Note

Foreign Antisuit Injunctions: Taking a Lesson from the Act of State Doctrine

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Introduction

The problem of parallel litigation arises when a party files a lawsuit in one forum and then that party or its opponent seeks to pursue litigation of a lawsuit raising similar, related, or even identical claims or issues in a different forum. One way of dealing with parallel litigation is for one of the presiding courts to issue an antisuit injunction against the party attempting to prosecute the parallel suit in the other forum. An antisuit injunction operates to prevent the party prosecuting the parallel suit from continuing with the parallel lawsuit, under the threat of being held in contempt by the court issuing the injunction.

Parallel litigation is particularly problematic when the two fora involved are two different countries. United States courts have the power to issue antisuit injunctions to prevent parties who are rightfully before them from pursuing litigation of similar or identical claims in foreign courts. The circuits are split, however, as to when the issu-

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ance of such an injunction is proper and what criteria to use in making that decision.

In light of the circuit split, separation of powers concerns, and the potential effect of the issuance of foreign antisuit injunctions on U.S. foreign relations, the Supreme Court should set forth a uniform framework for courts to follow when deciding whether to issue foreign antisuit injunctions. This framework should allow for some input from the executive branch as one factor for courts to consider in evaluating whether an injunction would be proper in a given case. In addition, the framework should allow for consideration of a variety of factors, including the comparative public policies of the two fora, the vexatiousness and inconvenience of the litigation, equitable considerations, and international comity. If instructed to consider these and other factors, courts would be in a better position to decide whether to issue an antisuit injunction, which would enable them to avoid unnecessary friction with other courts involved.

First, this Note examines the general problem of parallel litigation and the particular problem of parallel litigation involving international rather than interstate lawsuits. Whereas parallel litigation between two U.S. states implicates federalism and the Full Faith and Credit Clause,[1] the primary concern for courts dealing with international parallel litigation should be international comity.[2] This Note therefore examines what international comity is and why it should be the primary consideration for courts deciding whether to issue a foreign antisuit injunction. Next, this Note briefly discusses what options are generally available to a court confronted with international parallel litigation, one of which is to issue an antisuit injunction.

This Note directs the bulk of its analysis toward examining the circuit split that has developed with respect to what standard courts should apply when deciding whether to issue a foreign antisuit injunction. This Note discusses each of the competing approaches and several proposals for resolving the split. Next, this Note analyzes the positive and negative aspects of each of the two competing approaches.

Finally, this Note proposes a solution, drawing upon the approach followed by courts when dealing with the act of state doctrine.[3] Ac-

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1 U.S. CONST. art. IV, § 1.

2 *See infra* notes 11–12 and accompanying text.

3 The act of state doctrine is the general rule that the courts of the United States "will not sit in judgment on the acts of the government of another [country] done within [that country's] own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The act of state doctrine

cordingly, this Note gives a basic overview of the act of state doctrine before applying some of its principles to the issue of foreign antisuit injunctions. The ultimate solution advocates for the cooperation of the judicial branch with the Executive in the adoption of a flexible framework. This framework leaves room to deal with the exigencies and delicacies required by international diplomacy while maintaining due respect for the Executive's foreign relations prerogative.

I. Parallel Litigation

A. Parallel Litigation Generally

Parallel litigation arises in a number of different contexts including contract interpretation, tort, and business disputes of all kinds.[4] It arises when a party files suit in one forum and then that party, or its adversary, subsequently decides to file a similar or identical suit in a different forum. Consider the following hypothetical case as an example: plaintiff, *A*, files a claim against defendant, *B*, in State *X*. *B* then, for whatever reason, files what would be a counterclaim to the first action as a separate suit in State *Y*. *B* might file a separate action because she wants to take advantage of more favorable law in State *Y* or, perhaps more insidiously, she simply wants to harass *A*. The result—two proceedings being prosecuted in two different states with the same parties and, more than likely, the same factual and legal questions at issue—is an example of parallel litigation.

Assuming the courts of both States *X* and *Y* have proper jurisdiction over the actions brought before them, which (if either) of the two actions should be dismissed? Should *A*'s action be allowed to continue because *A* won the race to the courthouse? Should both actions be allowed to proceed simultaneously? If the latter option is chosen,

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consists entirely of judge-made law, and its application to bar the continuance of a suit is highly discretionary. Among the factors for a court to consider when deciding whether the act of state doctrine should apply is the position of the executive branch. *See infra* Part IV.A.

4 The context in which parallel litigation is least likely to arise is property. In an in rem or a quasi in rem action, the almost-undisputed rule is that the jurisdiction that is the situs of the property involved will be the jurisdiction to adjudicate the claim, and any other jurisdiction should cede any authority it may have over the claim to the jurisdiction of the situs. *See, e.g.*, DAVID P. CURRIE ET AL., CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 520 (7th ed. 2006) (discussing what is known as "the land taboo": the idea that cases involving land and other real property are different and should normally be adjudicated by the jurisdiction in which the real property sits). Even in this area, however, there is potential for blurring; for example, what is the situs of intellectual property? A full discussion of these issues is beyond the scope of this Note. For a more detailed discussion, see generally Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585 (1987).

as the general rule commands,[5] complications will often follow. Whichever claim is decided first may bar the other claim as res judicata. Thus, each party will have an interest in expediting his proceeding while slowing down the other proceeding to ensure that the more favorable judgment is entered first.[6]

If States *X* and *Y* have different laws or public policies, the incentive the parties have in expediting the favorable proceeding may extend to the states' courts as well. The court in State *X*, for example, may be tempted to expedite its proceeding to ensure that its judgment will be rendered first to protect whatever policy interests State *X* might have in the outcome of the litigation.[7] Whether the parties themselves or the courts involved are attempting to hurry a case to final disposition, this expedited process is known as a "race to judgment" and is one of the main problems associated with simultaneous parallel proceedings.[8]

Although fears of a race to judgment are one concern that parallel litigation raises, there are others. These other concerns include increased expense and inconvenience to litigants, a waste of scarce judicial resources, and the risk of inconsistent judgments arising from the two different fora.[9] These will be discussed in greater detail in the

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5 *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984).

6 *See* Richard W. Raushenbush, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1040–41 (1985) (noting that each party will select a forum that it believes benefits them and, having done so, "will attempt to terminate or to prevent proceedings in the other forum").

7 One reason for a party to pursue parallel litigation in a second forum is to attempt to circumvent unfavorable policies of the first forum. *Laker Airways*, 731 F.2d at 931. As a result, the courts of the state whose policy is being evaded by the parallel litigation will have an interest in having their case decided first, so that it will preclude judgment in the second action.

