decision. To determine which approach to follow, the Court must consider the application of international comity, a significant doctrine that courts and academics have praised, attacked, and misunderstood. Although application of comity analysis resolves a variety of international civil litigation issues, comity analysis is vexatious when applied to international antisuit injunctions. Some of the more recent decisions misinterpret the

12. Id. at 926-34; see infra notes 145-148 and accompanying text.
14. See infra notes 204-275 and accompanying text.
15. See infra notes 204-275 and accompanying text.
16. See infra notes 204-275 and accompanying text.
17. See infra notes 204-275 and accompanying text.
18. See infra notes 204-275 and accompanying text.
19. See infra notes 204-275 and accompanying text.
20. See infra notes 204-275 and accompanying text.
21. See, e.g., Louise Weinberg, Against Comity, 80 Geo. L.J. 53 (1991) (arguing against the application of reciprocal comity because of its discriminatory effects and the damage it inflicts on the rule of law).
22. See infra notes 64-85 and accompanying text.
comity doctrine and misunderstand its logical application to antisuit injunction cases.23

Assessing the optimal approach in antisuit injunction cases, this Article first explores the true meaning of the international comity doctrine and argues that the doctrine must play an important role in deciding antisuit injunction cases. This Article then reviews the decisions adopting and interpreting the restrictive and liberal approaches. Finally, this Article evaluates the two judicial tests in light of the comity doctrine and concludes that the restrictive approach better reflects the significant needs of both the United States and the international system.

II. COMITY'S REAL MEANING

When a court decides whether to issue an antisuit injunction against parallel litigation in foreign courts, a key consideration is the role of comity.24 The restrictive courts emphasize comity; they permit parallel litigation except in very narrow circumstances.25 Courts applying the liberal approach seemingly ignore comity concerns altogether, merely asking whether the parallel litigation is vexatious.26 An appreciation of comity's significance in antisuit injunction cases necessitates a fuller understanding of the doctrine itself.

A. Comity's History

Comity is a broad principle designed to help courts resolve disputes that implicate the laws of multiple jurisdictions.27 Although not required by international law,28 comity attempts to ensure the development of a working international dispute resolution system by advocating respect or deference for a foreign jurisdiction's laws.29 Comity is not a rule;30 rather it is a principle or policy that supports court-applied rules.31 The doctrine finds its modern roots in the writings of Dutch legal scholar Ulrik Huber.32 Huber based

23. See infra notes 64-85, 204-275 and accompanying text.
24. See supra notes 9-13 and accompanying text.
25. See supra notes 9-13 and accompanying text.
26. See infra notes 204-275 and accompanying text.
29. See infra notes 76-82 and accompanying text.
30. Maier, supra note 28, at 281.
31. Id.
comity notions on three principles. First, a nation’s law is limited to territorial application. Second, anyone found within territorial boundaries is subject to that law. Finally, and most importantly for the purposes of this Article, “by comity . . . the laws of each nation which are enforced within its boundaries maintain their validity everywhere, to the extent that the power or the laws of the other state and its citizens are not prejudiced.” Justice Story helped bring this third principle into U.S. law in his *Commentaries on the Conflict of Laws*. He stated as follows:

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

The most notable U.S. case applying the comity doctrine came in the Supreme Court’s decision in *Hilton v. Guyot*.

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international

33. *Id.* at 26 n.52.

34. *Id.*

35. *Id.* One commentator has explained the early development of the comity doctrine as follows:

Huber . . . introduced “comity” as a principle of modest mutual accommodation by which nations would “recognize rights acquired under the laws of another state . . . ‘so far as they do not cause prejudice to the power or rights of such government or of their subjects.’” With empires in retreat and absolutist notions of sovereignty ascendant in newly emerged nations, comity was for many jurists a satisfactorily non-binding yet reasonably coherent explanation for one ostensibly unfettered sovereign’s application of another’s law to a dispute with a domestic nexus. Comity at its inception was thus a blunt, conceptualist stab at untangling the dilemma of how sovereignty could delimit itself.


For Huber, the idea of comity derived from the tacit understanding of sovereigns. It was custom, but not necessarily customary law. Comity was sound judicial policy and invited reciprocity. But it was not obligatory, and it was explicitly subject to the limitation that the application of foreign law not interfere with the rights of the sovereign or its subjects.

Paul, *supra* note 27, at 17 (footnote omitted).


duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws.\textsuperscript{38}

Historically, the U.S. Supreme Court has applied comity broadly, with divergent results, in a wide variety of areas.\textsuperscript{39}

More recent cases relating to international dispute resolution have shown greater ambivalence toward comity. The Court used a comity analysis in \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}\textsuperscript{40} to enforce a general arbitration clause requiring arbitration of Sherman antitrust violations.\textsuperscript{41} In \textit{Société Nationale Industrielle Aérospatiale v. United States District Court},\textsuperscript{42} the Court stated that the application of the Hague Evidence Convention required a case-by-case comity determination looking to the "particular facts, sovereign interests, and likelihood that resort to those [particular] procedures will prove effective."\textsuperscript{43} The Court in \textit{Volkswagenwerk Aktiengesellschaft v. Schlunk},\textsuperscript{44} on the other hand, completely ignored comity concerns, finding that each signatory state could decide individually what constituted "service abroad" under the Hague Service Convention, possibly gutting that agreement's reason for existence.\textsuperscript{45}

In the most recent cases the Court was even less inclined to incorporate comity concerns. In \textit{W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.},\textsuperscript{46} the Court ignored comity concerns, creating a new threshold test for the act-of-state doctrine's application: "[a]ct of state issues only arise when a court \textit{must} decide—that is, when the outcome of the case turns upon—the effect of official

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\textsuperscript{38} Id. at 163-64.
\textsuperscript{39} See, e.g., Lauritzen v. Larsen, 345 U.S. 571 (1953) (comity invoked to determine whether the Jones Act applied to a foreign sailor serving on a foreign vessel); Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562 (1926) (comity used to determine whether to exercise jurisdiction over a foreign-owned merchant ship in a U.S. port); Wildenhus's Case, 120 U.S. 1 (1887) (comity used to determine which state's disciplinary laws applied to criminal activity aboard a boat in port); The Belgienland, 114 U.S. 355 (1889) (comity used to determine jurisdiction in an admiralty case); Brown v. Duchesne, 60 U.S. (19 How.) 183 (1856) (notions of comity used to determine the application of U.S. patent laws). For a discussion of these cases, see Steven R. Swanson, \textit{A Threshold Test for Validity: The Supreme Court Narrowst the Act of State Doctrine, 23 Vand. J. Transnat'l L.} 889 (1991).
\textsuperscript{40} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1984).
\textsuperscript{41} Id. at 629.
\textsuperscript{43} Id. at 544 (citation omitted).
\textsuperscript{44} Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988).
\textsuperscript{45} See id. at 707. For a complete discussion of these three cases and their comity implications, see Steven R. Swanson, \textit{Comity, International Dispute Resolution Agreements, and the Supreme Court, 21 Law & Pol'y Int'l Bus.} 333 (1990).
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action of a foreign sovereign." The Court's decision in *Hartford Fire Insurance Co. v. California* did not add clarity to the Court's comity jurisprudence. *Hartford Fire* examined whether the Sherman Act (antitrust) applied to certain activities outside the United States. Justice Souter found that if a Sherman Act defendant intended to affect commerce, and if his activities produced a substantial effect on the U.S. market, the Court had subject matter jurisdiction and could adjudicate the case unless there was a "true conflict" between the laws of the United States and the foreign jurisdiction. A true conflict could only exist if it were impossible to comply with the laws of both nations.

