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Sisyphus Meets Icarus: The Jurisdictional and Comity Limits of Post-Satisfaction Anti-Foreign-Suit Injunctions

Anthony C. Piccirillo

SISYPHUS MEETS ICARUS: THE JURISDICTIONAL AND COMITY LIMITS OF POST-SATISFACTION ANTI-FOREIGN-SUIT INJUNCTIONS

*Anthony C. Piccirillo**

This Note addresses an emerging conflict concerning federal subject matter jurisdiction and international comity: can and should federal courts issue post-satisfaction anti-foreign-suit injunctions? The Eighth Circuit has held that a federal court no longer possesses subject matter jurisdiction to grant anti-suit injunctions after a party has satisfied judgment. The Eighth Circuit also held that a post-satisfaction anti-foreign-suit injunction would be inconsistent with international comity. In contrast, the Second Circuit has held that a federal court possesses continuing subject matter jurisdiction to grant anti-foreign-suit injunctions after the satisfaction of judgment and that such an injunction does not violate international comity.

This Note argues that, as a general matter, federal courts no longer possess subject matter jurisdiction to grant anti-suit injunctions after the satisfaction of judgment. It also contends that post-satisfaction anti-foreign-suit injunctions are ordinarily inconsistent with international comity and concludes that the President and Congress, not the courts, are better equipped to resolve legal disputes implicating United States foreign relations.

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* J.D. Candidate, 2012, Fordham University School of Law; B.S.F.S., 2009, Georgetown University. I would like to thank my advisor, Professor Thomas Lee, for his excellent guidance and Professors Benjamin Zipursky and Howard Erichson for their helpful comments. I am also grateful to Amanda and my family for their love and encouragement.

INTRODUCTION

In Greek mythology, Sisyphus famously suffered a particularly cruel eternal punishment.[1] In Hades, Sisyphus was forced to roll a gigantic boulder to the top of a steep hill.[2] But each time the boulder reached the precipice, it would tumble back down the slope.[3] Sisyphus would then retrieve the boulder and recommence the task with no hope of ever completing his maddening labor.[4]

For federal courts, international commercial litigation may often seem like a Sisyphean struggle.[5] When a controversy spans two or more countries and parties have substantial resources, litigation can drag on for years with no end in sight.[6] Courts may adjudicate disputes only to see one of the parties bring another lawsuit in a foreign forum. In some cases a party may even satisfy judgment and then seek to reverse the judgment in another country's courts.[7]

1. *See, e.g.*, HOMER, THE ODYSSEY 269, Book XI (Robert Fagles trans., Penguin Books 1996).
2. *See id.*
3. *See id.*
4. *See id.*; *see also* APOLLODORUS, THE LIBRARY OF GREEK MYTHOLOGY 17, Book I (Keith Aldrich trans., Coronado Press 1975) ("He suffers this punishment because of Asopus' daughter Aegina. For when Zeus secretly made off with her, Sisyphus is said to have informed Asopus, who was searching for her.").
5. *Cf.* Collins v. Pond Creek Mining Co., 468 F.3d 213, 222 (4th Cir. 2006) (describing black lung tort litigation as a "Sisyphean endeavor"); Alperin v. Vatican Bank, 410 F.3d 532, 555 (9th Cir. 2005) (describing complicated litigation over World War II human rights violations as "a Sisyphean task: Just when the court appears to be making progress towards reaching legal peace, the rock rolls back down and the court must tackle the next issue").
6. *See infra* Parts II.A.1, II.B.1.
7. *See infra* Part II.

Anti-foreign-suit injunctions provide courts with a means by which to escape the Sisyphean torment of endless international litigation. Such injunctions prevent parties from maintaining a parallel lawsuit and provide much-needed finality for the judicial system.[8] However, a federal court's power to issue anti-foreign-suit injunctions is not limitless.[9] The court must have subject matter jurisdiction[10] and the injunction must be consistent with international comity.[11]

In light of the limits of jurisdiction and comity, federal courts should be mindful of another Greek myth—the story of Icarus.[12] Daedalus and his son Icarus escaped from exile through the use of artificial wings.[13] Although Daedalus cautioned Icarus not to fly too close to the sun, Icarus did not heed the warning.[14] Overjoyed with his power and newfound freedom, Icarus pushed the limits.[15] When the sun melted his wings, he plummeted to the sea.[16]

Federal courts must not attempt to escape the plight of Sisyphus by succumbing to the error of Icarus. This is particularly true for post-satisfaction anti-foreign-suit injunctions, that is, when a court enjoins a party from maintaining subsequent foreign litigation even though that party has fully satisfied the court's judgment. Under such circumstances, federal courts ordinarily lack subject matter jurisdiction to issue an anti-foreign-suit injunction.[17] In addition, comity generally mandates that courts refrain from granting anti-foreign-suit injunctions after the satisfaction of judgment.[18]

On June 23, 2008, the Supreme Court of the United States denied certiorari on a pair of cases that addressed post-satisfaction anti-foreign-suit injunctions. These cases, *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*[19] and *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*[20] differed on whether a federal court can and should issue an anti-foreign-suit injunction against a party after it has satisfied judgment.[21]

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8. *See infra* Part I.B.

9. This Note does not address whether state courts can and should grant post-satisfaction anti-foreign-suit injunctions. However, much of its analysis, particularly with regard to international comity, may be applicable to state courts.

10. *See infra* Part I.C.

11. *See infra* Part I.D.

12. *See* APOLLODORUS, *supra* note 4, at 90.

13. *See id*.

14. *See id.*

15. *See id.*

16. *See id.*; *see also* OVID, METAMORPHOSES 272, Book VIII (Charles Martin trans., W.W. Norton & Co. 2004) ("[T]he boy audaciously began to play and driven by desire for the sky, deserts his leader and seeks altitude. The sun's consuming rays, much nearer now, soften the fragrant wax that bound his wings until it melts.").

17. *See infra* Parts I.C, III.A.

18. *See infra* Parts I.D, III.B.

19. 491 F.3d 355 (8th Cir. 2007), *cert. denied*, 554 U.S. 917 (2008).

20. 500 F.3d 111 (2d Cir. 2007), *cert. denied*, 554 U.S. 929 (2008).

21. *See infra* Part II.