8 China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987); *see also* Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 856 (9th Cir. 1981) (allowing litigation to proceed in two fora simultaneously "could result in inconsistent rulings or even a race to judgment").

9 *See Seattle Totems*, 652 F.2d at 856. In theory, this last concern should not be a problem, because of the requirements of the Full Faith and Credit Clause at the domestic level, along with treaties governing the recognition of foreign judgments on the international level, but the concern still exists, primarily because there is no international requirement of full faith and credit. *See infra* note 24 and accompanying text; *see also* EFCO Corp. v. Aluma Sys. USA, Inc., 983 F. Supp. 816, 824–25 (S.D. Iowa 1997) ("Maintaining two concurrent and simultaneous proceedings would consume a great amount of judicial, administrative, and party resources for only speculative gain. Furthermore, simultaneous adjudications regarding identical facts and highly similar legal issues creates the risk of inconsistent judgments."). For more on concerns raised by parallel litigation, specifically international parallel litigation, see N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 610–12 (2006).

following section, which deals more particularly with parallel litigation that arises in an international context.

B. Special Concerns Regarding International Parallel Litigation: International Comity and Foreign Relations

In today's world of multinational corporations and ever-growing global interdependence, parallel litigation increasingly arises in cases brought before the courts of more than one country. In such cases, one party may seek to litigate the merits of a case in a foreign country at the same time as an almost-identical case is pending in a U.S. court, or before an arbitral panel. The problems discussed above with respect to parallel litigation in general will also arise in the context of international parallel litigation, with additional problems being presented by concerns of international comity and the subtleties of foreign relations. As discussed below, these additional concerns make parallel litigation on the international level an even more difficult and delicate problem than it is domestically.

International comity is a doctrine that allows courts to decline to exercise jurisdiction in certain cases out of deference to the laws or interests of a foreign country.[10] In 1895, the Supreme Court described international comity as

> neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[11]

Over the past century, international comity, also referred to as "the comity of nations," has continued to be a doctrine that guides courts in granting varying degrees of deference to the decisions, laws, and jurisdiction of foreign courts.[12]

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10 *See, e.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 546 (1987).

11 Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

12 *See* Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985) (stating that "[c]omity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated"); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (stating that "[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect"); Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 165 B.R. 379, 384

In the context of international parallel litigation, international comity and foreign relations concerns come into play because of the potential impact that one country's actions may have on its relations with another country. When litigation or litigants are properly before the courts of two countries simultaneously, the actions of one country in dealing with that litigation, or those litigants, may have an adverse effect on relations with the other country. For example, action taken by one court to keep parallel litigation from continuing in a second court in another country could be interpreted as an affront to the capabilities of the courts of the second country more generally.[13]

Additionally, actions taken by the courts of one country to keep litigants out of the courts of another country—such as the issuance of an antisuit injunction—could be met with similar behavior by the courts of the other country. In such a situation, the parties would be unable to litigate in either forum, which would deny them a remedy entirely.[14] For numerous reasons such as these, many commentators and courts advocate for comity to play a large role when dealing with international parallel litigation.[15]

C. Solutions to the Problem of Parallel Litigation

As discussed above, a court may have good reason to want to prevent parallel litigation in either a domestic or a foreign forum. What options does a court faced with parallel litigation have? This Note focuses on the three most common options.[16] First, a court may choose to do nothing, allowing both proceedings to go on simultaneously.[17] Second, a court may choose to stay or dismiss its own pro-

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(S.D.N.Y. 1994) (stating that international comity counsels "recognition of foreign proceedings to the extent that such proceedings are determined to be orderly, fair and not detrimental to the nation's interests").

13 Raushenbush, *supra* note 6, at 1070 (noting that "a 'defensive' injunction indicates a distrust of the foreign court's willingness to conduct parallel, noninterdictory proceedings and thus may create unnecessary antagonism between the courts").

14 Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984) (citing Peck v. Jenness, 48 U.S. 612, 625 (1849)).

15 *See, e.g.*, *id.* at 916; Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1, 4 (1996); 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, 967 (1994).

16 *See* RALPH G. STEINHARDT, INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW 676–77 (2002).

17 *E.g.*, Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines, 925 F.2d 1193, 1194–95 (9th Cir. 1991) (reversing district court's grant of a stay on grounds that there were no "exceptional circumstances" to warrant abstention in what the court characterized as "an unexceptional commercial dispute").

ceeding in favor of allowing the foreign proceeding to continue unfettered.[18] Third, a court may choose to issue an antisuit injunction against the parties before it, to keep them from prosecuting the litigation in the foreign forum. Each of these options will be discussed in this section.

The first option, to allow both proceedings to continue simultaneously, is the default approach.[19] "[P]arallel proceedings on the same *in personam* claim should . . . be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other."[20] Although this option is good in that it prevents either court from having to decline to exercise its jurisdiction in a case,[21] it can also be problematic. A situation where two virtually identical cases are allowed to proceed in two different forum states could result in a "race to judgment," where the courts speed through the proceedings in an effort to obtain the first judgment in the case.[22] Such a situation could also result in inconsistent judgments, for example, if the second court fails to recognize the first court's ruling under the doctrine of res judicata.[23] Faced with parallel litigation, therefore, it should not be surprising that, in at least some cases, courts have looked to other options.

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18 *E.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976) (laying out limited grounds on which a district court can and should dismiss "due to the presence of a concurrent state proceeding for reasons of wise judicial administration"); Brinco Mining Ltd. v. Fed. Ins. Co., 552 F. Supp. 1233, 1240 (D.D.C. 1982) (dismissal on grounds of *Colorado River* abstention, holding that foreign courts are due the same amount of deference as other federal courts; because parallel proceedings would not be allowed to continue in two different U.S. district courts, they should not be allowed to continue in the courts of two different countries).

19 *Laker Airways*, 731 F.2d at 926.

20 *Id.* at 926–27.

21 This is particularly true in the case of federal courts because when a federal court has jurisdiction, it is typically under an obligation to exercise it. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution.").

22 STEINHARDT, *supra* note 16, at 677.

23 *Id.*; *see also* Baker v. Gen. Motors Corp., 522 U.S. 222, 236 (1998) ("[A]ntisuit injunctions . . . in fact have not controlled the second court's actions regarding litigation in that court." (citing James v. Grand Trunk W. R.R. Co., 152 N.E.2d 858, 867 (1958))); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 11 (2004) ("[T]here is no international equivalent to the Full Faith and Credit Clause. First to judgment does not mean first to enforcement. In the international arena, when a party seeks to enforce the judgment from the first-finished suit in the second country, relitigation may be necessary.").