Dissenting on this point, Justice Scalia argued that there were two jurisdictional issues. First, the court must have subject matter jurisdiction, which he agreed existed in this case. Even with subject matter jurisdiction, however, Scalia argued that the court must consider whether Congress intended to reach the conduct in question; in other words, the second inquiry was whether prescriptive jurisdiction was present. Relying on the comity-driven decisions in *Timberlane Lumber Co. v. Bank of America* and *Mannington Mills, Inc. v. Congoleum Corp.* and the Restatement (Third) of the Foreign Relations Law of the United States section 403, Justice Scalia argued that prescriptive jurisdiction depends on reasonableness. Applying this standard, Justice Scalia concluded that prescriptive jurisdiction was absent. In his opinion, the majority's "true conflict"

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47. *Id.* at 406.
49. *Id.* at 769.
50. *Id.* at 798-99 (citing Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).
51. *Id.* at 799 (citing Restatement (Third) of the Foreign Relations Law of the United States § 403 cmt. e (1987)).
52. *Hartford Fire*, 509 U.S. at 812 (Scalia, J., dissenting).
53. *Id.*
54. *Id.* at 813.
55. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir. 1976) (suggesting a comity-based balancing approach in determining whether to exercise prescriptive jurisdiction).
59. *Id.* at 819.
approach would "bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries."60

Justice Souter's majority opinion did not seriously consider comity, or the *Timberlane* line of cases applying the doctrine, to determine whether U.S. legislation should control foreign activity.61 The "true conflict" approach disregards friendly interactions among the world's legal systems. Although the Court never explicitly rejected comity as a guiding principle in transnational litigation, recent court decisions62 show disappointing insensitivity to international comity concerns and fail to define its parameters clearly.63

B. *The True Meaning of Comity*

One important legal commentator, Professor Harold Maier, has broken judicial comity discussions into two categories:

One category bears on the maintenance of amicable external relations with other nation-states and stresses the importance of extending courtesy to other sovereigns and reciprocal recognition of national governmental interests. This category suggests that comity is a standard for external political conduct. The second category relates to the forum state's self-interest in making choice-of-law decisions that will further the development of an effectively functioning international system. Such a system would foster the growth of transnational commercial and social intercourse.64

Unfortunately, many modern comity decisions focus on the political concerns of the first category rather than the more legitimate international systemic concerns of the second category.65 Courts are not particularly well trained to consider these political

60. Id. at 820.
63. For a Supreme Court decision that seemingly ignores international comity concerns in another legal area, see United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) (allowing the criminal prosecution of a defendant kidnapped in Mexico and brought within U.S. jurisdiction).
64. Maier, *supra* note 28, at 283 (footnote omitted).
65. See *id.*
issues, and it is difficult for any reasonable results to be attained when the idea of comity is so "vague and unlegal." For example, how does a court decide which country's economic policies are more important? How does a court determine a particular ruling's likely impact on foreign relations? Furthermore, the doctrine's application "has led to its use to describe an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith." In addition, use of a case-by-case political approach by U.S. courts yielded even less predictability and corresponding clarity. The Laker court, however, properly rejected this political approach when it refused to balance the interests of the United States and Great Britain in the enforcement of their respective economic policies.

A judicial approach would provide a more workable doctrine in cases involving the special interests presented by international civil litigation. Justice Story outlines its parameters:

Every nation must judge for itself what is its true duty in the administration of justice in its domestic tribunals. It is not to be taken for granted, that the rule of the foreign nation, which complains of a grievance, is right, and that its own rule is wrong.

... The true foundation, on which the administration of international law must rest, is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.

Story adds that comity requires consideration of all nations' interests, rather than just one country's concerns. Instead of political

66. See Pearce, supra note 35, at 527.

67. Maier, supra note 28, at 281; see Pearce, supra note 35, at 527 (stating that comity is a nebulous and multifarious term); Paul, supra note 27, at 3 (stating that the meaning of international comity is uncertain).

68. Maier, supra note 28, at 283. Professor Maier has stated that "the label 'comity' in modern times has sometimes come to serve as a substitute for analysis." Id. at 281.


70. Maier, supra note 28, at 284.

71. Story, supra note 36, §§ 34-35. This rationale was criticized by one scholar who stated:

[Utility assumes that in general we will benefit from the mutual recognition of foreign law. The United States recognizes foreign law in order to promote international cooperation and encourage the recognition of U.S. law in the foreign courts. Still, there is no evidence that courts in practice weigh the utility of recognizing or enforcing foreign law or judgments. In fact, utility does not fully explain the need to weigh competing foreign and domestic interests.

Paul, supra note 27, at 49-50 (footnote omitted).

72. Story, supra note 36, § 36.
posturing, Story's description suggests significant legal analysis involving rules that encourage international intercourse and mutual assistance so as to discourage confrontation.\textsuperscript{75}

Thus, comity is a principle that informs courts when they face a potential collision of power by two or more nations.\textsuperscript{74} First, it is a pragmatic principle, encouraging each nation to treat other nations just as it would want to be treated.\textsuperscript{75} This long-term respect and helpfulness between nations guides the comity principle and prevents a country's courts from repeatedly ignoring other nations' interests, thereby preserving its own interests as well.\textsuperscript{76}

Second, international comity contains a systemic importance that goes well beyond the interest of individual parties.\textsuperscript{77} Story asserts that such a system implicates the interests of all nations rather than just those involved in the instant dispute.\textsuperscript{78} The international interest in a peaceful dispute resolution may not be furthered by considering only the immediate interests of the disputing countries.

From an international perspective, comity concerns demand greater attention than a short-term, more expedient view provides.\textsuperscript{79} For example, suppose there are parallel suits in the United States and a small country of relatively insignificant economic or political power. If a U.S. court enjoins the foreign action, there are no negative consequences for the U.S. economy, and the small country is unlikely to engage in a diplomatic or military quarrel over the injunction. Yet the United States has a larger international systemic interest in the reduction of tension, free flow of wealth, and mutual respect.

Peaceful and efficient dispute resolution benefits the particular states in question and the world as a whole. When one state's legal system respects the legal system of another state, the likelihood of tension between the two countries diminishes, and contentious

\textsuperscript{73} Professor Maier reads this as a legal principle, encouraging "transnational commercial and social intercourse in a system that assumes mutual restraint by both sovereign states and private parties in exercising power, and it emphasizes principles of justice and practicality as policies for determining applicable law." Maier, supra note 28, at 283-84.

\textsuperscript{74} See generally id. (stating that comity explains how a state can give recognition or effect in its courts to another nation's laws without diminishing or denying its own sovereignty).

\textsuperscript{75} Harold G. Maier, Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention, 19 VAND. J. TRANSNAT'L L. 239, 253 (1986).

\textsuperscript{76} Id.

\textsuperscript{77} Story, supra note 36, §§ 34-36.

\textsuperscript{78} Id.

\textsuperscript{79} Maier, supra note 28, at 317-18.
political interaction becomes unnecessary.\textsuperscript{80} Additionally, this respect extends beyond those systems to the international framework for dispute resolution. Courts that do not practice such deference slow the development of an international system.\textsuperscript{81} The exercise of brute power, rather than the sensitive consideration of a global perspective, creates counterproductive international discord and provides no foundation for further development of international civil litigation mechanisms.\textsuperscript{82}

In addition to depoliticizing private disputes, the creation of a working dispute-resolution system should produce greater international economic benefits. As the U.S. federal system shows, free flow of judgments is essential in creating more efficient markets.\textsuperscript{83}

Finally, comity is important because it enforces respect for foreign legal systems as a whole by calling on states to recognize and enforce rights created by other states.\textsuperscript{84} When a court overreaches its legitimate authority, the community has less regard for that authority. A U.S. court that refuses to consider its decisions' foreign dimensions may lose the respect of three communities—domestic, foreign, and international. Power seizures by U.S. courts in the foreign sphere will certainly diminish respect for the U.S. legal system because the United States will be seen as an international bully. Further, U.S. courts may find themselves unable to enforce decisions that overreach international norms, and U.S. litigants may find themselves unable to enforce their judgments abroad or gain other assistance from foreign courts. This bias is seen, in part, in foreign refusals to cooperate with U.S. discovery requests and foreign legislation meant to negate "foreign" application of U.S. antitrust laws.\textsuperscript{85} An international pariah becomes far less influential in the international sphere, and the United States certainly wants to retain a leading role in the creation of international law.