The issue of post-satisfaction anti-foreign-suit injunctions complicates a longstanding circuit split regarding the proper role of comity in anti-foreign-suit injunctions.[22] It also reveals an emerging conflict regarding the extent to which a federal court's ancillary jurisdiction extends after the satisfaction of judgment.[23] While some commentators have mentioned the comity implications of *Goss* and *Karaha Bodas*, the ancillary jurisdiction issue is relatively uncharted territory.[24]

In *Goss*, a U.S. manufacturer of printing presses (Goss) sued a Japanese manufacturer (TKS) in the Northern District of Iowa under the Antidumping Act of 1916.[25] A jury awarded Goss over $35 million in damages.[26] While TKS appealed, Japan enacted a clawback statute allowing Japanese parties to recover damages paid out under the Antidumping Act.[27] When TKS attempted to sue Goss under the Japanese law, the U.S. Court issued an anti-suit injunction.[28] After losing on appeal, TKS satisfied judgment and asked that the injunction be removed.[29] When the district court refused to lift the anti-suit injunction, TKS appealed.[30] The Eighth Circuit held that the district court lacked ancillary jurisdiction to issue an anti-foreign-suit injunction since judgment was satisfied and, even if there was continuing subject matter jurisdiction, an injunction would have violated international comity.[31]

The Second Circuit reached a different conclusion in *Karaha Bodas*. In that case, a Cayman Islands company owned and controlled mostly by U.S. investors (KBC) agreed to a joint venture with an Indonesian state-owned oil and gas company (Pertamina).[32] When Pertamina suspended the project, KBC brought an action before an arbitration tribunal in Switzerland

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22. *See infra* Part I.D.

23. *See infra* Part I.C.

24. *See* Charles Kotuby, *Comity at the Court: Three Recent Orders Seeking the View of the Solicitor General*, CONFLICT OF LAWS (Feb. 21, 2008), http://conflictoflaws.net/2008/comity-at-the-court-three-recent-orders-seeking-the-view-of-the-solicitor-general/ (focusing on the comity aspects of the *Goss–Karaha Bodas* split but also mentioning that the conflict "stems around the doctrine of 'ancillary jurisdiction,' specifically whether a federal court loses the power to bar foreign litigation once it decides the merits of a claim and the resulting judgment is satisfied"); Bradley P. Nelson, Presentation Before the American Bar Association, Conflicts in the Law of Foreign Antisuit Injunctions, Section on Litigation (July 30–Aug. 2, 2009), *available at* http://www.sw.com/5AA59A/AAttachments/Article_re_Antisuit_Injunctions.pdf (highlighting the comity aspects of the *Goss–Karaha Bodas* split but not discussing ancillary jurisdiction in depth).

25. Pub. L. No. 64-271, §§ 800-01, 39 Stat. 756, 798, *repealed by* Pub. L. No. 108-429, § 2006, 118 Stat. 2434, 2597 (2004); *see also* Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 356 (8th Cir. 2007).

26. *See Goss*, 491 F.3d at 356–57.

27. "A clawback statute is a countermeasure that enables defendants who have paid a multiple damage judgment in a foreign country to recover the multiple portion of that judgment from the plaintiff." *Id.* at 357 n.2.

28. *See id.* at 359.

29. *See id.*

30. *See id.* at 356–57.

31. *See id.* at 368.

32. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 113 (2d Cir. 2007).

and won a $261 million award.[33] After years of litigation in forums throughout the world,[34] KBC ultimately brought an action to enforce the arbitral award in the Southern District of New York.[35] The New York federal court issued a judgment in favor of KBC, which Pertamina satisfied.[36] Pertamina then brought suit against KBC in the Cayman Islands claiming that the arbitral award was based on fraud.[37] The district court enjoined Pertamina from proceeding with the Cayman Islands action and Pertamina appealed.[38] The Second Circuit held that the principles of res judicata and collateral estoppel gave the court ancillary jurisdiction to maintain an anti-foreign-suit injunction, even after the satisfaction of judgment.[39] The court also held that the anti-suit injunction did not violate international comity.[40]

The conflict on post-satisfaction anti-foreign-suit injunctions is important for three reasons. First, it adds greater complexity to international commercial disputes, which could affect litigants' strategies in international litigation.[41] Second, this conflict reveals doctrinal uncertainty on fundamental questions of federal subject matter jurisdiction and the extent to which it extends after judgment is satisfied.[42] Finally, the conflict over post-satisfaction anti-foreign-suit injunctions implicates international comity and, consequently, relations between the United States and other countries.[43]

This Note consists of three parts. Part I provides background on multi-forum international litigation and anti-suit injunctions. It next examines federal ancillary subject matter jurisdiction and discusses Supreme Court cases supporting what this Note calls the restrictive and permissive rules on post-satisfaction ancillary jurisdiction. Finally, Part I addresses the role of comity in anti-foreign-suit injunctions through an examination of a current circuit split on the question.

Part II describes and analyzes the respective holdings of *Goss* and *Karaha Bodas*. This part discusses how these two decisions took opposite positions on ancillary jurisdiction and diverged on comity. Finally, this part examines the practical consequences of the respective court decisions.

In Part III, this Note proposes a resolution to the conflict on post-satisfaction anti-foreign-suit injunctions. This part contends that the Eighth Circuit properly adopted the restrictive rule on post-satisfaction ancillary jurisdiction while the Second Circuit incorrectly adopted the permissive rule. With regard to comity, Part III contends that, as a general matter,

33. *See id.* at 113–14.
34. *See id.* at 114–16.
35. *See id.* at 116.
36. *See id.*
37. *See id.* at 117.
38. *See id.* at 117–18.
39. *See id.* at 127–30.
40. *See id.* at 120–27.
41. *See infra* Part I.A.
42. *See infra* Part I.C.
43. *See infra* Part I.D.

courts should refrain from issuing anti-foreign-suit injunctions after the satisfaction of judgment. Nonetheless, there may be exceptional circumstances, such as in *Karaha Bodas*, where post-satisfaction anti-foreign-suit injunctions are consistent with comity. Finally, Part III recommends that courts defer to the executive and legislative branches on matters that implicate international relations and the sovereignty of foreign states.

I. POST-SATISFACTION ANTI-FOREIGN-SUIT INJUNCTIONS: DOCTRINAL AND POLICY FOUNDATIONS

This part provides background for understanding the conflict on post-satisfaction anti-foreign-suit injunctions. Part I.A discusses the challenges of managing multi-forum international litigation. Part I.B discusses the procedural and practical aspects of anti-suit injunctions as a method for resolving multi-forum litigation. The rest of this part examines the limits on federal courts' power to grant anti-foreign-suit injunctions, separately addressing the constraints of subject matter jurisdiction and international comity.

A. Rolling Sisyphus's Boulder: Managing Multi-forum International Litigation

There are a variety of mechanisms, besides anti-foreign-suit injunctions, which enable courts to cope with parallel proceedings in foreign forums. This section first briefly highlights the reasons why litigants may choose to pursue parallel litigation. Next, it addresses the concepts of forum non conveniens, *lis alibi pendens*, and the preclusion doctrines of res judicata and collateral estoppel. Finally, it mentions the possibility of avoiding parallel proceedings through the use of forum selection clauses.[44]

1. Motivations for Multi-forum International Litigation

A party may choose to commence a duplicative action in a foreign forum for a variety of strategic reasons. First, a defendant to an action in an initial forum may seek a declaration of no liability in a foreign forum that it can then enforce in the original forum through res judicata or collateral estoppel.[45] This tactic may be particularly advantageous to the defendant if the parallel forum would apply more favorable substantive law.[46] Second, a defendant may bring a parallel foreign action in order to place pressure on the plaintiff by forcing him to litigate simultaneously in two different

44. *See infra* Part I.A.5.