The second option for a court faced with parallel litigation in another state is to stay or dismiss the local proceeding in favor of allowing the claim to go forward to judgment in the alternate forum. Although this might seem like a good option for a court wanting to maintain a high level of respect and deference to a foreign court, it also has its problems. Deference to a foreign jurisdiction may seem good in theory, but a blanket rule of deference would be problematic in certain classes of cases. One such category is that of cases in which local law is intricately involved; for example, a court sitting in judgment on an action brought under U.S. antitrust laws could not very well dismiss the case in favor of litigation of the same issues in a foreign country.[24] Another category is one in which the public policy of the local state may be violated, even egregiously so, by a dismissal in favor of a foreign proceeding.[25]

Some have suggested that a simple "first in time" rule should apply, so that whichever action is filed first, that court should be allowed to continue, and the other should stay its hand pending the judgment.[26] Although that approach would undoubtedly work in many situations, it would become difficult on the margins and would do nothing to solve the issues of public policy or local law that were discussed above.

The third option available to a court faced with the possibility or existence of parallel litigation in another state is to issue an antisuit injunction. This option typically presents itself on a motion from one of the parties before the court on a particular matter. The moving party, usually the plaintiff, would ask the court to issue an injunction, ordering the opposing party not to institute or continue to prosecute litigation involving the same matters in the courts of another state.

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24 *See, e.g.*, Stephanie A. Casey, *Balancing Deterrence, Comity Considerations, and Judicial Efficiency: The Use of the D.C. Circuit's Proximate Cause Standard for Determining Subject Matter Jurisdiction over Extraterritorial Antitrust Cases*, 55 AM. U. L. REV. 585, 599–600 (2005) (noting the high degree to which U.S. courts have demanded that U.S. antitrust laws apply to actions impacting the United States or U.S. citizens, even when those actions take place in foreign courts).

25 A good example of such a public policy can be found by looking at defamation cases. U.S. courts are generally hesitant to dismiss their own proceedings to allow foreign courts from countries with stricter laws (e.g., the United Kingdom) to reach a judgment first. In this area, U.S. courts will also generally decline to enforce a judgment rendered abroad on grounds that it would violate U.S. public policy—as evidenced by the First Amendment—to do so. *See generally* Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999 (1994).

26 *See, e.g.*, Calamita, *supra* note 9, at 674.

Thus, "the injunction is not directed to the courts of the other State, but simply to the parties litigant . . . ."[27]

The issuance of an antisuit injunction furthers the interests of judicial economy, in that it prevents duplicative litigation and the race to judgment.[28] It also ensures that the interests and policies of the issuing state will be protected, by preventing another state with different policies and interests from passing judgment on the case.[29] This aspect is viewed as especially important in the international context, where cases may involve litigation in the United States and in another country with policies radically different from those of the United States.[30] At the same time, in cases with an international dimension, the issuance of an antisuit injunction can become particularly problematic.[31]

II. The Antisuit Injunction

A. Antisuit Injunctions Generally

In 1890, the Supreme Court held that an injunction, issued by a state court to keep a party before it from prosecuting the same issues in the courts of another state, was valid.[32] The Court held that the issuance of such an injunction did not violate the Full Faith and Credit or Privileges and Immunities Clauses of Article IV of the Constitution.[33] In that case, the Court also quoted Joseph Story's *Commentaries on Equity Jurisprudence* for the proposition that:

> "[A]lthough the courts of one country have no authority to stay proceedings in the courts of another, they have an un-

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27 Cole v. Cunningham, 133 U.S. 107, 121 (1890).

28 *See, e.g.*, Edwin A. Perry, *Killing One Bird with One Stone: How the United States Federal Courts Should Issue Foreign Antisuit Injunctions in the Information Age*, 8 U. MIAMI BUS. L. REV. 123, 147 (1999) (discussing the great expense that can be incurred by a company attempting to litigate a case in two different fora, particularly when one is a foreign country, and noting that a great benefit of foreign antisuit injunctions is that they "conserve[ ] global judicial resources").

29 *See, e.g.*, George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 623 (1990) (discussing cases in which public policy considerations "occupy center stage" for a court deciding whether to issue a foreign antisuit injunction).

30 *See id.* at 606 (noting the heightened role for policy concerns present when considering issuing an antisuit injunction in the context of international litigation).

31 Although antisuit injunctions are issued against "the parties litigant" and not against the courts of the other countries where those parties might bring their litigation, *Cole*, 133 U.S. at 121, the perceptions of those countries can differ, and some could conceivably perceive the issuance of such an injunction as an affront to their sovereignty, or an insult to their system of justice. *See* Raushenbush, *supra* note 6, at 1070.

32 *Cole*, 133 U.S. at 112.

33 *Id.*

> doubted authority to control all persons and things within their own territorial limits . . . . [W]henever the parties [to a suit] are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may require, and, with that view, to order them to take or to omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country."[34]

Since *Cole*, there has been no real question as to a court's authority to issue an injunction against a party properly before it to restrain that party from prosecuting litigation of the same case in a foreign forum, even if that foreign forum is a foreign country.[35] Instead, the question has been, in light of the deference and respect owed to the courts of a foreign country, when is the issuance of such an injunction proper? The following section details the different approaches taken by the various U.S. courts in answering that question.

B. Permissive and Restrictive Approaches to Foreign Antisuit Injunctions

Federal courts are split on the question of when it is appropriate to issue a foreign antisuit injunction. Of the courts of appeals that have considered the issue, three, the Fifth, Seventh, and Ninth Circuits, have affirmatively adopted a more liberal, permissive approach,[36] while five, the First, Third, Sixth, Eighth, and D.C. Circuits, have affirmatively adopted a more restrictive approach.[37] Two courts

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34 *Id.* at 118–19 (quoting JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 899–900 (1836)).

35 *See, e.g.*, Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 855 (9th Cir. 1981) ("A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be used sparingly." (internal quotation marks omitted)); The Salvore, 36 F.2d 712, 714 (2d Cir. 1929) ("The court first securing jurisdiction has the authority and power of enjoining the parties to the litigation from proceeding in another jurisdiction. And the court has an undoubted authority to control all persons and things within its own territorial limits." (citing *Cole*, 133 U.S. at 119)).

36 Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425 (7th Cir. 1993); Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852 (9th Cir. 1981); *In re* Unterweser Reederei, GmbH, 428 F.2d 888 (5th Cir. 1970), *rev'd on other grounds sub nom.*, M/S Brennan v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

37 Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355 (8th Cir. 2007); Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11 (1st Cir. 2004); Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 160–61 (3d Cir. 2001); Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354–55 (6th Cir. 1992); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

of appeals, the Fourth and Tenth Circuits, have apparently had no occasion to consider the issue, and one other, the Eleventh Circuit, summarily affirmed a decision taking the more restrictive approach.[38] Finally, the Second Circuit, as will be discussed below, has adopted a variation on the restrictive approach.[39] The lack of Supreme Court guidance on the matter has allowed this circuit split to develop, particularly over the past twenty years. This section examines in greater detail the different approaches followed by the various circuits, along with the advantages and disadvantages of each.