\textsuperscript{80} See Maier, supra note 75, at 253.
\textsuperscript{81} Maier, supra note 28, at 303-04.
\textsuperscript{83} Members of the European Union have also seen the wisdom of such a rule, agreeing to the European Economic Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1978 O.J. (L 304) 77, which provides for uniform jurisdictional rules and the enforcement of signatory state's judgments.
\textsuperscript{84} Born, supra note 82, at 547.
\textsuperscript{85} Id. at 849-52.
III. COMITY OR VEXATION: A VEXING CHOICE

A court unquestionably has the power to order parties before it not to start or continue litigation in a foreign court. The question is when a court should exercise discretion. In deciding whether to issue an injunction against a parallel proceeding in a foreign court, U.S. courts have essentially used one of two basic analyses. The restrictive approach presumes that U.S. courts will not stop foreign proceedings, allowing both actions to continue until at least one has reached judgment. In contrast, the liberal approach finds duplicative proceedings vexatious. Courts adhering to this approach will enjoin parties from proceeding in foreign jurisdictions. The latter view negatively impacts comity and international dispute resolution.

A. The Restrictive Approach

1. Pre-Laker Cases

Although the restrictive approach initially developed in cases involving parallel proceedings in state and federal courts, the courts soon extended the analysis to parallel litigation in foreign jurisdictions. In Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., the Court of Appeals for the First Circuit overturned the district court's grant of an injunction against further proceedings in a Canadian court. Finding comity to be the primary interest, the court explained that the injunction's "direct effect" on the foreign sovereign's jurisdiction required the exercise of "care and great restraint." In fact, the court stated that comity concerns should only be overcome

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86. A court has this power because the injunction is not directed at the foreign court, but at the parties subject to the jurisdiction of the domestic court. 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 (1930) (discussing injunctions of sister-state actions).

87. See infra notes 90-203 and accompanying text.

88. See infra notes 204-275 and accompanying text.

89. See Donovan v. City of Dallas, 577 U.S. 408, 412 (1964) (holding that a state court cannot enjoin a person from litigating an in personam action in a federal court that has proper jurisdiction); Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466 (1939) (holding that exercise of state court jurisdiction over the administration of a trust deprived a federal court of jurisdiction over a later suit involving the same matter).

90. See, e.g., Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F. 577 (1st Cir. 1969).

91. Id. at 579.

92. Id. at 578.
when the forum seeks to enforce its own substantial interests, or in limited circumstances when relitigation would cover exactly the same points, as, for example when both suits are in rem, and the burden of a second suit thus renders reliance on res judicata alone inappropriate.\footnote{Id. at 578-79.}

In \textit{Compagnie des Bauxites de Guinea v. Insurance Co. of North America},\footnote{Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877 (3d Cir. 1981).} the Court of Appeals for the Third Circuit found that the lower court abused its discretion by enjoining a parallel action in England.\footnote{Id. at 887.} The lower court based its injunction on the existence of duplicative issues and the delay in the English suit’s filing. The Third Circuit found that these reasons alone could not overcome the comity concerns flowing from the antisuit injunction,\footnote{Id.} which “necessarily affects the court and compromises ‘the comity which the federal courts owe to courts of other jurisdictions.’”\footnote{Id. (citing \textit{Canadian Filters}, 412 F.2d at 578).} Relying on the federal/state decisions,\footnote{Id.} the Third Circuit found that the “harassing and vexatious” nature of a duplicative proceeding could not overcome the general principle allowing both actions to proceed.\footnote{Id.}

\section*{2. D.C. Circuit’s \textit{Laker} Opinion}

The seminal case applying the restrictive approach was an antitrust suit by \textit{Laker Airways} against a number of major airlines.\footnote{Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).} Laker, a British discount airline, filed suit in the U.S. District Court for the District of Columbia against U.S. and foreign carriers, alleging violations of U.S. antitrust laws.\footnote{Id.} One defendant (later followed by others) petitioned British courts seeking a declaratory judgment that no laws were violated and an injunction enjoining
the plaintiff's action in the United States. The injunction was granted. Laker then sought a preliminary injunction in the U.S. district court to prevent the remaining defendants from filing any action in a foreign court that would interfere with U.S. jurisdiction.

In determining whether to grant the preliminary injunction, the district court considered two issues: whether the plaintiff was likely to prevail on the merits in a request for a permanent injunction, and the "relative balance of injuries and the public interest." The British court issued its antisuit restraint on the basis that Laker was one of its nationals. The U.S. court rejected the argument, however, stating that Congress intended foreigners to have a remedy under U.S. antitrust laws. The district court found no support for the proposition that one nation could prevent its citizens from bringing suit in another nation's courts. It viewed the British injunction as "unprecedented by American standards." After all, no unusual circumstances justified an injunction; given the nature of modern travel and communications, the suit could not be seen as vexatious. If the British courts could interfere in this U.S. litigation, what would keep U.S. courts from doing the same to actions involving U.S. companies in foreign countries?

The district court also rejected the British court's argument that the arduous U.S. discovery process made justice impossible. It criticized the British court for second-guessing U.S. procedural mechanisms, expressing concern about the creation of undesirable precedent. The U.S. court also questioned the British court's finding that it was in a better position to hear the case; after all, the case had significant U.S. connections. First, four defendants were U.S. carriers and another four were from continental Europe, while only two were British. Second, the lawsuit involved air

102. Id.
103. Id.
104. Id.
106. Id.
107. Id. (citing Pfizer Inc. v. India, 434 U.S. 308, 314 (1978)).
108. Id. at 1129-31.
109. Id. at 1131.
110. See id. at 1132.
111. Id. at 1132-33.
112. See id.
113. Id. at 1133.
travel to and from the United States, giving rise to alleged violations of U.S. law.\textsuperscript{114} Third, eliminating some defendants could seriously undercut the plaintiff's ability to pursue its legal remedy—a remedy deemed crucial to U.S. economic policy.\textsuperscript{115}

Finally, the court balanced the injuries and the public interest. It rejected the defendants' argument that British courts should decide whether to apply U.S. antitrust laws, noting that no British court would apply U.S. laws.\textsuperscript{116} The court found British law inadequate because it appeared to allow the alleged activities.\textsuperscript{117} The U.S. court concluded that the British court would likely find the defendants' activities legal and enjoin further prosecution of the suit in the United States,\textsuperscript{118} thereby resulting in irreparable harm to Laker. Such an injury would far outweigh any harm to the defendants caused by an injunction.\textsuperscript{119} In addition, public policy concerns relating to the injury to U.S. consumers and the application of U.S. antitrust laws supported Laker's request for an injunction.\textsuperscript{120}

Some months later, the English Supreme Court of Judicature granted permanent injunctive relief to the defendants.\textsuperscript{121} The U.S.

\begin{footnotesize}
\begin{enumerate}
  \item \textit{Id.}
  \item \textit{Id.} at 1134.
  \item \textit{Id.} at 1136-37. In support of this conclusion, the court pointed to the difficulty in proving U.S. law and the traditional British hostility towards the antitrust laws. \textit{Id.}
  \item \textit{Id.} at 1137.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} at 1138.
  \begin{quote}
  [T]he British Government invoked the provisions of the British Protection of Trading Interests Act ("Act"). Upon a determination that measures taken to regulate trade outside the United Kingdom "threaten to damage the trading interests of the United Kingdom," the Act authorizes the English Secretary of State to require that any person conducting business in the United Kingdom disobey all foreign orders and cease all compliance with the foreign judicial or regulatory provisions designated by the Secretary of State. The Act authorizes the Secretary of State to prevent United Kingdom courts from complying with requests for document production issued by foreign tribunals, and forbids enforcement of treble damage awards or antitrust judgments specified by the Secretary of State. On 27 June 1983 the Secretary of State for Trade and Industry cited his powers under the Act and issued an order and general directions prohibiting persons who carry on business in the United Kingdom, with the exception of American air carriers ... from complying with "United States antitrust measures" in the district court
  \end{quote}

\textit{Laker}, 731 F.2d at 920 (footnotes omitted). Later, in \textit{British Airways Board v. Laker Airways Ltd.}, 1985 App. Cas. 58 (1984), the House of Lords held that Laker could not be enjoined because the defendants lacked a right not to be sued in U.S. courts. \textit{See id.} at 84. The right
\end{enumerate}
\end{footnotesize}
district court decided to break the gridlock.\textsuperscript{122} Laker, bound by the British court's injunction, could not continue the U.S. action without risking the ire of the British judiciary.\textsuperscript{123} The U.S. court, seeking \textit{amicus} advice regarding its options, received one alternative—the appointment of a trustee or receiver to continue the lawsuit.\textsuperscript{124}