45. *See* Kenneth B. Reisenfeld, *"The Usual Suspects": Six Common Defense Strategies in Cross-Border Litigation*, *in* INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 75, 84 (Barton Legum ed., 2005). For a more detailed discussion of res judicata, see *infra* Part I.A.4.

46. *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926–27, 945 (D.C. Cir. 1984) (noting that defendants brought a parallel action in the U.K. because U.S. law is more favorable for antitrust plaintiffs).

countries.[47] Finally, a party may bring a foreign action to obtain procedural advantages that might not be available in the initial forum.[48] This last rationale is particularly relevant given the perceived plaintiff-friendly characteristics of U.S. courts.[49]

2. Forum Non Conveniens

Courts are not powerless against the strategic machinations of globe-trotting litigants. One of a court's most significant powers is its ability to dismiss a suit under the doctrine of forum non conveniens.[50] Forum non conveniens is a common law doctrine that permits a court to decline jurisdiction over a case if another forum would be more convenient or appropriate.[51] Although no statute or rule specifically authorizes forum non conveniens, courts have "repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances" even when personal jurisdiction and venue are proper.[52] While Congress has passed legislation authorizing the transfer of cases among federal courts,[53] forum non conveniens remains relevant in federal courts when a foreign court is more appropriate or convenient.[54]

The Supreme Court has held that while a court should ordinarily favor the plaintiff's choice of forum, it may weigh public and private interests to determine whether it should dismiss a case on forum non conveniens grounds.[55] In many cases, these public and private interests clearly point to

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47. *See* Reisenfeld, *supra* note 45, at 84.

48. *See id.*

49. *See* José I. Astigarraga & Scott A. Burr, *Antisuit Injunctions, Anti-antisuit Injunctions, and Other Worldly Wonders*, *in* INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, *supra* note 45, at 89–90. Features of U.S. Courts that may appeal to plaintiffs, and pose a challenge to defendants, are:

> (1) the availability of contingent-fee lawyers . . . ; (2) the availability of punitive or treble damage awards; (3) the availability of jury trials in civil cases; (4) the availability of broader discovery; (5) the absence of rules making an unsuccessful party liable for the costs of the successful party; (6) the availability of causes of action that might not exist in other countries, such as under the . . . RICO statute, the antitrust laws, or the securities laws; and (7) the availability of class action suits.

Id.

50. *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 347 (4th ed. 2007).

51. *See id.*

52. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947).

53. *See* 28 U.S.C. § 1404(a) (2006) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

54. *See, e.g.*, BORN & RUTLEDGE, *supra* note 50, at 353.

55. The Court has articulated the factors to be weighed:

> The factors pertaining to the private interests of the litigants includ[e] the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public factors bearing on the question include[ ] the administrative difficulties flowing from court congestion; the "local interest in

dismissal in favor of a foreign court, especially when evidence and witnesses are located abroad and the foreign law would apply.[56] Under such circumstances, a court may dismiss an action even if the dismissal would result in less favorable substantive law for the plaintiff.[57] Nonetheless, forum non conveniens may not be appropriate if a foreign forum would provide the plaintiff with "no remedy at all."[58]

When a parallel proceeding is already underway or is contemplated in a foreign forum, courts are generally more willing to grant a forum non convieniens dismissal.[59] However, courts will often attach certain conditions to the dismissal to assure that the plaintiff will actually be able to litigate in the foreign forum.[60] For example, a court may require the defendant to waive a statute of limitations defense, consent to jurisdiction and service in the foreign forum, make witnesses available, provide discovery consistent with the scope of U.S. law, or promise to pay a judgment in the foreign forum.[61]

In sum, forum non conveniens allows courts to dispose of certain cases at an early stage and encourages parties to continue the litigation in a more appropriate forum. In such cases the court often invites the parties to continue or commence a parallel action abroad.[62] However, when a court wishes to defer to a foreign proceeding, but is unwilling or unable to dismiss the case under forum non conveniens, it may instead invoke the principle of *lis alibi pendens*.[63]

3. *Lis Pendens*

The doctrine of *lis alibi pendens*, or simply *lis pendens*, permits a court to stay an action in deference to litigation in another forum, rather than dismissing the case outright through forum non conveniens.[64] Although there is no statutory or constitutional provision authorizing *lis pendens*, courts have consistently stayed proceedings in favor of other forums,

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> having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981) (citations omitted) (quoting *Gilbert*, 330 U.S. at 508–09).

56. *See id.* at 258–60.

57. *See id.* at 247 ("The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.").

58. *Id.* at 254.

59. *See* Reisenfeld, *supra* note 45, at 82.

60. *See id.* at 83.

61. *See id.*

62. *See* BORN & RUTLEDGE, *supra* note 50, at 522 ("Although the *forum non conveniens* doctrine often applies in the absence of any related foreign litigation, U.S. courts have occasionally applied the doctrine in cases involving parallel foreign litigation.").

63. *See id.*

64. *See id.*

including foreign forums.[65] *Lis pendens* motions are most promising when parties seek a stay in favor of a case that was filed earlier or simultaneously.[66] Only rarely do courts grant *lis pendens* motions in favor of subsequently filed foreign lawsuits.[67]

4. Res Judicata and Collateral Estoppel

While forum non conveniens and *lis pendens* allow courts to defer to foreign proceedings, courts do not ordinarily interfere with simultaneous foreign litigation.[68] As the D.C. Circuit has noted, "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."[69] Once a court reaches a judgment, the other court is expected to cease litigation on any claims or issues decided in the first forum.[70]

Res judicata and the similar doctrine of collateral estoppel are necessary elements of any functional judicial system because they protect the finality of judgments.[71] Res judicata bars litigants from raising a claim that was or should have been asserted in a prior proceeding.[72] Collateral estoppel prevents parties from contesting issues that were actually litigated in a previous proceeding and were necessary to a prior judgment.[73] U.S. courts will ordinarily apply res judicata and collateral estoppel to foreign judgments, and vice versa.[74] As discussed below, U.S. courts may feel compelled to issue anti-suit injunctions when it is unclear whether a foreign court would respect the U.S. court's decision.[75]

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65. *See, e.g.*, Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512 (11th Cir. 1994) (staying a U.S. action in favor of a pending appeal in German courts). There is uncertainty regarding the appropriate standard for *lis pendens*. *See* BORN & RUTLEDGE, *supra* note 50, at 524–26. Some federal courts have followed Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), which emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" and thus limiting the use of *lis pendens*. *Id.* at 817. Meanwhile, other federal courts have looked to *Landis v. North Am. Co.*, 299 U.S. 248 (1936), which suggests a more liberal standard for *lis pendens*. *See* BORN & RUTLEDGE, *supra* note 50, at 524–26.