1. The Permissive Approach

The permissive, or liberal, approach to foreign antisuit injunctions more often results in an injunction being issued than does the restrictive approach. Of the courts following the liberal approach, the leading and most-cited case comes from the Ninth Circuit in *Seattle Totems Hockey Club, Inc. v. National Hockey League*.[40] In that case, the Ninth Circuit affirmed the issuance of an antisuit injunction against a party that was attempting to bring, in a Canadian court, a claim that constituted a compulsory counterclaim under Rule 13(a) of the Federal Rules of Civil Procedure with respect to an antitrust action pending in a U.S. federal court.[41] In affirming the injunction, the court cited *In re Unterweser Reederei, GmbH*[42] for situations in which the issuance of a foreign antisuit injunction would be appropriate.[43] Those situations, as summarized by the Ninth Circuit, are "when [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."[44] A court is more likely to issue an antisuit injunction under this approach, as compared

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38 *See* Canon Latin Am., Inc. v. Lantech (CR), S.A., 453 F. Supp. 2d 1357, 1361 (S.D. Fla. 2006) (noting that "[t]he Eleventh Circuit has not spoken directly on the issue, but has affirmed, without opinion, a decision . . . declining to enter an anti-suit injunction based on the restrictive approach" (citing Mut. Serv. Cas. Co. v. Frit Indus. Inc., 805 F. Supp. 919 (M.D. Ala. 1992), *aff'd*, 3 F.3d 442 (11th Cir. 1993))).

39 *See* Ibeto Petrochemical Indus. Ltd. v. M/T Beffen, 475 F.3d 56, 64 (2d Cir. 2007); China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987).

40 *Seattle Totems*, 652 F.2d at 852.

41 *Id.* at 853, 856.

42 *In re* Unterweser Reederei, GmbH, 428 F.2d 888 (5th Cir. 1970), *rev'd on other grounds sub nom.*, M/S Brennan v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

43 *Seattle Totems*, 652 F.2d at 855.

44 *Id.*

to the restrictive approach, because the permissive approach considers more factors, allowing for more flexibility and judicial discretion.

In addition to the Ninth Circuit, the Fifth and Seventh Circuits have formally adopted this liberal, permissive approach to the issuance of antisuit injunctions.[45] Although *Seattle Totems* is the case most cited for its statement of the permissive approach, the Fifth Circuit had earlier adopted the approach in *Unterweser Reederei*. In that case, the Fifth Circuit affirmed the granting of an antisuit injunction against one party in a contract dispute who wished to pursue litigation in the United Kingdom after the case had been brought in the United States.[46] The court held that the contract's forum selection clause that required litigation of all claims in London was overcome by the particular circumstances giving rise to the claim and by the fact that English courts might give effect to provisions of the contract that were contrary to U.S. public policy.[47]

Although the Fifth Circuit continues to adhere to the permissive approach,[48] it does not permit all injunctions sought, as demonstrated by *Karaha Bodas Co. v. Preusahaan Pertambangan Minyak Dan Gas Bumi Negara*.[49] In that case, the court reversed a district court's grant of an antisuit injunction in an arbitration dispute. The parties in *Karaha Bodas* were involved in arbitration in Switzerland, which resulted in an award that the plaintiff here was seeking to have enforced in a U.S. court.[50] The defendant was dissatisfied with the award and brought an annulment action in an Indonesian court.[51] The plaintiff then sought an antisuit injunction, seeking to enjoin the defendant from prosecuting the Indonesian annulment action. The district court granted the injunction, but the court of appeals reversed, citing the special situation of arbitral awards under the New York Convention,[52]

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45 *See* Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425 (7th Cir. 1993); *In re Unterweser Reederei*, 428 F.2d at 888.

46 *In re Unterweser Reederei*, 428 F.2d at 896.

47 *Id*.

48 *See* Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996) (explicitly refusing to adopt the restrictive standard: "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.").

49 Karaha Bodas Co. v. Preusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357 (5th Cir. 2003).

50 *Id.* at 361.

51 *Id.*

52 "The New York Convention" is the common name of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. This treaty provides an international framework which strongly favors the enforcement—as opposed to the disregard—of arbitral awards, even when made in a country dif-

and finding that, as a result, the Indonesian annulment action did not interfere with the enforcement of the award by U.S. courts.[53]

The Seventh Circuit formally adopted the permissive approach in 1993, in *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*[54] In that case, the court affirmed the issuance of an antisuit injunction against the American subsidiary of a French company, Compagnie des Machines Bull,[55] which was attempting to litigate claims relating to its American insurance policy in France. After examining the different standards applied by the circuits on either side of the prominent split, the Seventh Circuit sided with the circuits that had adopted the "laxer" standard.[56] In adopting that standard, the court emphasized that it did not mean

> that international comity should have no weight in the balance; we do not interpret the "lax" cases as assigning it no weight. The difference between the two lines of cases has to do with the inferences to be drawn in the absence of information. The strict cases presume a threat to international comity whenever an injunction is sought against litigating in a foreign court. The lax cases . . . do not deny that comity could be impaired by such an injunction[,] but they demand evidence . . . that comity is likely to be impaired in *this* case . . . . A representation by the State Department would be one method of conveying such information.[57]

The court went on to agree with the district court that no such evidence had been provided in the case and affirmed the grant of the injunction.[58]

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ferent from the one in which the award is sought to be enforced. *See generally* STEINHARDT, *supra* note 16, at 694–727.

53 *Karaha Bodas Co.*, 335 F.3d at 366–69 (analyzing the various aspects of arbitration agreements and awards pursuant to the New York Convention and finding that "none of the factors that support antisuit injunctions are strong" in this case). In particular, the New York Convention provides for multiple simultaneous proceedings, and indeed the parties to this case had instituted multiple proceedings in various countries, such that both parties would effectively be estopped from raising a claim of hardship from having to litigate in two different countries. *Id.*

54 Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425 (7th Cir. 1993).

55 Ninety percent of Compagnie des Machines Bull was owned by the French state, a fact which is significant when considering the impact an antisuit injunction may have on foreign relations; the French government, as a clear majority shareholder, would have had a great deal of interest in the outcome of this litigation. *See id.* at 426.

56 *Id.* at 431.

57 *Id.*

58 *Id.* at 433.