Two of the enjoined defendants sought review of the injunction in the D.C. Circuit.\textsuperscript{125} They alleged that the lower court had abused its discretion because "the injunction trample[d] Britain's rights to regulate the access of its nationals to judicial remedies" and "the injunction contravene[d] the principles of international comity which ordinarily compel deference to foreign judgments and which virtually always proscribe any interference with foreign judicial proceedings."\textsuperscript{126}

The appellate court began its analysis by determining which court had prescriptive jurisdiction over the issues presented by the case.\textsuperscript{127} The United States asserted a territorial basis for jurisdiction—i.e., the effects created by the defendants' alleged activities provided jurisdiction.\textsuperscript{128} These effects included the impact on consumers, creditors, and the regulation of U.S. business in general.\textsuperscript{129} The case accordingly satisfied the \textit{Alcoa}\textsuperscript{130} test, which requires intent to affect commerce plus substantial effects within the United States.\textsuperscript{131} In contrast, Britain established jurisdiction primarily on the nationality of the parties—a long-recognized basis for the exercise of prescriptive jurisdiction.\textsuperscript{132} Thus, the court of appeals found that both the United States and Britain possessed concurrent prescriptive jurisdiction over the \textit{Laker} case.\textsuperscript{133}

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not to be sued could be based on a contractual agreement or on the fact that the U.S. suit is unconscionable. Leigh, \textit{supra} note 100, at 142.


\textsuperscript{123} \textit{Id.} at 355.

\textsuperscript{124} \textit{Id.} at 355-56.

\textsuperscript{125} Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 915 (D.C. Cir. 1984).

\textsuperscript{126} \textit{Id.} at 915.

\textsuperscript{127} See \textit{id.} at 921-26.

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.} at 924-25.

\textsuperscript{130} United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

\textsuperscript{131} \textit{Id.} at 432.

\textsuperscript{132} \textit{Laker}, 731 F.2d at 926.

\textsuperscript{133} \textit{Id.}
\end{flushleft}
The presence of concurrent jurisdiction, however, did not require estoppel of either action.\textsuperscript{134} Indeed, the court felt both actions should be litigated:

Parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other. The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction. For this reason, injunctions restraining litigants from proceeding in courts of independent countries are rarely issued.\textsuperscript{135}

The appellate court stated that interference was rarely warranted, noting that an injunction against the parties was, in effect, an injunction against the foreign court.\textsuperscript{136}

The court, however, did identify limited situations in which antisuit injunctions might be appropriate. In particular, such relief would be granted when required to protect the court’s jurisdiction or a public policy concern of the forum jurisdiction.\textsuperscript{137} An injunction may also be necessary when required “to provide full justice to litigants.”\textsuperscript{138} Although relitigation of a final judgment would be clearly undesirable, the court argued that an injunction against a parallel proceeding before judgment was even less desirable.\textsuperscript{139}

The \textit{Laker} court rejected the liberal approach, which considers both the similarity of the parties and issues and whether the second litigation is vexatious,\textsuperscript{140} finding that it violated the general rule that parallel proceedings should continue until one reaches judgment. The court concluded that vexatiousness would be better addressed in a \textit{forum non conveniens} motion and that concerns about duplicative proceedings were not enough to overcome important comity concerns.\textsuperscript{141} The possibility of a “race to judgment” or of inconsistent results was not sufficient to disallow parallel proceedings.\textsuperscript{142} The court found that the likelihood that courts would subvert the judicial process to reach the first judgment was

\begin{thebibliography}{9}
\bibitem{134} Id.
\bibitem{135} Id. at 926-27 (footnote omitted).
\bibitem{136} Id. at 927.
\bibitem{137} Id.
\bibitem{138} Id.
\bibitem{139} Id. at 927-28.
\bibitem{140} See infra notes 204-275 and accompanying text.
\bibitem{141} \textit{Laker}, 731 F.2d at 928.
\bibitem{142} Id. at 928-29.
\end{thebibliography}
small. In addition, inconsistent results were unlikely because the second court would respect the first court’s final judgment.

Under the Laker approach, an injunction should issue when necessary to prevent a foreign court from interfering with a U.S. court’s jurisdiction. Thus, if a U.S. litigant seeks an antisuit injunction from a foreign court to stop U.S. litigation, the U.S. court has the power, and perhaps the duty, to enjoin such an action. The court cannot allow itself to be deprived of the power to render a verdict when it clearly has jurisdiction. The appellate court accordingly endorsed the district court’s decision to grant the injunction; after all, these proceedings were not traditional parallel proceedings seeking judgment on the merits, but suits filed in British court for the sole purpose of halting the U.S. action. An injunction may also be required to protect important public policy concerns, although the court felt that such relief rarely should be granted.

The relevant factors included the importance of the policy issue to the forum state and the identity of the parties.

The argument that U.S. courts should defer to the British because of the plaintiff’s “paramount nationality” was similarly rejected. This theory suggested that where two competent courts are adjudicating parallel proceedings, the plaintiff’s national court should determine where litigation should proceed, making every case brought by a foreign national subject to attack in the national’s home state. The Laker court found this approach was supported in neither precedent nor policy in either national or international law. A foreign court should not decide the jurisdiction of a U.S. court.

Defendants also argued that the district court’s actions violated notions of international comity. Although the court agreed that a strong comity doctrine was essential, it found no violation, not-

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143. Id. at 929.
144. Id.
145. Id.
146. The court admitted that the British suits did contain a claim for relief that the defendants in the U.S. action had not violated any law, but argued that the primary purpose of the British litigation was to stop the U.S. action. Id. at 930.
147. Id. at 931.
148. Id. at 931-32.
149. Id. at 934-35.
150. Id. at 935.
151. Id. at 936.
152. Id. at 935.
153. Id. at 937.
154. The court stated: “We approach their claims seriously, recognizing that comity serves our international system like the mortar which cements together a brick house. No
ing that the doctrine gives way when its application would violate the doctrine's own policies or those of the forum state.\textsuperscript{155} The \textit{Laker} court viewed the U.S. injunction as a purely defensive move to protect the important public policies of U.S. antitrust laws and found that the British courts improperly applied comity by enjoining Laker from continuing its U.S. litigation.\textsuperscript{156} Given the British government's interference with the U.S. court's appropriate jurisdiction, the comity doctrine supported, rather than undercut, an injunction.\textsuperscript{157}

Finally, the court addressed the deadlock that would flow from the actions of the British and U.S. courts, but could not find a judicial role to lessen the conflict between the political branches of the two governments relating to the application of U.S. antitrust laws.\textsuperscript{158} The court rejected an interest balancing approach to determine which country had the greater stake in the litigation, pointing out that such an approach had two major flaws. First, it would be difficult for the court to provide a neutral assessment of each country's interests.\textsuperscript{159} Looking at the factors generally considered in interest balancing, the court found the judicial system ill-suited for such a task.\textsuperscript{160} Second, the approach discourages international comity.\textsuperscript{161} The court pointed out that numerous fora attacked the balancing approach.\textsuperscript{162} In addition, it appeared that U.S. courts almost never deferred to the foreign court under a balancing analysis.\textsuperscript{163} Finally, international law does not require a balancing of interests to determine which court should exercise its admitted

\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.} at 939.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.} at 948. In particular, the court rejected an interest balancing approach, stating as follows:

Most proposals for interest balancing consist of a long list of national contacts to be evaluated and weighed against those of the foreign country. These interests may be relevant to the desirability of allocating jurisdiction to a particular national forum. However, their usefulness breaks down when a court is faced with the task of selecting one forum's prescriptive jurisdiction over that of another.

\textit{Id.}

\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{See id.} at 950.
\textsuperscript{163} \textit{Id.}
3. Second Circuit

The Court of Appeals for the Second Circuit adopted a *Laker*-like approach in *China Trade and Development Corp. v. M.V. Choong Yong*. China Trade sued Ssangyong Shipping for failure to deliver soybeans after Ssangyong's ship ran aground in the Southern District of New York. During the discovery process, Ssangyong brought an action in the Korean District Court of Pusan seeking a declaratory judgment that Ssangyong was not responsible for the loss. China Trade then asked the U.S. court to enjoin Ssangyong from further pursuit of the Pusan action. The lower court granted the injunction using the liberal approach, and found that the two threshold requirements—identical parties and issues—were met. Having met the threshold test, the court then examined five additional issues to determine whether an injunction was proper:

1. frustration of a policy in the enjoining forum;
2. the foreign action would be vexatious;
3. a threat to the issuing court's in rem or quasi in rem jurisdiction;
4. the proceedings in the other forum prejudice other equitable considerations; or
5. adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.