66. *See* Astigarraga & Burr, *supra* note 49, at 95–96.

67. *See id.*

68. *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926–27 (D.C. Cir. 1984).

69. *Id.*; *see also* BORN & RUTLEDGE, *supra* note 50, at 522.

70. *See* BORN & RUTLEDGE, *supra* note 50, at 522.

71. *See* LINDA J. SILBERMAN ET AL., CIVIL PROCEDURE: THEORY AND PRACTICE 775 (3d ed. 2009). Res judicata is also called "claim preclusion" and collateral estoppel is also called "issue preclusion." *See id.* In addition, "res judicata" may be used as a blanket term for both preclusion doctrines. *See id.* In keeping with the language used by most of the cited cases, this Note uses the term res judicata to refer to the preclusion of claims and collateral estoppel to refer to the preclusion of issues.

72. *See id.*

73. *See id.* at 776.

74. *See* 18 LAWRENCE B. SOLUM, MOORE'S FEDERAL PRACTICE § 130.50 (3d ed. 1997).

75. *See infra* Part I.D.

5. Planning Ahead: Forum Selection and Arbitration Agreements

It is important to note that parties can often avoid multiple proceedings in different countries by adopting agreements and arbitration agreements. A forum selection agreement is a contract requiring parties to litigate their disputes in a particular forum.[76] While U.S. courts once disfavored forum selection clauses,[77] the Supreme Court has since held that "in the light of present-day commercial realities and expanding international trade," a forum selection clause "should control absent a strong showing that it should be set aside."[78] Ordinarily, a U.S. court may only reject a forum selection agreement on the grounds of "(1) defects in the formation or validity of the forum selection agreement and other contractual defenses, such as fraud, duress, unconscionability, and lack of assent; (2) unreasonableness; and (3) public policy."[79]

Parties can also agree to avoid courts altogether by submitting their disputes to arbitration. Many businesses prefer arbitration to litigation because of arbitration's perceived advantages in time, flexibility, and expense.[80] Consequently, businesses engaged in international commerce may decide to include arbitration clauses in their contracts.[81] Most countries, including the United States, defer to these agreements and thus they provide an effective means of avoiding multi-forum litigation.[82]

One caveat: while it is a good practice for parties to adopt forum selection or arbitration clauses, it is important to note that such clauses have no value in disputes not based on a pre-existing contractual relationship between parties.[83]

B. Sisyphus Revolts: Anti-suit Injunctions in Federal Courts

In addition to the tools discussed above, federal courts may also manage multi-forum international litigation through the use of anti-foreign-suit injunctions. This section first addresses the doctrinal basis for federal courts' power to grant such injunctions. It then discusses anti-foreign-suit

76. *See* BORN & RUTLEDGE, *supra* note 50, at 435.

77. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9–10 (1972).

78. *Id.* at 15.

79. BORN & RUTLEDGE, *supra* note 50, at 460. The proposed Hague Convention on Choice of Court Agreements also adopts a favorable approach to forum selection agreements, recognizing them as presumptively valid. *See* 44 INT'L LEGAL MATERIALS 1294, 1296–97 (2005).

80. Bergesen v. Joseph Muller Corp., 710 F.2d 928, 929 (2d Cir. 1983); Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1049 (1961).

81. *See* Joseph T. McLaughlin & Kathleen M. Scanlon, *Updated: A Master Checklist for Drafting Contract Clauses in Transnational Matters*, ALTERNATIVES, June 2009, at 105 (discussing strategies for drafting effective arbitration clauses).

82. See *infra* Part I.B.2.a.

83. *See* Louise Ellen Teitz, *Where to Sue: Finding the Most Effective Forum in the World*, *in* INTERNATIONAL LITIGATION: STRATEGIES AND PRACTICE, *supra* note 45, at 51. For example, there was a forum selection clause in the joint-venture contract in *Karaha Bodas*, *see infra* note 259, while in *Goss* such a clause would not have been possible since there was no contract between the parties, *see infra* Part II.A.1.

injunctions from a practical perspective and highlights situations where post-satisfaction anti-foreign-suit injunctions may arise.

1. Statutory Authority

It is undisputed that federal courts have the power to enjoin parties under their jurisdiction from maintaining lawsuits in another forum.[84] The All Writs Act[85] is the source of this power, stating that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[86]

The Anti-Injunction Act[87] prohibits anti-suit injunctions against lawsuits in state court unless "expressly authorized by Act of Congress, or where necessary in aid of [a federal court's] jurisdiction, or to protect or effectuate [a federal court's] judgments."[88] Since the act's initial adoption in 1793, courts have given meaning to its terms. For example, in *Chick Kam Choo v. Exxon Corp.*,[89] the Supreme Court held that there is a "relitigation exception" to the Anti-Injunction Act, which "is founded in the well-recognized concepts of *res judicata* and collateral estoppel" and permits "a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court."[90] The Anti-Injunction Act does not apply to federal courts' ability to enjoin proceedings in foreign courts.[91]

2. Anti-foreign-suit Injunctions in Practice

While an anti-foreign-suit injunction could arise in a number of situations, this section will focus on two scenarios in which post-satisfaction anti-suit injunctions are possible: international arbitration and clawback statutes.

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84. *See, e.g.*, Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 359 (8th Cir. 2007); China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987) ("The power of federal courts to enjoin foreign suits by persons subject to their jurisdiction is well-established."); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984) ("It is well settled that . . . American courts have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions.").

85. 28 U.S.C. § 1651 (2006).

86. *See Goss*, 491 F.3d at 364 (noting that the All Writs Act gives federal courts the power to issue anti-suit injunctions); BORN & RUTLEDGE, *supra* note 50, at 549–50.

87. 28 U.S.C. § 2283.

88. *Id.*

89. 486 U.S. 140, 146–47 (1988) (noting that the Anti-Injunction Act has "existed in some form since 1793" and citing cases where the Supreme Court has defined the Act's scope).

90. *See id.* at 147.