2. Advantages and Disadvantages of the Permissive Approach

The permissive approach has the advantage of flexibility. It allows courts to take more factors into account and, arguably, allows courts to reach more equitable conclusions when deciding whether to issue an antisuit injunction. There is also lower risk of conflicting decisions resulting from international parallel litigation, assuming the injunction is adhered to, because an injunction is much more likely to be issued. This also makes the permissive approach better from the standpoint of judicial economy, because it eliminates duplicative proceedings.

The permissive approach has some drawbacks, however. First, it is more open to manipulation by the courts, because there are many more factors to consider. Second, because international comity is only one of many factors to be considered, and because injunctions are so much more likely to be granted, there is more risk of a decision that will annoy a foreign country. For some courts, this latter disadvantage has weighed heavily against the adoption of the permissive approach because of fears that an injunction will have negative foreign policy implications.[59]

3. The Restrictive Approach

The restrictive approach to foreign antisuit injunctions states that the mere presence of vexatious or duplicative proceedings in a foreign forum will be insufficient grounds to issue an antisuit injunction.[60] Instead, under this approach, a foreign antisuit injunction should be issued only if the parallel proceeding constitutes a threat to U.S. jurisdiction, or if it constitutes a threat to a strong U.S. policy.[61] Such a threat arises, *inter alia*, when "action of a litigant in another forum

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59 *See* Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004) ("We deem international comity an important integer in the decisional calculus—and the liberal approach assigns too low a priority to that interest."); Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 161 (3d Cir. 2001) ("Our jurisprudence . . . reflects a serious concern for comity. This Court may [therefore] properly be aligned with those that have adopted a strict approach when injunctive relief against foreign judicial proceedings is sought.").

60 Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 928 (D.C. Cir. 1984).

61 *Id.* at 927. There appear to be two branches to the restrictive approach: the first is what this Note refers to as the "strict restrictive approach," which is followed by the Third, Sixth, and Eighth Circuits, and makes protection of jurisdiction and important public policy almost the exclusive justifications for the issuance of a foreign antisuit injunction. The "flexible restrictive approach" will be discussed later in this Part. It is followed by the First and Second Circuits, and advocates a more flexible balancing of comity against equitable concerns, without going as far as the permissive approach; it still ascribes a great deal of weight to comity. The circuits following

threatens to paralyze the jurisdiction of the [U.S.] court,"[62] preventing the U.S. action from going forward, or when a litigant attempts to evade the "crucial" or "fundamental" public policies of the United States by bringing the parallel action in a forum where such policies do not exist.[63]

For courts following the restrictive approach, a much greater premium is placed on deference to foreign courts and international comity. The D.C. Circuit provided the first "definitive standard considering international comity concerns"[64] in 1984 when it decided *Laker Airways Ltd. v. Sabena, Belgian World Airlines*.[65] In that case, the D.C. Circuit emphasized the role that international comity should play in the decision to issue a foreign antisuit injunction. Antisuit injunctions should be issued only in rare circumstances, noted the court, to avoid unfavorable reciprocity: "Injunctions operate only on the parties within the personal jurisdiction of the courts. However, they effectively restrict the foreign court's ability to exercise its jurisdiction. If the foreign court reacts with a similar injunction, no party may be able to obtain any remedy."[66] The court also went to great lengths to explain that, in its view, the rationales given by courts applying the permissive approach were insufficient to outweigh comity interests.[67]

As mentioned, the First, Second, Third, Sixth, and Eighth Circuits also have formally adopted the restrictive standard, and the Eleventh Circuit has summarily affirmed a lower court's application of the restrictive approach, leading to speculation as to whether the Eleventh Circuit will explicitly adopt that approach in the future.[68]

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both the strict and flexible restrictive approaches cite *Laker Airways* as the seminal case, but interpret it differently.

62 *Id.*

63 *Id.* at 931.

64 Swanson, *supra* note 15, at 2.

65 *Laker Airways*, 731 F.2d at 909.

66 *Id.* at 927 (internal citations omitted).

67 *Id.* at 928–29 ("Some courts issue the injunction when the parties and issues are identical in both actions, justifying the injunction as necessary to prevent duplicative and, therefore, 'vexatious' litigation . . . . [These interests] are more properly considered in a motion for dismissal for *forum non conveniens*. They do not outweigh the important principles of comity that compel deference and mutual respect for concurrent foreign proceedings . . . . Similarly, the possibility of an 'embarrassing race to judgment' or potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings."); *see also id.* at 929 (noting further that empirical evidence that courts sacrifice procedure or substance in an effort to obtain a faster judgment is scant).

68 *See* Gen. Elec. Co. v. Deutz AG, 129 F. Supp. 2d 776, 783 n.6 (W.D. Pa. 2000), *rev'd on other grounds*, 270 F.3d 144 (3d Cir. 2001). Such speculation has not always proved accurate: prior to its formal adoption of the restrictive approach in June 2007, the Eighth Circuit had

The Sixth Circuit formally adopted the restrictive approach in 1992 in *Gau Shan Co., Ltd. v. Bankers Trust Co.*[69] In that case, a Hong Kong borrower sued a U.S. lender, claiming fraud.[70] The borrower sought an injunction to keep the U.S. lender from litigating its claims in a Hong Kong court.[71] The Sixth Circuit reversed the district court's issuance of the injunction, citing *Laker Airways* and the Second Circuit's decision in *China Trade & Development Corp. v. M.V. Choong Yong*.[72] The Sixth Circuit emphasized the need for judicial restraint in this area, stating that "[t]he inappropriate use of antisuit injunctions can have unintended, widespread effects," including damage to the predictability underlying international commerce that depends on "cooperation and reciprocity between courts of different nations."[73]

In *General Electric v. Deutz*,[74] the Third Circuit also formally adopted the restrictive approach. The court examined the two different approaches and explicitly stated that it was "among [the courts] that resort to the more restrictive standard."[75] In reversing the district court's issuance of an antisuit injunction, the court relied on its own precedent from past cases dealing with foreign antisuit injunctions to illustrate the circuit's history of "serious concern for comity."[76]

In 2007, the Eighth Circuit joined the circuits that had adopted the restrictive approach when it decided *Goss International Co. v. Man Roland Druckmaschinen Aktiengesellschaft*.[77] With the government of Japan entering as amicus on behalf of the defendant appellants, the Eighth Circuit vacated a district court decision that had granted a foreign antisuit injunction in the case, which had involved

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summarily affirmed a district court's application of the liberal approach to foreign antisuit injunctions in *Medtronic, Inc. v. Catalyst Research Co.*, 518 F. Supp. 946, 954–56 (D. Minn. 1981), *aff'd*, 664 F.2d 660 (8th Cir. 1981). This affirmation had led to (ultimately incorrect) speculation by the district court in *General Electric*, 129 F. Supp. 2d at 783 n.6, that the Eighth Circuit would follow the liberal approach.