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164. *Id.*
166. China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987).
167. *Id.* at 34.
168. *Id.* at 35.
169. *Id.*
170. *Id.*
171. *Id.* The court adopted this test from an earlier decision in the Southern District of New York, *American Home Assurance Co. v. Insurance Corp. of Ireland*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984). In another case in the Southern District of New York, *Chase Manhattan Bank, N.A. v. State of Iran*, 484 F. Supp. 832 (S.D.N.Y. 1980), the court actually decided that a parallel proceeding in another court was not vexatious. The litigation concerned an attempt by Chase Manhattan Bank to pull Iranian assets from accounts in Chase's London office in order to offset them against Iran's liabilities. *Id.* at 834-35. This was done pursuant to President Carter's freezing of Iranian assets during the hostage crisis. Iran brought suit in the United Kingdom, and Chase sought to have the action enjoined. *Id.* The district court determined that because the English action was brought first and concerned the enforceability of the presidential order under English law, the English claim was not vexatious. *Id.*
The district court found that two factors required an injunction in this case. First, the Korean litigation would be vexatious for China Trade. Second, the additional suit would result in extra expenses and a race to judgment.

Although the Second Circuit accepted the district court’s threshold requirements, it rejected the subsequent five-factored approach. Indeed, the appellate court pointed out that concerns about vexatiousness, race to judgment, or additional expenses likely existed in every case involving parallel proceedings. Because the general rule permitted parallel proceedings to run their course, the court determined that the analysis beyond the threshold requirements should be based on Laker: “(A) whether the foreign action threatens the jurisdiction of the enjoining forum, and (B) whether strong public policies of the enjoining forum are threatened by the foreign action.” Here, unlike in Laker, there was no threat to the district court’s jurisdiction, and the possibility that a Korean court would not enforce a U.S. judgment did not amount to an attempt to avoid the forum’s public policy. The court reversed the district court decision, stating that the lower court had ignored important international comity concerns.

Interestingly, Eighth Circuit Court Judge Bright, sitting by designation, dissented, arguing that the federal district court was correct:

It seems to me that in this day of exceedingly high costs of litigation, where no comity principles between nations are at stake in resolving a piece of commercial litigation, courts have an affirmative duty to prevent a litigant from hopping halfway around the world to a foreign court as a means of confusing, obfuscating and complicating litigation already pending for trial in a court in this country. This is especially true when that court has been processing the case for almost two years and has acquired personal jurisdiction over the parties and subject matter jurisdiction over the claim.

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172. *China Trade*, 837 F.2d at 35.
173. *Id.*
174. *Id.*
175. *Id.* at 36.
176. *Id.*
177. *Id.*
178. *Id.* at 37.
179. *Id.*
180. *Id.* at 40 (Bright, J., dissenting).
4. Sixth Circuit

The Court of Appeals for the Sixth Circuit also adopted the restrictive approach in \textit{Gau Shan Co. v. Bankers Trust Co.}\textsuperscript{181} The court began its analysis by reviewing the decisions on both sides, concluding that antisuit injunctions should be used "only in the rarest of cases."\textsuperscript{182} It then noted that the United States was no longer the predominant world economic power, making world economic cooperation essential.\textsuperscript{183} Further, because almost every economic transaction had international ramifications with overlapping jurisdictional claims, international comity concerns were more important than ever.\textsuperscript{184}

The court recognized numerous practical and systemic disadvantages associated with antisuit injunctions.\textsuperscript{185} First, the device restrained the foreign court's jurisdiction\textsuperscript{186} and could result in multiple injunctions and never-ending litigation.\textsuperscript{187} In addition, any system that ignored international comity could negatively affect commerce by undercutting predictability, a cornerstone of international trade.\textsuperscript{188} Unpredictability would result when courts of differing nations refused to work together for just purposes.\textsuperscript{189}

Because the Sixth Circuit viewed the antisuit injunction as demonstrating the forum court's disrespect for the foreign legal system,\textsuperscript{190} the court feared that foreign courts would likely refuse necessary assistance to U.S. courts.\textsuperscript{191} According to the court, the mere existence of a parallel proceeding did not outweigh international comity concerns:

Thus, the better rule is that duplication of parties and issues alone is not sufficient to justify issuance of an antisuit injunction. . . .

Factors such as "vexatiousness" or "oppressiveness" and a "race to judgment" are "likely to be present whenever parallel actions are proceeding concurrently." . . . An antisuit injunction


\textsuperscript{182} \textit{Gau Shan}, 956 F.2d at 1354.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Id.} at 1354-55.

\textsuperscript{188} \textit{Id.} at 1355.

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.}
based upon these factors would tend to debilitate the policy that permits parallel actions to continue and that disfavors antisuit injunctions. . . . Therefore, we shall consider only two factors in determining whether Bankers Trust should be enjoined from proceeding in its Hong Kong action: 1) whether this court’s jurisdiction is threatened by the Hong Kong action, and 2) whether this court’s important public policies are being evaded by the Hong Kong action.192

In applying this test, the Sixth Circuit pointed out two situations in which the court’s jurisdiction was threatened, and found that neither existed in this case.193 Determining whether the public policy exception applied, the court stated that the standard was whether the different foreign remedies were “repugnant to fundamental notions of what is decent and just.”194 The party seeking the injunction, Gau Shan, argued that the Hong Kong action was brought in order to avoid Tennessee’s treble damages provision for procurement of a breach of contract.195 The court pointed out that it was insufficient that the laws of one forum provided an advantage over those of another; if this fact were significant, antisuit injunctions would be a common occurrence in international litigation.196 Indeed, the court decided that Tennessee law was less important than national policy concerns in an international comity discussion.197 Thus, the court felt that “only the evasion of the most compelling public policies of the forum will support the issuance of an antisuit injunction,” and therefore the lower court had improperly issued the injunction.198

5. Eleventh Circuit

Finally, in Mutual Service Casualty Insurance Co. v. Frit Industries, Inc., a district court in the Eleventh Circuit examined a request to enjoin parallel litigation in two foreign jurisdictions.199 Although courts in the Eleventh Circuit are required to follow Fifth Circuit

192. Id. (citations omitted).
193. Id. at 1556. The first situation is when the case involves the exercise of in rem or quasi-in-rem jurisdiction founded upon the location of property within the court’s jurisdiction. A foreign court might order the removal of that property, removing the entire basis for jurisdiction. The second situation is the type seen in Laker, in which the foreign court is trying to enjoin the U.S. action. Id.
194. Id. at 1558.
195. Id.
196. Id.
197. Id.
198. Id.
precedents from when both circuits comprised the Fifth Circuit prior to 1981, the district court surprisingly denied that the Fifth Circuit decision in In re Unterweser Reederei GMBH stood for the application of the liberal rule. The court instead applied the restrictive approach to the antisuit issue. The Eleventh Circuit affirmed without opinion.

Thus, the D.C., Second, Sixth, and possibly the Eleventh Circuit Courts of Appeals have adopted the restrictive approach outlined in the Laker case. In addition, pre-Laker decisions in the First and Third Circuits seem to have predicted that decision. These decisions stress the need for a smoothly operating international system with an emphasis on judicial cooperation. The comity principle motivates courts to refrain from the exercise of power that they admittedly have in order to strengthen the world system.

B. Liberal Approach

The liberal approach to the antisuit injunction issue focuses on the vexatious nature of parallel proceedings, applying basically the same reasoning that U.S. courts use domestically to decide whether to enjoin a sister-state proceeding.

1. Fifth Circuit

In Unterweser, the Fifth Circuit reviewed the district court’s injunction against a British court’s action. The court stated its general approach to the issue:

This power has been exercised 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.