91. *See* BORN & RUTLEDGE, *supra* note 50, at 541.

a. Anti-foreign-suit Injunctions in International Arbitration

As arbitration remains an important method of international commercial dispute resolution, anti-foreign-suit injunctions are often an unwelcome disruption.[92] In international arbitration, anti-foreign-suit injunctions are most likely to arise in two contexts: (1) a court may enjoin parties from pursuing arbitration in a foreign forum,[93] or (2) a court that is enforcing an arbitral award may enjoin a party from bringing a suit in a foreign forum designed to nullify the award.[94]

In general, U.S. courts are less likely to enjoin foreign arbitral proceedings than the courts of some nations.[95] However, a U.S. court may issue anti-foreign-suit injunctions against arbitration proceedings if, for example, it finds that the dispute is not arbitrable or is not covered by the arbitration agreement.[96]

The second context arises when a party seeks to enforce an arbitral award. The United Nations Convention on the Recognition and Enforcement of Arbitral Awards of 1958[97] (the New York Convention), which has nearly 150 signatories,[98] governs the enforcement of international arbitral awards.[99] The New York Convention requires

92. Emmanuel Gaillard, *Introduction* to ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 1 (Emmanuel Gaillard ed., 2005) (noting that the use of anti-suit injunctions has spread from common law jurisdictions to civil law jurisdictions and that the use of anti-suit injunctions in international arbitration "has been spreading at a disturbing pace"). It should be noted, however, that anti-foreign-suit injunctions arise in only a small portion of all international arbitrations. For example, during a three-year period, only fifteen out of an estimated 1,500 arbitrations before the International Chamber of Commerce involved anti-suit injunctions. *See* Julian D.M. Lew, *Anti-suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings*, *in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION, *supra*, at 33.

93. *See* Axel H. Baum, *Anti-suit Injunctions Issued by National Courts to Permit Arbitration Proceedings*, *in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION, *supra* note 92, at 19.

94. *See* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 112 (2d Cir. 2007). For a legal analysis of the ability of arbitral panels to issue their own anti-suit injunctions, see generally Laurent Lévy, *Anti-suit Injunction Issued by Arbitrators*, *in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION, *supra* note 92, at 115–29.

95. *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006) (requiring U.S. courts to enforce arbitration agreements in most circumstances); *see also* Lew, *supra* note 92, at 39 ("Unfortunately, there are corners of the world [where courts regularly use anti-foreign-suit injunctions to thwart international arbitration] where there is a belief that the State must protect its interests at all costs.").

96. *See* Lew, *supra* note 92, at 32.

97. Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The implementing legislation for the New York Convention is codified at 9 U.S.C. §§ 201–208 (2006).

98. *Status 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. COMMISSION ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Nov. 16, 2011).

99. *See* New York Convention, *supra* note 97, at art. 1 ("This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out

contracting states to enforce arbitral awards originating in other contracting states with very limited exceptions.[100] While U.S. courts regularly confirm foreign arbitral awards, in some circumstances, parties might seek to nullify the award by bringing suit in another forum.[101] In such instances, it may be appropriate for a U.S. court to issue an anti-foreign-suit injunction.[102]

b. Anti-foreign-suit Injunctions and Clawback Statutes

As a consequence of the perception that certain U.S. laws are too plaintiff-friendly,[103] some foreign legislatures have adopted blocking statutes designed to protect their citizens from the extraterritorial application of certain U.S. laws and procedures, particularly U.S. trade laws.[104] These blocking statutes generally seek to prevent or limit the availability of discovery or prohibit the enforcement of certain U.S. judgments within the country's jurisdiction.[105] The most radical type of blocking statute is a clawback statute, which gives defendants who lost in U.S. court a cause of action to recover some or all of the judgment against them in a foreign court.[106]

Foreign countries may adopt clawback statutes in response to specific U.S. policies.[107] In 1980, the United Kingdom passed the Protection of Trading Interests Act, which allowed defendants in certain U.S. antitrust cases to sue the victorious plaintiff in U.K. courts and collect the multiple portion of damages.[108] Canada, Australia, France, and members of the

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of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.").

100. *See id.* at art. 5 (enumerating the grounds for declining to enforce an arbitral award).

101. *See, e.g.*, Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 359–60, 375–76 (5th Cir. 2003) (considering and ultimately reversing an anti-foreign-suit injunction directed at an Indonesian lawsuit challenging the determination of a Swiss arbitral tribunal).

102. *Compare id.* (reversing the district court's decision to grant an anti-foreign-suit injunction), *with* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111 (2d Cir. 2007) (affirming the district court's decision to grant an anti-foreign-suit injunction).

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

104. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795, 799 (1993) (holding that U.S. antitrust laws apply to foreign conduct that has a substantial effect on the U.S. and declining to consider whether jurisdiction should be declined because of comity considerations); *see also* R. Edward Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 GEO. WASH. J. INT'L L. & ECON. 315, 316 (1995) (arguing that foreign blocking statutes exist largely as a response to the extraterritorial application of U.S. antitrust laws). *But see* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 168–69 (2004) (narrowly interpreting the extraterritoriality of certain antitrust provisions out of a concern for international comity).

105. *See* Price, *supra* note 104, at 325–26.

106. *See* Joseph E. Neuhaus, Note, *The Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097, 1097–98 (1981).

107. *See id.*

108. *See id.*; *see also* Nelson, *supra* note 24, at 5 (describing British and Canadian clawback statutes).

British Commonwealth adopted or voiced their support for similar statutes.[109] In 1996, the European Union adopted a clawback measure intended to neutralize the effects of the Helms-Burton Act,[110] a U.S. law that created a cause of action against individuals or companies engaged in the trafficking of former U.S. property seized by the Cuban government.[111] Under the EU measure, certain EU persons may "recover any damages, including legal costs" from a non-EU person.[112] Most recently, Japan enacted a clawback statute allowing its citizens to recover damages paid out under the U.S. Anti-Dumping Act.[113]

Even in the absence of express statutory authorization, courts may sometimes seek to reverse a prior satisfied judgment.[114] For example, courts have reversed the satisfied judgment of a foreign forum on the grounds of jurisdictional deficiencies, lack of notice, fraud, or bias.[115] Foreign courts may also clawback a satisfied foreign judgment if it is inconsistent with international law or domestic public policy.[116]

Ultimately, foreign jurisdictions often attempt to clawback U.S. judgments in order to force a diplomatic solution to irreconcilable substantive policies.[117] Accordingly, while U.S. courts may be tempted to grant anti-foreign-suit injunctions to thwart foreign clawback attempts, it is also possible for the legislative and executive branches to pursue a diplomatic solution to the problem.[118]

C. Flying Too Close to the Sun, Part One: The Limits of Federal Subject Matter Jurisdiction

U.S. federal courts are courts of limited jurisdiction and derive their power solely from the U.S. Constitution or statute.[119] Thus, a party seeking federal jurisdiction has the burden of demonstrating federal power to

109. *See* Neuhaus, *supra* note 106, at 1098.

110. 22 U.S.C. §§ 6021–6091 (2006).

111. Jürgen Huber, *The Helms-Burton Blocking Statute of the European Union*, 20 FORDHAM INT'L L.J. 699, 701 (1997).

112. *See id.* at 705.