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

70 *Id.* at 1352.

71 *Id.*

72 *Id.* at 1353–54 (citing China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987)).

73 *Id.* at 1355.

74 Gen. Elec. Co. v. Deutz AG, 270 F.3d 144 (3d Cir. 2001).

75 *Id.* at 160–61.

76 *Id.* at 161 (citing Rep. of Phil. v. Westinghouse Elec. Corp., 43 F.3d 65, 75, 80–81 (3d Cir. 1994); Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am., 651 F.2d 877, 887 (3d Cir. 1981)).

77 Goss Int'l Co. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355 (8th Cir. 2007).

violations of section 801 of the Antidumping Act of 1916[78] by a Japanese manufacturer of newspaper printing presses.[79] After discussing the circuit split and expounding on the merits of each of the two approaches, the court stated that it would "join the majority of [its] sister circuits and [would] adopt the conservative approach in determining whether a foreign antisuit injunction should issue."[80]

Like the Third Circuit, the Eighth Circuit emphasized its concern with international comity in adopting the restrictive approach.[81] The court determined that a suit in Japan would not threaten the jurisdiction of the United States in this case, further noting the appellants' argument that "the United States would be deeply offended if a foreign court granted an antisuit injunction under similar circumstances."[82] Finally, having found no threat to U.S. jurisdiction, the court vacated the lower court's grant of a preliminary antisuit injunction and remanded for dismissal of the appellee's motion.[83]

The First Circuit's formal adoption of the restrictive approach came in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*.[84] In that case, the court examined the circuit split before declaring: "We reject the liberal approach. . . . [T]his approach gives far too easy passage to international antisuit injunctions. . . . [I]n an area that raises significant separation of powers concerns and implicates international relations, we believe that the law calls for a more cautious and measured approach."[85] However, the First Circuit did not adopt the restrictive approach uncritically. It rejected what it viewed as a "gloss" that had been put on the traditional approach by *General Electric v. Deutz* and *Gau Shan*, which suggested that preservation of jurisdiction and protection of important national policies were the only possible justifications for the issuance of an antisuit injunction.[86] The First Circuit instead adopted what was, in its view, the "traditional" version of the approach, as set forth in *Laker Airways*, which "indicated that it was prudent to use a wider-angled lens, mak-

78 Antidumping Act of 1916 § 801, 15 U.S.C. § 72 (repealed 2004).

79 *Goss*, 491 F.3d at 357–58.

80 *Id.* at 361.

81 *Id.* at 360 ("Although comity eludes a precise definition, its importance in our globalized economy cannot be overstated.").

82 *Id.* at 362.

83 *Id.* at 369.

84 Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004).

85 *Id.*

86 *Id.* at 18.

ing clear that the equitable considerations surrounding each request for an injunction should be examined carefully."[87]

This more flexible version of what had become an extremely rigid test has also been adopted by the Second Circuit. In January 2007, the Second Circuit in *Ibeto Petrochemical Industries Ltd. v. M/T Beffen* took great pains to note that it looks at more than merely whether there is a threat to jurisdiction or a threat to the enjoining state's strong public policies to determine the propriety of an injunction.[88] The test followed by the Second Circuit, with its origins in *China Trade & Development Corp. v. M.V. Choong Yong*,[89] is as follows. First, a case must meet two threshold requirements: "an anti-suit injunction against parallel litigation may be imposed only if: (A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined."[90] Once the court has determined that those two threshold requirements are met, it should consider whether any of the following factors are present:

> (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.[91]

Of those factors, the Second Circuit has noted that the first and third are the most important, but that they are not themselves dispositive.[92] According to the Second Circuit, a court must thoroughly examine all of the considerations to determine whether the equitable factors at play in a case are sufficient to outweigh comity concerns.[93]

Based on its statements in *Ibeto Petrochemical*, one might well ask whether the Second Circuit truly adheres to the restrictive ap-

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87 *Id.* (citing Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984)).

88 Ibeto Petrochemical Indus. Ltd. v. M/T Beffen, 475 F.3d 56, 64 (2d Cir. 2007) ("Some courts and commentators have erroneously interpreted *China Trade* to say that we consider *only* these two factors."). The court cited *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1353 (6th Cir. 1992), and Perry, *supra* note 28, at 142–43, as examples of such erroneous interpretations.

89 China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987).

90 *Ibeto Petrochemical Indus.*, 475 F.3d at 64 (citing *China Trade*, 837 F.2d at 35).

91 *China Trade*, 837 F.2d at 35.

92 *Ibeto Petrochemical Indus.*, 475 F.3d at 64.

93 *See id.* (citing *China Trade*, 837 F.2d at 36–37).

proach at all. It seems, however, that a third branch of antisuit injunction jurisprudence has been developed by the First and Second Circuits: a modified, more flexible version of the restrictive approach. This approach gives more weight to comity than the permissive approach but is not as rigid as the test applied by the Third and Sixth Circuits.

4. Advantages and Disadvantages of the Restrictive Approach(es)

The restrictive approach (in either form) has the advantage of giving more weight to comity than the permissive approach, such that a foreign court is less likely to be irked by the issuance of an antisuit injunction. This is true both because injunctions will less likely be issued and because comity concerns will be taken into account in deciding to issue an injunction so that, should an injunction be issued, the other country involved may feel that its interests have at least been considered. The heightened role for comity could have far-reaching effects with respect to reciprocity and the other concerns that have been previously raised with respect to the impact that foreign antisuit injunctions can have on foreign relations.

However, the restrictive approach also has its drawbacks. First, this approach is more likely to allow multiple proceedings in different fora to go forward simultaneously, creating a greater risk for conflicting decisions and a "race to judgment" mentality. Additionally, allowing multiple proceedings to continue simultaneously is not as good for judicial economy interests and allows for duplicative, harassing, and vexatious litigation. These concerns are somewhat mitigated by the use of the modified restrictive approach, however, because it seems likely that a court faced with a parallel proceeding that is clearly intended only to harass one of the parties would be able to step in and put a stop to it.

III. A Proposal: The Modified Restrictive Approach, Plus Borrowing from the Act of State Doctrine

The circuit split that has developed with respect to the propriety of the issuance of antisuit injunctions should not be allowed to continue. In a purely domestic context, such division may not be cause for too much concern because of the requirements of the Full Faith and Credit Clause, but the absence of any such obligation in the international arena creates a much larger issue. It is important that the United States be able to maintain a single voice with respect to foreign relations, a goal that could be hampered by the proliferation of

approaches—or even the resolved division of courts between only two or three approaches—for dealing with foreign antisuit injunctions.[94] Primarily for this reason, the Supreme Court must give some guidance to the lower federal courts as to how foreign antisuit injunctions should be handled.