Applying these principles, the Fifth Circuit concluded that an antisuit injunction is appropriate when parallel proceedings would create “inequitable hardship” and inefficient litigation. A year

204. See Bermann, supra note 1, at 595.
205. Unterweser, 428 F.2d at 889.
206. Id.
207. Id. at 890.
208. Id. at 896.
later the court reemphasized the vexatiousness of parallel proceedings by approving the lower court’s injunction in *Bethell v. Peace*.209

Most recently, the Fifth Circuit reaffirmed the liberal approach by granting an antisuit injunction in *Kaepa, Inc. v. Achilles Corp.*210 *Kaepa* involved a distribution agreement between a U.S. company (Kaepa) and a Japanese entity (Achilles) providing that Achilles would market Kaepa’s product (athletic shoes) in Japan.211 The agreement also required the application of Texas law in Texas courts.212 Under the belief that Achilles was in breach of the agreement, Kaepa sued in Texas state court and Achilles removed the case to federal court where discovery commenced.213 Subsequently, Achilles brought an action, based on similar claims, against Kaepa in the Japanese courts; Kaepa accordingly asked the district court to enjoin Achilles’s Japanese suit.214 The motion was granted.215

On appeal, Achilles argued that the lower court overlooked international comity concerns in granting the injunction.216 The appellate court pointed out that the district court certainly possessed the *power* to grant the injunction.217 Noting the controversy over the application of this power, the Fifth Circuit explained that its previous decisions focused on “the need to prevent vexatious or oppressive litigation.”218 The court denied that either *Untereser* or *Bethel* prevented courts from considering comity concerns when deciding whether to grant an injunction.219 Having said this, however, the Fifth Circuit’s holding reflected little concern for the international context:

> We decline . . . 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.

In the instant case, for example, it simply cannot be said that the grant of the antisuit injunction actually threatens relations between the United States and Japan. First, no public international issue is implicated by the case: Achilles is a private party engaged in a contractual dispute with another private party. Second, the dispute has been long and firmly ensconced within the

211. *Id.* at 625.
212. *Id.* at 625-26.
213. *Id.* at 626.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 627.
219. *Id.*
The court was apparently more concerned that parallel proceedings would “entail ‘an absurd duplication of effort’ and would result in unwarranted inconvenience, expense and vexation.”\textsuperscript{221} The injunction was therefore affirmed.\textsuperscript{222}

2. Ninth Circuit

In \textit{Seattle Totems Hockey Club, Inc. v. National Hockey League},\textsuperscript{223} the Ninth Circuit adopted the tests set out by the Fifth Circuit in \textit{Unterweser} and \textit{Bethel}.\textsuperscript{224} Ignoring any international repercussions, the Ninth Circuit focused on the fact that parallel proceedings cause delay, inconvenience, and the possibility of a race to judgment or inconsistent results.\textsuperscript{225}

3. Seventh Circuit

The status of the Seventh Circuit is unresolved, although the most recent cases reflect a liberal interpretation. A 1960 decision used the vexatiousness standard to reverse a lower court opinion granting an injunction.\textsuperscript{226} Later, in \textit{Ingersoll Milling Machine Co. v. Granger},\textsuperscript{227} the court cited the \textit{Laker} case without criticism.\textsuperscript{228} Although finding it unnecessary to decide the issue, Judge Posner of the Seventh Circuit opined that it “incline[d] toward the laxer standard” in \textit{Philips Medical Systems International B.V. v. Brueeman}.\textsuperscript{229}

\textsuperscript{220} \textit{Id.}

\textsuperscript{221} \textit{Id.} (footnote omitted). The court noted that “Achilles’s belated ploy of filing as putative plaintiff in Japan the very same claims against Kaepa that Kaepa had filed as plaintiff against Achilles smacks of cynicism, harassment, and delay.” \textit{Id.} at 627-28.

\textsuperscript{222} \textit{Id.} at 624.

\textsuperscript{223} \textit{Seattle Totems Hockey Club, Inc. v. National Hockey League}, 652 F.2d 852 (9th Cir. 1981).

\textsuperscript{224} \textit{Id.} at 855-56.

\textsuperscript{225} \textit{Id.} at 856.

\textsuperscript{226} Sperry Rand Corp. v. Sunbeam Corp., 285 F.2d 542, 545 (7th Cir. 1960).

\textsuperscript{227} \textit{Ingersoll Milling Mach. Co. v. Granger}, 833 F.2d 680 (7th Cir. 1987).

\textsuperscript{228} \textit{Id.} at 684.

The court did not believe that injunctive relief could have a negative effect on U.S. relations with foreign nations absent actual objection from the foreign state.\(^{230}\) Calling the comity doctrine "vague."\(^{231}\) the court reasoned that the same rules should apply to domestic and international attempts to enjoin court actions as the world becomes a smaller place.\(^{232}\)

Judge Posner addressed the comity issue once again in *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*\(^{233}\) In that case, insurers of computer equipment destroyed by fire in France sought a ruling that they were not liable because the insured (a subsidiary of an entity of which the French government owned ninety percent) intentionally set the fire.\(^{234}\) The insured then brought a new action in the district court against one insurer and the broker, and commenced separate litigation against the other insurer in the Commercial Court of Lille, France.\(^{235}\) The district court in Chicago consolidated the two domestic suits, and the insured filed additional counterclaims against the insurance companies in the consolidated suit.\(^{236}\) The insurers asked French officials to commence a criminal investigation of the alleged arson.\(^{237}\) They also asked the French commercial court to stay its proceedings, pending the outcome of the criminal investigation; the French court agreed over the insured's objection.\(^{238}\)

As the U.S. case was on the verge of trial, the insured moved to lift the French stay, even though the criminal investigation was not completed.\(^{239}\) Before the French court could rule on that motion, the insurers sought and received an injunction from the U.S. district court against the insured's litigation in France.\(^{240}\) Judge Posner began his discussion by admitting that "at first glance the action of an American judge in enjoining what is practically an arm of the French state ... from litigating a suit on a French insurance policy in a French court may seem an extraordinary breach of international comity."\(^{241}\) He quickly pointed out that the case was

\(^{230}\) Id.
\(^{231}\) Id. at 604.
\(^{232}\) Id. at 604-05.
\(^{234}\) Id. at 427.
\(^{235}\) Id.
\(^{236}\) Id.
\(^{237}\) Id.
\(^{238}\) Id.
\(^{239}\) Id.
\(^{240}\) Id.
\(^{241}\) Id. at 428.
more complex and that comity was indeed no bar to the antisuit injunction.\textsuperscript{242} After all, there was no reason to treat a government-owned litigant differently than a private one, and no one had alleged government involvement in the arson.\textsuperscript{243} In addition, the insured chose a U.S. district court.\textsuperscript{244} Posner noted that the parties had already invested largely in discovery, which had uncovered some evidence of arson and likely motivated the insured’s attempt to shift litigation to France.\textsuperscript{245}

Posner also expressed concern about the French commercial court, which “[a]lthough called a ‘court,’ it is actually a panel of arbitrators, composed of businessmen who devote part time to arbitrating.”\textsuperscript{246} He similarly questioned the court’s procedures, especially the fact that the court usually does not hear witnesses and could not sift through the massive documentation produced in U.S. discovery.\textsuperscript{247} Although Posner conceded that arbitrators decided complex issues under arbitration agreements, the judge distinguished the instant case because the parties had not agreed to arbitration.\textsuperscript{248} He doubted that such a court would find arson without a prior criminal conviction.\textsuperscript{249}

\textsuperscript{242} Id. at 428, 433.
\textsuperscript{243} Id. at 428.
\textsuperscript{244} Id. at 429.
\textsuperscript{245} Id. at 428-29.
\textsuperscript{246} Id. at 429.
\textsuperscript{247} Id. Judge Posner’s description of the foreign court’s procedures borders on the offensive. He stated as follows:

Although called a court, it is actually a panel of arbitrators, composed of businessmen who devote part time to arbitrating. According to an affidavit of a French legal expert that the district judge was entitled to and did credit, the Commercial Court of Lille rarely if ever hears live witnesses. No problem, argues BDS; just ship the court the hundreds of depositions and hundreds of thousands of documents obtained in pretrial discovery in the district court. But it is difficult enough for courts staffed with legal professionals to cope with massive documentary records; it borders on the inconceivable that businessmen serving as part-time arbitrators could do so. As far as we are aware, the members of the Commercial Court do not have 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. Much of this stuff could no doubt be dispensed with in a trial with witnesses, but if there are to be no witnesses and the arbitrators are to be remitted to rummaging through deposition transcripts and other massive documentation, we do not see how Allendale could get them to consider its defense of arson.