113. *See infra* notes 226–29 and accompanying text.

114. *See* Neuhaus, *supra* note 106, at 1115–18 (collecting Anglo-American cases in which, absent statutory authorization, courts have reversed satisfied foreign judgments).

115. *See id.* at 1115.

116. *See id.* at 1117.

117. *See id.* at 1133 ("One of Britain's prime reasons for enacting the clawback statute was to attempt to force a diplomatic solution to what it views as the excessive scope of United States trade regulations.").

118. *See infra* Part II.D.1 (discussing the efforts of Congress and the State Department to address Japan's anti-dumping clawback statute).

119. *See, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute."). The Supreme Court has also recognized that federal courts have "inherent power" in limited circumstances, including "the inherent authority to appoint counsel to investigate and prosecute violation of a court's order." *Id.* at 380. This Note does not address the scope of federal courts' inherent power.

adjudicate the dispute.[120] This section first highlights the ordinary bases of federal subject matter jurisdiction. It then discusses the doctrine of ancillary jurisdiction, which allows courts to adjudicate matters that would not independently satisfy the requirements of federal subject matter jurisdiction. Finally, this section examines two lines of cases suggesting different rules regarding federal courts' post-satisfaction ancillary jurisdiction.

1. Bases for Federal Subject Matter Jurisdiction

The two principal bases for federal subject matter jurisdiction are federal question jurisdiction and diversity jurisdiction.[121] Under federal question jurisdiction, federal courts may adjudicate disputes regardless of the citizenship of the parties and the amount in controversy if the claim "aris[es] under the Constitution, laws, or treaties of the United States."[122] Under diversity jurisdiction, federal courts may adjudicate state law disputes between citizens of different states if the amount in controversy exceeds $75,000.[123]

2. The All Writs Act and Subject Matter Jurisdiction

The All Writs Act provides federal courts with authority to grant anti-suit injunctions.[124] While federal courts have in the past attempted to assert the All Writs Act as an independent basis for subject matter jurisdiction over

120. *See id.* at 377 ("It is to be presumed that a cause lies outside [federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." (citations omitted)). In contrast, "state courts are considered courts of *plenary* subject matter jurisdiction" and "[u]nless state law has limited the court's jurisdiction to a particular subject matter or a particular federal claim is committed to the exclusive jurisdiction of the federal courts, the state court can resolve disputes over any subject matter." SILBERMAN ET AL., *supra* note 71, at 301.

121. Other bases for which the Constitution provides original federal subject matter jurisdiction include disputes between the states, disputes affecting foreign diplomats, disputes to which the U.S. is a party, and disputes between citizens of a state and citizens of a foreign country. *See* U.S. CONST. art. III, § 2.

122. 28 U.S.C. § 1331 (2006); *see also* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] Laws of the United States . . . ."). Congress has committed certain claims to exclusive federal jurisdiction. *See, e.g.*, 15 U.S.C. § 78aa (2006) (securities); 28 U.S.C. §§ 1333 (admiralty and maritime), 1334 (bankruptcy), 1338 (copyright and patent).

123. 28 U.S.C. § 1332; *see also* U.S. CONST. art. III, § 2 ("The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ."). The Supreme Court has held that § 1332 (but not the Constitution), requires complete diversity of citizenship, i.e., no plaintiff may be the citizen of the same state as any defendant. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Because complete diversity is not a constitutional requirement, Congress has allowed for federal jurisdiction under some circumstances when there is only minimal diversity, i.e., only one plaintiff is a citizen of a different state from one defendant. *See, e.g.*, 28 U.S.C. §§ 1332(d) (minimal diversity in class actions where the amount in controversy exceeds $5 million), 1369(a) (minimal diversity in disputes arising out of a mass disaster).

124. 28 U.S.C. § 2283; *see supra* note 86 and accompanying text.

otherwise jurisdictionally defective claims,[125] the Supreme Court put an end to this practice in *Syngenta Crop Protection, Inc. v. Henson.*[126] In *Syngenta*, the Court held that the All Writs Act does not provide federal courts with independent subject matter jurisdiction over a suit.[127] In addition, the Court held that it is not possible to create federal jurisdiction through the combination of the All Writs Act and the doctrine of ancillary jurisdiction.[128]

3. The Doctrine of Ancillary Jurisdiction

Federal courts are not strictly limited to adjudicating claims that independently satisfy a statutory basis for federal jurisdiction. Under certain circumstances, federal courts have the power to adjudicate other matters through the exercise of ancillary jurisdiction.[129] In its broadest sense, ancillary jurisdiction allows federal courts to exercise subject matter jurisdiction in furtherance of two purposes: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[130] The common law of ancillary jurisdiction, at least with regard to the first purpose, has been codified under the heading of supplemental jurisdiction.[131] The second purpose, regarding ancillary enforcement jurisdiction, is a "creature of necessity" that a court should only apply in "extraordinary circumstances" since the Federal Rules of Civil Procedure already provide several mechanisms and procedures to facilitate the

125. *See, e.g.*, Stephenson v. Dow Chem. Co., 273 F.3d 249, 256 (2d Cir. 2001), *aff'd in part and vacated in part*, 539 U.S. 111 (2003) (holding that the All Writs Act justified removal to federal court of jurisdictionally defective state court claims to protect a federal class action judgment); *In re* Agent Orange Product Liability Litig., 996 F.2d 1425, 1431 (1993) (same).

126. 537 U.S. 28 (2002).

127. *See id.* at 34.

128. *See id.*

129. Ancillary jurisdiction is sometimes considered alongside the separate but related concept of pendent jurisdiction in the context of joinder of claims and parties. Pendent jurisdiction is often used to refer to a plaintiff's joinder of related state claims when jurisdiction is based on a federal question claim, while ancillary jurisdiction is used to refer to federal jurisdiction over "a jurisdictionally defective claim (whether asserted as a claim, counterclaim, or third-party claim) because of its close relationship to the plaintiff's anchor federal claim (whether based on federal question or diversity jurisdiction)." SILBERMAN ET AL., *supra* note 71, at 379–80. In the context of joinder of claims and parties, these two concepts are often deemed collectively "supplemental jurisdiction." *E.g.*, 28 U.S.C. § 1367 (2006). This Note does not use ancillary jurisdiction in contradistinction to pendant jurisdiction but rather employs the term in its broadest sense. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379 (1994); *infra* notes 162–71 and accompanying text.

130. *Kokkonen*, 375 U.S. at 379–80 (citations omitted).