Because of the degree of emphasis rightfully placed on international comity and separation of powers concerns by so many of the circuits, this Note proposes a solution that borrows from another area of law where both of those issues feature prominently: the act of state doctrine.[95] Specifically, this Note proposes that courts should borrow a practice used in the realm of the act of state doctrine known as the *Bernstein*[96] exception. As used in the act of state doctrine, the *Bernstein* exception allows for the executive branch to submit a letter to a court grappling with an act of state decision, explaining the Executive's position on the issue of whether a case should be allowed to go forward.[97] The executive submission is then used by the court as one factor of several to consider in making its ultimate decision. This Note proposes that such a system of executive submissions should be adopted by courts contemplating the issuance of foreign antisuit injunctions.

A. The Act of State Doctrine

1. What It Is, and Why We Have It

The act of state doctrine is a creature of federal common law. It has its roots in the case of *Underhill v. Hernandez*,[98] in which the Supreme Court held: "Every sovereign state is bound to respect the in-

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94 *See, e.g.*, Christopher C. Wheeler, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 STAN. J. INT'L L. 253, 255 (2003) (emphasizing that the doctrine of international comity is "ultimately grounded in a separation of powers concern for the executive branch's conduct of foreign policy" and the particular need for uniformity in that area).

95 In a case in which the act of state doctrine applies, a U.S. court must refrain from deciding the merits of the case, to avoid sitting in judgment on acts done by a foreign state within its territory. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). A number of exceptions apply, however, that make the doctrine inapplicable and allow courts to render judgments on the merits. Some are taken directly from the language in *Underhill*, such as the requirement of territoriality: if an act is done outside the territory of the state in question, it will not have the benefit of the act of state doctrine. The applicability of the act of state doctrine to a given case, including other exceptions, is taken up in note 105, *infra*.

96 Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 210 F.2d 375 (2d Cir. 1954) (per curiam).

97 *See infra* Part III.A.2.

98 Underhill v. Hernandez, 168 U.S. 250 (1897).

dependence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[99] The Restatement (Third) of U.S. Foreign Relations Law frames the doctrine in the following manner:

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain . . . from sitting in judgment on . . . acts of a governmental character done by a foreign state within its own territory and applicable there.[100]

The doctrine purports to have "constitutional underpinnings,"[101] but is not constitutionally required, and may be modified by Congress.[102] It is essentially the international version of the political question doctrine.[103] The constitutional underpinnings of the doctrine lie in the separation of powers, and in recognition of the broad scope of the Executive's foreign affairs power.[104]

The purpose of the act of state doctrine is essentially to prevent courts from making certain rulings that may be contrary to U.S. foreign policy or certain rulings that may have an adverse effect on U.S. foreign relations. In deciding whether the act of state doctrine should apply to bar the litigation of the merits of a particular case, courts will consider several factors, including the position of the executive branch.[105]

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99 *Id.* at 252.

100 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443(1) (1987).

101 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

102 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443(2) (1987).

103 Int'l Ass'n of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries, 649 F.2d 1354, 1358–59 (9th Cir. 1981). The political question doctrine is a judicially created limit on justiciability, said to be "primarily a function of the separation of powers." Baker v. Carr, 369 U.S. 186, 210 (1962). If certain criteria are found in a given case, the issue may be considered a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

104 *Sabbatino*, 376 U.S. at 423.

105 Other factors a court will consider include: whether the act at issue in the case qualifies as an official or public act, whether the act took place within the territory of the foreign state,

2. Bernstein *Letters*

In the context of the act of state doctrine, the way the Executive makes its position heard is through the use of so-called "*Bernstein* letters."[106] These are submissions, usually by the State Department, to a court entertaining an action where an act of state problem is present.[107] They are generally only filed when a clear national interest is involved or could be compromised by a court's ruling in a particular case.[108] In these submissions, the State Department makes clear either that it sees no problem with the case going forward, or that it would be better from a foreign relations perspective if the case were not allowed to continue.[109] *Bernstein* letters are given "some weight" by the courts to which they are submitted. but they are not disposi-

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whether the government in question was extant and recognized by the United States at the time the of the suit (if not, then the fear of embarrassment disappears), and whether Congress has spoken to override the common-law act of state doctrine. *See, e.g.*, *id.* at 398. A complete, detailed discussion and analysis of the act of state doctrine are beyond the scope of this Note. This Part is offered as background to this Note's proposed solution to the problem of foreign antisuit injunctions, which will borrow from the "*Bernstein* exception" that is used when dealing with act of state doctrine issues. For a more detailed discussion of the act of state doctrine, see, for example, Robert Delson, *The Act of State Doctrine—Judicial Deference or Abstention?*, 66 AM. J. INT'L L. 82 (1972).

106 The *Bernstein* exception and *Bernstein* letters get their name from the case in which such an exception was first prominently used, Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 210 F.2d 375 (2d Cir. 1954) (per curiam). In that case (with a long procedural history briefly laid out below), Bernstein, the plaintiff, sued to recover damages and other assets from a Belgian company that had acquired some of Bernstein's property that he had been forced to surrender to the Nazis in 1937. The Second Circuit originally refused to allow the case to go forward, saying that the act of state doctrine applied despite the fact that the Nazi government no longer existed. Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246 (2d Cir. 1947); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 173 F.2d 71 (2d Cir. 1949). After that decision, Bernstein requested aid from the State Department, which responded to the Second Circuit that the case could go forward, and, in fact, that it *should* go forward. The Second Circuit then changed its position and allowed the case to go forward. For a discussion of the history of this case, see STEINHARDT, *supra* note 16, at 578.

107 *See, e.g.*, Stephen Jacobs et al., Comment, *The Act of State Doctrine: A History of Judicial Limitations and Exceptions,* 18 HARV. INT'L L.J. 677, 688–91 (1977).

108 For example, in *Bernstein* itself, the State Department's submission made plain that applying the act of state doctrine to keep the case from going forward was not a good idea; treating the Nazi government as if it still existed for purposes of immunity granted under the act of state doctrine would be contrary to U.S. national policy of granting relief to individuals who had fallen victim to the Nazi regime. Press Release, U.S. Dept. of State, Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers, Apr. 27, 1949, 20 DEP'T ST. BULL. 592.