\textsuperscript{248} Id.
\textsuperscript{249} Id. at 430. Posner dismissed the fact that a French civil court had done just that in an earlier case. After all, this earlier case involved a discotheque, not a warehouse containing $100 million of computer equipment. Obviously, French courts have the capacity to handle dance halls, but nothing complex like computers. Id.
Posner stated that the U.S. district court was far better positioned to litigate the dispute. The primary insurance policy was issued in the United States, and the insurer, broker, and insured were all U.S. citizens. Although the alleged arson occurred in France, Posner still believed that the “institutional” superiority of the district court made the French forum an unwise choice.

Posner began his legal analysis by pointing out that a court should normally not abstain from exercising jurisdiction, especially in litigation that has advanced beyond the early stages. Given that the U.S. action would continue if the French commercial court lifted its stay, Posner claimed that the dual proceedings would create an “absurd duplication of effort.” Considering the international comity doctrine, Posner again argued the liberal approach to antisuit injunctions although he believed that comity could weigh against injunction if there were “empirical flesh on the theoretical skeleton.” According to the judge, the “flesh” required proof that comity would be harmed in the individual case. Proof that the relations between the U.S. and France would be harmed by an injunction in the instant case might include, for example, some sort of official notice such as a missive from the U.S. State Department or the French agency with the ownership interest in the insured.

In this case, the French Commission de Controle des Assurances (Insurance Commission), which regulates the insurance industry in France, provided an amicus brief that promoted the insured’s interest in litigating insurance disputes in the French court system. It denounced the lower court’s description of the commer-

250. Id.
251. Id.
252. Id. Posner denied any parochialism, stating as follows:
This conclusion has nothing to do with the relative merits of the French and American procedural systems, an issue on which it would be impertinent for us to express a view. We have arbitral bodies, some with exclusive jurisdiction, such as the National Railroad Adjustment Board ordained by the Railway Labor Act, 45 U.S.C. § 155, and the French have courts staffed by professional judges. We can imagine a mirror-image case in which a French court was asked to enjoin an American firm from proceeding in the National Railroad Adjustment Board because that board was not equipped to do justice between the parties in the particular circumstances of their dispute.

253. Id.
254. Id. at 431.
255. Id.
256. Id.
257. Id.
258. Id.
cial court as "insulting." This denunciation was not enough for Posner. He felt that the Insurance Commission should not be seen as representing France. As for the alleged insult, the judge responded that the court was not questioning the French court's competence, only "its capacity relative to a U.S. district court to resolve this particular dispute."

Given the strong U.S. interest in protecting its insurance industry from fraud, and the U.S. court's greater ability to adjudicate this case, Posner found the undemonstrated comity concerns to be minimal. The appellate court accordingly concluded that the district court had the power to issue the injunction and did not exceed its authority in doing so.

4. Eighth Circuit

The Eighth Circuit position is also somewhat unclear. In Medtronic, Inc. v. Catalyst Research Corp., the court affirmed the district court's antisuit injunction. The lower court required that the parties and issues be the same, and these requirements were met. Noting that comity necessitated "that the Court use extreme care and restraint in taking any action which would interfere in any way with the jurisdiction of a foreign court," the district court issued the injunction. The court found that an injunction should issue because the granted relief was narrow, a "balancing of hardships" recommended it, no parallel foreign judgment had yet been reached, the underlying contract had more contacts with the United States, and the injunction would avoid duplicative litigation. Although the court refused to find the parallel litigation vexatious, a balancing of the equities still favored the injunction.

259. Id.
260. Id. at 432.
261. Id.
262. See id. at 432-33.
263. Id. at 453. For another discussion of the Allendale case, see Haig Najarian, Note, Granting Comity Its Due: A Proposal to Revive the Comity-Based Approach to Transnational Antisuit Injunctions, 68 St. John's L. Rev. 961 (1994).
265. Id. at 661.
267. Id.
268. Id. at 955-56.
269. Id.
270. Id. at 956.
With no real discussion of the international issues, Judge Bright simply affirmed the district court decision and found that the case record supported the district court's equitable balancing.\textsuperscript{271} Thus, the decision provides relatively little guidance on the Eighth Circuit's approach, although Judge Bright's sitting-by-designation opinion in \textit{China Trade}\textsuperscript{272} may provide helpful insight. Another useful indicator is the Minnesota Federal District Court's decision in \textit{Cargill, Inc. v. Hartford Accident and Indemnity Co.},\textsuperscript{273} which clearly articulated the liberal approach:

The threshold question is whether the parties are the same in both actions, the issues are the same, and resolution of the first action will be dispositive of the action to be enjoined. . . . A foreign action should then be enjoined when it 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.\textsuperscript{274}

Applying this rule to the facts, the court rather easily determined that the adjudication in two different fora would be vexatious and a "waste of judicial resources,"\textsuperscript{275}—a determination applicable in almost any parallel litigation involving the same parties and issues.

The Fifth, Ninth, and probably the Seventh and Eighth Circuits have adopted the liberal approach which rejects generalized comity concerns for a presumption favoring an injunction in cases involving the same parties and issues. This view shows a willingness to preserve the U.S. court's exclusive control over matters within their jurisdiction and an unwillingness to find long-term benefits in a more cautious approach. Although these decisions might allow concurrent jurisdiction when a specific possibility of international discord is shown, courts are unwilling to defer to comity under less-defined circumstances. Of special interest and concern are the recent opinions in the Fifth and Seventh Circuits that seem to require a more direct and immediate negative impact on foreign relations before a comity-based decision will be made.

\textsuperscript{271} Medtronic, Inc. v. Catalyst Research Corp., 664 F.2d 660, 665 (8th Cir. 1981).
\textsuperscript{272} See text of Judge Bright's opinion in text accompanying note 180.
\textsuperscript{274} \textit{Id.} at 715 (citations omitted).
\textsuperscript{275} \textit{Id.}
IV. COMITY AND THE DIVIDED CASE LAW

Comity is most important when the legal systems of two or more nations consider issues presented by the same core set of facts. While comity informs many international civil litigation issues such as discovery, exercise of various forms of jurisdiction, and service of process abroad, the parallel suit injunction cases present a stark conflict between the judicial power of at least two different jurisdictions. After all, the systemic issues relating to the international application of justice are in dispute. The underlying conflict can yield an injunction, a counter-injunction, and possibly gridlock, especially when the court systems refuse to consider comity concerns.

Comity alleviates these conflicts by allowing each system to analyze the effects of parallel proceedings and antisuit injunctions on the international dispute resolution system. Gridlock is certainly not comity's goal; rather comity seeks efficient and just dispute resolution, both within the particular litigation and throughout the international system.

A. The Restrictive Approach

Does the restrictive approach to antisuit injunctions adequately reflect the policies of comity? It is important to recognize that the restrictive rule is not the comity rule; instead the restrictive rule is supported by comity concerns. Most criticism of comity charges that it is imprecise and political in nature. The restrictive approach is neither. Laker and its progeny require that the forum court allow the foreign litigation to continue in most cases. Judgment in one of the parallel cases may be used as res judicata in the other case. This clear rule is easily applied with absolutely no political content; it is unnecessary to consider which country is the better forum or the foreign relations implications.

The rule is also pragmatic and reflects the best interests of the United States. If U.S. courts enjoin foreign actions regularly, foreign courts will likely respond in kind, creating gridlock and making transnational business more difficult. This long-term impact poses real concerns for the United States.

In developing an international system for effective dispute resolution, the Laker approach is probably the best a court system can adopt, absent a multilateral international agreement. Injunctions and counter-injunctions cannot provide a meaningful foundation for an efficient and just international system to resolve disputes.
On the other hand, complete deferral to the foreign court could create an unfair forum.