131. *See* 28 U.S.C. § 1367 (2006); Peacock v. Thomas, 516 U.S. 349, 354 n.5 (1996) ("Congress codified much of the common-law doctrine of ancillary jurisdiction as part of 'supplemental jurisdiction' in 28 U.S.C. § 1367.").

collection of judgment.[132] Accordingly, the Supreme Court has suggested that there are few if any circumstances where a federal court may exercise ancillary jurisdiction in the absence of authorization by statute or the Federal Rules of Civil Procedure.[133]

4. Post-satisfaction Ancillary Jurisdiction

There are two lines of Supreme Court precedent that can be understood to support contrary conclusions on the question of post-satisfaction ancillary jurisdiction. On the one hand, certain Supreme Court cases from the late nineteenth and early twentieth centuries upheld post-satisfaction exercises of jurisdiction and thus tend to support what this Note calls the permissive rule. On the other hand, two more recent Supreme Court cases narrowly defined and applied ancillary jurisdiction and thus tend to support what this Note calls the restrictive rule on post-satisfaction ancillary jurisdiction.

a. The Permissive Rule

Under the permissive rule, federal courts have broad post-satisfaction ancillary jurisdiction "to secure or preserve the fruits and advantages of a judgment or decree."[134] Various common law and equity doctrines, which permit courts to correct, amend, or vacate a judgment, demonstrate that post-satisfaction jurisdiction is not alien to common law jurisprudence.[135] Many of these principles are embodied in Rule 60(b) of the Federal Rules of Civil Procedure, which allows relief from final judgment under several circumstances.[136] These traditional common law and equitable powers, combined with Rule 60, make it clear that a court's power over parties does not necessarily terminate once a judgment is satisfied.[137]

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132. *See Peacock*, 516 U.S. at 359 & n.7 (noting that Rule 69(a) permits judgment creditors to use any execution method authorized by the state in which the district court sits, and Rule 62(a) permits execution at any time following the judgment).

133. *See id.*

134. Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934).

135. As amici suggested,

> At common law . . . post-satisfaction powers included the power to correct a judgment, the power to amend a judgment to award additional monetary relief on related claims, the power to reopen a judgment based on newly discovered evidence, and the power to set a judgment aside. Indeed, common-law pleading contained a series of writs now shrouded in ancient lore and mystery—such as the various writs of scire facias, the writ of audita querela, and the related writs of coram nobis and coram vobis,—that could be used after satisfaction of a judgment. Even more significant powers belonged to equity, which, after satisfaction, could set aside a judgment procured by fraud, mistake, or wrongful action.

Brief for Law Professors as Amici Curiae Supporting Petitioner at 9–10, Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd., 554 U.S. 917 (2008) (No. 07-618), 2007 WL 4340911, at *9–10 [hereinafter Brief for Law Professors] (citations and internal quotation marks omitted).

136. *Id.* at 11. Rule 60(e) explicitly preempts many of the common law writs. *See* FED. R. CIV. P. 60(e) ("The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.").

137. *See* Brief for Law Professors, *supra* note 135, at 11.

Nonetheless, the ability of a court to exercise power over parties after satisfaction as a matter of personal jurisdiction does not necessarily mean that federal courts always have ancillary subject matter jurisdiction to grant post-satisfaction relief.[138] On this question, it is necessary to consult and draw inferences from scant Supreme Court precedent.[139]

One potentially instructive case is *Pacific Railroad of Missouri v. Missouri Pacific Railway Co.*[140] In that case, a New York citizen had brought an initial diversity action in equity against a Missouri railroad company to foreclose a mortgage.[141] The trial court ordered foreclosure and sale of the property.[142] The railroad subsequently brought a bill in equity—which did not independently meet any criteria for federal jurisdiction—claiming that the decree in the initial action was based on fraud.[143] The Supreme Court held that the district court had ancillary jurisdiction to hear the fraud claim because "[o]n the question of jurisdiction the suit may be regarded as ancillary to [the previous action], so that the relief asked may be granted . . . without regard to the citizenship of the present parties."[144]

Dietzsch v. Huidekoper is another case that may support the permissive rule.[145] In that case, the plaintiff brought a replevin suit in state court.[146] The defendant removed the case to federal court, which ruled that the plaintiff was not entitled to the replevied property.[147] Nevertheless, the state court continued to adjudicate the dispute and ruled in favor of the plaintiff.[148] The defendant then moved for an anti-suit injunction against

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138. *See id.* at 11–12.

139. *See id.*

140. 111 U.S. 505 (1884); Brief for Law Professors, *supra* note 135, at 13 (relying on *Pacific Railroad* in support of the permissive rule on ancillary jurisdiction).

141. *See Pacific Railroad*, 111 U.S. at 506–07.

142. *See id.*

143. *See id.* at 507.

144. *Id.* at 522. It is likely that under the current Federal Rules of Civil Procedure, such an action would be permitted. *See* FED. R. CIV. P. 60(b)(3) ("On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party . . . .").

145. 103 U.S. 494 (1880); *see, e.g.*, Brief for Law Professors, *supra* note 135, at 14 ("In combination, *Pacific Railroad* and *Dietzsch* show that a federal court possesses the necessary jurisdiction to issue an anti-suit injunction even after all proceedings in the original action have concluded."); Brief in Opposition at 33, PT Pertamina v. Karaha Bodas Co., 554 U.S. 929 (2008) (No. 07-619), 2007 WL 4365700, at *33 [hereinafter *Karaha Bodas* Opposition] (arguing that *Dietzsch* demonstrates that "[f]ederal courts maintain continuing jurisdiction to protect their final judgments, even after satisfaction"); Brief of the United States as Amicus Curiae in Opposition at 12, *Karaha Bodas*, 554 U.S. 929 (No. 07-619), 2008 WL 2185729, at *12 [hereinafter Brief for United States in *Karaha Bodas*] (citing *Dietzsch* in support of the permissive rule and contending that it is still good law); Petition for a Writ of Certiorari at 32–34, Goss Int'l. Corp. v. Tokyo Kikai Seisakusho, Ltd., 554 U.S. 917 (2008) (No. 07-618), 2007 WL 3353450, at *32–34 [hereinafter *Goss* Petition] (arguing that the Eighth Circuit's decision on ancillary jurisdiction is inconsistent with *Dietzsch*).

146. *See Dietzsch*, 103 U.S. at 495–96.

147. *See id.* at 495.