109 *See, e.g.*, Jacobs, *supra* note 107.

tive.[110] In the event that no such letter is submitted with respect to a given case, courts are not to imply anything from executive silence.[111]

The *Bernstein* exception to the application of the act of state doctrine has been controversial since its inception because of concerns about its implications for separation of powers. Justice Douglas expressed the view that the *Bernstein* exception effectively turns the judiciary into "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts out of the fire, but not others."[112] The practice of considering executive submissions has never been explicitly adopted or even approved of by a majority of the Supreme Court, but the Court has never explicitly condemned the process either.[113] Indeed, in *First National City Bank v. Banco Nacional de Cuba*,[114] three Justices were willing to go so far as to give the executive branch's submission dispositive weight.[115]

Despite criticisms like that of Justice Douglas, the *Bernstein* exception is still useful, and arguably necessary. The Executive is the "sole organ of the nation in its external relations, and its sole representative with foreign nations."[116] As such, the Executive must be allowed to speak with one voice. When the judicial resolution of a case could jeopardize relations with a foreign country, it seems only logical, then, that the Executive be allowed to have some say in whether such a case should be resolved in the courts of this country. The reverse is also true: if the judicial resolution of a case would not jeopardize foreign relations in any way, then the Executive should be able to state its position to that effect, so that courts that may not want to resolve the case for some other reason would not be able to hide behind what

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110 *See, e.g.*, Delson, *supra* note 105, at 83 ("The history of the doctrine indicates that its function is not to effect unquestioning judicial deference to the Executive, but to achieve a result under which diplomatic rather than judicial channels are used in the disposition of controversies between sovereigns.").

111 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 404 (1964).

112 First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring in the result).

113 *See, e.g.*, *Sabbatino*, 376 U.S. at 420 ("This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now.").

114 *First Nat'l City Bank*, 406 U.S. at 759.

115 *Id.* at 768 (Rehnquist, J., joined by Burger, C.J., and White, J.) ("We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the act of state doctrine.").

116 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (citing John Marshall, Argument of March 7, 1800, Annals, 6th Cong., col. 613).

would become patent falsities, like fear of national embarrassment or fear of disrupting foreign relations, in making their decisions.

B. Applicability of the Bernstein *Exception to the Realm of Foreign Antisuit Injunctions*

Although the *Bernstein* exception has been controversial, it should be endorsed by the Court for application in the area of foreign antisuit injunctions. This was a suggestion briefly mentioned in dictum by the Seventh Circuit in its opinion in *Allendale Mutual Insurance*,[117] and one that should be seriously considered by the Court in deciding how to resolve the circuit split that has developed with respect to the issuance of foreign antisuit injunctions.

Under this proposal, executive statements could be submitted in cases that could potentially have a serious impact on the ability of the nation to speak with one voice on issues of foreign policy and foreign relations. This would serve to lessen both the concerns of those circuits preoccupied with international comity, and the concerns of those who tend to view "comity" skeptically as something that could be used as a standby or catchall by results-oriented judges.[118]

Allowing for executive submissions would not create too great a burden on the executive branch, because such submissions would only need to be issued in those relatively few cases that demand the Executive take a position. As is the case in the act of state doctrine, executive silence should not permit an inference by a court either way as to what the Executive's position "really" is.[119] This mechanism would prevent the proposed system from imposing too heavy a burden on the State Department or any other executive agency that may be called upon to submit positions on antisuit injunctions.

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117 Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431 (7th Cir. 1993) ("When every practical consideration supports the [issuance of a foreign antisuit] injunction, it is reasonable to ask the opponent for some indication that the issuance of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States. A representation by the State Department would be one method of conveying such information.").

118 *See, e.g.*, Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982) ("Like the concept of public policy in the conflict of laws, the label 'comity' in modern times has sometimes come to serve as a substitute for analysis.").

119 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964) (showing that executive silence or failure to submit a *Bernstein* letter cannot be inferred as taking any position).

C. A Complete Framework for Foreign Antisuit Injunctions

Beyond executive submissions, there is more that a court should consider when deciding whether to issue a foreign antisuit injunction. The Supreme Court should provide lower courts with an express test to use, along with a list of factors to consider. The test adopted by the Supreme Court should follow the pattern set forth by the Second Circuit in *China Trade* and *Ibeto Petrochemicals*, the one described previously as the modified restrictive approach. Under this approach, the parties must be the same in both actions, and the resolution of the case before the enjoining court must be dispositive of the action to be enjoined.[120] Once those threshold matters have been satisfied, courts should consider a number of other factors: (1) whether a policy in the enjoining forum would be frustrated; (2) whether the foreign action would be vexatious; (3) whether the foreign action represents a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) whether the proceedings in the other forum prejudice other equitable considerations; or (5) whether adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.[121] In addition, as the Second Circuit cautioned, such injunctions should be used only sparingly, out of concern for international comity.[122]

This test is preferable to the others presently used by the various circuits. It allows for more flexibility than the strict restrictive approach, but still gives comity concerns a greater role than does the permissive approach. As discussed above, concern for international comity should dominate in the realm of foreign antisuit injunctions, but it should not dominate to the exclusion of all other considerations. The Second Circuit's test allows for sufficient weight to be given to comity, while still providing the flexibility needed to deal with the exigencies of international diplomacy. By allowing the addition of executive submissions as another factor for courts to consider, the Second Circuit's flexible restrictive approach will become the ideal framework for analyzing issues relating to the issuance of foreign antisuit injunctions.

It is true that allowing for the consideration of so many factors will create the potential for different courts to resolve the antisuit injunction question in different ways, but it is the uniformity of ap-

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120 China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987).

121 *Id.* at 35–36.

122 *Id.* at 36.

proach that is most important, along with the allowance of input from the executive branch. Such executive input will help to resolve the majority of cases that the restrictive circuits would be most concerned about.

Conclusion

Maintaining friendly foreign relations is crucial, particularly in this era of ever-increasing globalization and interconnectedness. Because the Constitution has vested the power to conduct foreign relations in the executive branch, it is important that that branch have some say in the question of when it is appropriate and proper for a U.S. court to issue an injunction to prevent a party from proceeding with duplicative litigation in a foreign forum. For that reason, it makes sense to import the process of executive submissions from the area of the act of state doctrine into this context.

It is also important that the Supreme Court speak as to which of the approaches currently in use by the various circuits is preferable. Uniformity in this area is important because of the potential foreign policy implications of a bad decision. Any framework under which decisions as to the propriety of such injunctions are to be made should give significant consideration to the principles of international comity. As a result, the restrictive approach set forth by the D.C. Circuit in *Laker Airways*, as applied by the First and Second Circuits, and taking into account executive submissions on the propriety of an injunction in any given case, should be formally adopted by the Supreme Court as the proper framework for evaluating decisions regarding the issuance of foreign antisuit injunctions. This approach will allow for international comity to be considered and will leave room for the Executive to state a position in particularly delicate cases, thus permitting the Executive to maintain its status as a unitary actor in the realm of foreign affairs and minimizing the potential for a negative impact on U.S. foreign policy.