In one sense, the restrictive approach merely postpones the difficulty with enforcing any judgment eventually obtained in a foreign court. Even so, combining the restrictive approach with liberal rules for enforcing foreign judgments still creates a better developed international dispute resolution system. The restrictive rule can lead to a race to judgment, duplicative efforts, and the use of parallel suits for inappropriate purposes such as harassment or an unfair discovery advantage. Alternatively, rejection of the restrictive rule initiates direct confrontation with other nations’ court systems, a matter of extraordinarily grave concern. Cooperation is more likely to produce solutions than confrontation. Court systems (and their national governments) at war with one another will not work together to solve problems. Ultimately, cooperation is the goal of comity. Because the Laker rule embodies considerations supporting a better system for resolving disputes, it is the approach that best reflects comity considerations.

B. The Liberal Approach

For the most part, the liberal approach completely ignores comity. Once the threshold questions (whether the parties and issues are the same) are answered in the positive, courts look to a multifactored analysis to determine whether to issue the injunction. These factors emphasize the vexatious or oppressive nature of the duplicative litigation and disregard the international context of the dispute.

At first, the liberal approach appears to provide a predictable solution for the practical problems associated with duplicative litigation. Although this simplistic rule might mechanically reduce the costs flowing from overlapping judicial processes, its realistic application might not yield any substantial savings. Once the injunction issues, what keeps the foreign court from continuing the litigation? The foreign court may even require that the parties proceed or counter-enjoin the U.S. action, which can lead to a total cessation of the litigation process. Such results could enlarge, rather than minimize, the suit-driven costs and frustrations.

More importantly, the liberal approach does nothing to encourage the development of an international dispute resolution system. A parochial assertion of U.S. power likely alienates other court systems and, perhaps, their national governments. As already
demonstrated in other areas;\textsuperscript{276} such alienation may lead to attempts to block U.S. legislative and judicial actions. Assertions of unilateral power by U.S. courts do not encourage international agreements that may help ease these tensions. In sum, although the liberal approach might yield uncertain savings in the individual dispute, it is detrimental to the development of a functioning international system.

The more recent antisuit injunction decisions provide the most interesting analysis. Two circuit courts appear to evince an actual animosity or bitterness towards comity. The Fifth Circuit's statement that it "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,"\textsuperscript{277} exemplifies this distaste. Additionally, Judge Posner called the doctrine "vague" in his \textit{Philips} decision.\textsuperscript{278} Such statements demonstrate a fundamental misunderstanding of comity. These opinions essentially create a straw person and then knock it down. The straw person is the allegation that comity is by definition vague and amorphous; a true contention only if the doctrine is not applied correctly. If courts look to political concerns rather than systemic issues, comity may become vague and unmanageable. The restrictive approach, however, avoids a vague, political analysis. Instead, \textit{Laker} created an easily applied doctrine, supportive of the international system, with no political content. It appropriately leaves the political issues to the political branches.

Even more interesting are the statements in the recent decisions from the Fifth and Seventh Circuits indicating that the courts are only willing to consider international comity concerns when an antisuit injunction would create a real and imminent possibility of a dispute between two nations. In \textit{Kaepa}, the Fifth Circuit argued that an antisuit injunction was appropriate because there was no evidence that it "actually threaten[ed] relations between the United States and Japan."\textsuperscript{279} Even more dismissive of diplomatic concerns were Judge Posner's antisuit injunction decisions. In \textit{Philips}, he argued that as the world becomes a smaller place, the same rules should apply in the domestic and international settings.\textsuperscript{280} His \textit{Allendale} opinion clarified the appropriate setting for

\textsuperscript{276} See \textit{Born}, supra note 82, at 849-52.
\textsuperscript{277} \textit{Kaepa}, Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996).
\textsuperscript{279} \textit{Kaepa}, 76 F.3d at 627.
\textsuperscript{280} \textit{Philips}, 8 F.3d at 605.
international comity concerns, requiring proof that comity will be
harmed in an individual case. Posner's requirement that the
injunction's opponent provide evidence that "an injunction really
would throw a monkey wrench, however small, into the foreign
relations of the United States," demonstrates a flawed under-
standing of comity. To satisfy this standard, Posner appears to be
looking for an objection from the State Department or a represen-
tative of the foreign government. Although Posner suggests that
there may be other ways of showing a "monkey wrench," he does
not suggest what they may be.

Posner and the Fifth Circuit misapply comity by imposing
explicit deference to the political branches or requiring a specific
instance of international tension when making the antisuit in-
junction decision. Reading comity in the political context, this view
becomes very fact specific. Posner takes the analysis further by
looking for official notification from an involved government's
political branch that international relations would be strained.
Ironically, the courts that criticize comity as "vague" willingly con-
sider political issues to disallow an injunction under the liberal
approach.

Judge Posner's statement about the shrinking world is also dif-
ficult to understand. Although most would argue that a shrinking
world requires a greater understanding of other legal systems, Pos-
ner seems to reach the conclusion that U.S. values (and its legal
system) should prevail in a smaller world. In addition to this
skewed perspective, Judge Posner criticized the French legal system
and even rejected the French agency's complaint that the lower
court's view of the French commercial court was insulting. The
strain between the two court systems in the Allendale case best dem-
strates the need for the application of the restrictive approach.
Ultimately, notions of comity must prevail if the antisuit injunction
problem is to find a solution. The liberal approach ignores comity
or applies it in a way that is unlikely to encourage a solution. By
focusing on the political approach to comity, the liberal courts
reject the crucial legal problems that comity was meant to address.
The restrictive approach serves to foster these comity concerns and

282. Id.
283. Id. at 431-32.
284. Id.
285. Philips, 8 F.3d at 605.
286. Allendale, 10 F.3d at 431-32.
creates an atmosphere for the further development of an international dispute resolution system.

V. Conclusion

The circuits are currently split on which test should apply when determining antisuit injunction cases. The D.C., Second, Sixth, and possibly the Eleventh Circuits have adopted the restrictive approach outlined in the \textit{Laker} decision. Under that view, parallel suits are generally allowed to continue unless the forum court's jurisdiction is challenged or the forum's public policy is violated. Meanwhile, the Fifth, Ninth, Seventh, and Eighth Circuits have adopted the liberal approach, almost invariably enjoining vexatious duplicative proceedings whenever the parties and issues are the same. This important divergence renders the issue ripe for clarification by the Supreme Court.\footnote{287}

In facing this issue, courts should consider the crucial role of international comity. The doctrine, often misconstrued and poorly applied, was not meant to provide courts with an opportunity to opine on international political issues or the forum state's foreign affairs. Instead, comity is a legal doctrine that requires consideration of the practical needs of the forum state and the international system in creating a smoothly functioning mechanism for dispute resolution. This goal has become increasingly important as the world becomes more interconnected.

Although the restrictive approach may not provide the perfect solution in every case, it does appropriately reflect the goals of comity. Instead of looking to political concerns in individual cases, the restrictive approach applies a general rule of law based upon a comity analysis. That rule creates opportunities for global cooperation.

The liberal approach acts oppositely by encouraging judicial conflict and, ultimately, gridlock. This approach ignores the interests of a developing international system and retards its development. The modified liberal approach suggested by Judge Posner is a slight improvement. It would allow a court to consider what Posner calls comity concerns in an individual case. Of course, such an approach shows a misunderstanding of the doctrine because it

\footnote{287. The Supreme Court recently missed an opportunity to clarify this issue when it refused to grant certiorari in the \textit{Kaepa} case. Achilles Corp. v. Kaepa, Inc., 117 S. Ct. 77 (1996); see supra notes 210-222 and accompanying text.}
turns on the political questions presented by the case rather than the legal questions which should be addressed by the courts.

Ultimately, this issue needs to be resolved so that development of a just and efficient mechanism for the resolution of international disputes is encouraged. Although relatively simple, the restrictive approach best balances the issues presented by the United States's need to become a part of that system. Although the antisuit dispute is ripe for resolution by the Supreme Court, recent cases show a lack of sensitivity and sophistication relating to the issues presented by antisuit injunctions and international comity. The Supreme Court must demonstrate concern for international comity and effect a change in the decisions. Faced with the possibility of direct conflict between U.S. and foreign courts, the Supreme Court may be forced to directly address comity concerns and reaffirm their importance in international civil litigation. Without a change in direction, U.S. leadership in an emerging international system is likely to wane.