148. *See id.*

plaintiffs, enjoining them from collecting on the replevin bond in state court. Because the replevin bond would have effectively nullified its ruling, the federal court issued the injunction.[149] The Supreme Court upheld the injunction, holding that the district court had ancillary jurisdiction to enjoin the plaintiffs from collecting on the property in state court.[150] The Court reasoned that if the federal court had not enjoined the state court action, the defendants would have found "themselves in precisely the same plight as if the judgment [in the federal case] had been against them, instead of for them" and would have deprived them of the "substantial fruits of a judgment rendered in their favor."[151]

The final case lending support to the permissive rule is *Dugas v. American Surety Co.*[152] In that case a surety brought an interpleader action against several claimants to a limited fund.[153] The court distributed the proceeds on a pro rata basis.[154] One of the claimants, Dugas, then brought a suit in state court to recover more than his apportioned share.[155] In response, the surety company filed a bill in federal court to enjoin Dugas from proceeding in state court.[156] The federal court granted the anti-suit injunction, holding that

> [t]he jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, but subject to the qualification that the relief be not of a different kind or on a different principle.[157]

It is important to note that in *Dugas* the federal district court's original order contained an injunction against state proceedings.[158] In addition, federal law explicitly provided for the use of anti-suit injunctions in such circumstances.[159]

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149. *See id.*

150. *Id.* at 497 ("The bill in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin . . . .").

151. *Id.* at 498.

152. 300 U.S. 414 (1937); *see, e.g.*, Brief for United States in *Karaha Bodas*, *supra* note 145, at 12 (citing *Dugas* in support of the permissive rule on ancillary jurisdiction); *Goss* Petition, *supra* note 145, at 33 (noting that in *Dugas* the Supreme Court "upheld an antisuit injunction to protect the integrity of a final monetary judgment").

153. *See Dugas*, 300 U.S. at 418.

154. *See id.* at 419.

155. *See id.* at 420.

156. *See id.* at 421.

157. *See id.* at 428.

158. The district court's order "[e]njoin[ed] each of the defendants from instituting or prosecuting in any state court, or in any other federal court, any suit against [the surety company] on account of any right or claim growing out of [the common fund]." *Id.* at 419.

159. *See* Federal Interpleader Act of 1926 § 2, Pub. L. No. 69-203, 44 Stat. 416, 416 ("[A federal] court shall have power to issue its process for all . . . claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal court [regarding the common fund in question].").

While there is no case directly supporting the permissive rule, the history of common law writs and equitable powers, combined with the holdings of *Pacific Railroad*, *Dietzsch*, and *Dugas*, make it plausible that a federal court has ancillary jurisdiction to issue a post-satisfaction anti-suit injunction.[160]

b. The Restrictive Rule

The restrictive rule proposes a narrower conception of ancillary jurisdiction that bars federal courts from exercising jurisdiction over claims that are "entirely new and original" or "of a different kind or [based] on a different principle."[161] This rule draws support from two recent Supreme Court cases.

Proponents of the restrictive rule rely heavily on the 1994 Supreme Court case *Kokkonen v. Guardian Life Insurance Co. of America* for support.[162] In that case, the parties litigated state claims and counterclaims in a diversity action in federal court that ultimately resulted in a settlement.[163] Pursuant to a recitation of the terms of the settlement, the district court judge dismissed all claims with prejudice in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.[164] The order did not reserve jurisdiction in the district court or make reference to the terms of the settlement agreement.[165] After a dispute over the terms of the settlement agreement, one of the parties moved in the district court to enforce it.[166] The Supreme Court ruled that there was no ancillary jurisdiction to hear the claim for the breach of the settlement agreement.[167]

The Court held that federal courts may exercise ancillary jurisdiction: (1) to permit the disposition of related claims, and (2) to enable a court to "function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[168] In this case, ancillary jurisdiction could not be based on the first purpose because the original claim and the "breach of [the] settlement agreement ha[d] nothing to do with each other."[169] The district court was also unable to avail itself of the second purpose of ancillary jurisdiction, because "[the district court's] only order . . . was that the suit be dismissed, a disposition that is in no way

160. *See* Brief for Law Professors, *supra* note 135, at 14.

161. Peacock v. Thomas, 516 U.S. 349, 358 (1996) (citations and internal quotation marks omitted).

162. 511 U.S. 375 (1994); *see, e.g.*, Petition for a Writ of Certiorari at 19–20, PT Pertamina v. Karaha Bodas Co., 554 U.S. 929 (2008) (No. 07-619), 2007 WL 3353451, at *19–20 [hereinafter *Karaha Bodas* Petition] (citing *Kokkonen* in support of the restrictive rule).

163. *See Kokkonen*, 511 U.S. at 377.

164. *Id.* at 376–77. A "plaintiff may dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared." FED. R. CIV. P. 41(a)(1)(ii).

165. *See Kokkonen*, 511 U.S. at 377.

166. *See id.* at 377.

167. *See id.* at 381–82.

168. *Id.* at 379–80.

169. *Id.* at 380.

flouted or imperiled by the alleged breach of the settlement agreement."[170] The Court went on to note that

> [t]he situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.[171]

The restrictive rule also finds support in *Peacock v. Thomas*.[172] In that case, a judgment creditor tried to collect from the officer of a debtor corporation that had been found liable in a prior federal action.[173] While there was jurisdiction in the initial action under the Employee Retirement Income Security Act[174] (ERISA), the Court found that there was no ancillary jurisdiction over the subsequent claim between non-diverse parties.[175]

The Court held that the subsequent action was not justified under either purpose of ancillary jurisdiction.[176] First, the subsequent claim to collect from the corporation's officer was not sufficiently factually related to the original claim.[177] Second, the Court adopted a narrow view of its ancillary enforcement jurisdiction, holding that it does not extend "beyond attempts to execute, or to guarantee eventual executability of, a federal judgment."[178] Finally, the Supreme Court noted that parties should look to the Federal Rules of Civil Procedure as the principal means of enforcing a judgment,[179] further stating that while "[t]he Rules cannot guarantee payment of every federal judgment . . . as long as they protect a judgment creditor's ability to execute on a judgment, the district court's authority is adequately preserved."[180]

Both *Kokkonen* and *Peacock* stand for a narrow approach to ancillary jurisdiction, grounded in a narrow reading of the terms of the court's final order.[181] Under these cases, and the restrictive rule which they support, a federal court lacks ancillary jurisdiction over subsequent jurisdictionally defective claims unless such claims implicate the terms of the court's final

170. *Id.* at 380–81.
171. *Id.* at 381.
172. 516 U.S. 349 (1996); *see, e.g.*, *Karaha Bodas* Petition, *supra* note 162, at 20 ("In the recent *Kokkonen* and *Peacock* decisions, [the Supreme Court] emphasized that ancillary jurisdiction extends only to matters truly necessary to protect the court's authority to manage the proceedings before it.").
173. *See Peacock*, 516 U.S. at 352.
174. 29 U.S.C. § 1001 (2006).
175. *See Peacock*, 516 U.S. at 359–60.
176. *See id.*
177. *See id.* at 355–56 ("[T]here is insufficient factual dependence between the claims raised in [plaintiff's] first and second suits to justify the extension of ancillary jurisdiction . . . . The claims in these cases have little or no factual or logical interdependence . . . .").
178. *Id.* at 357.
179. *See id.* at 359 (noting the Federal Rules' "fast and effective mechanisms for execution").
180. *Id.*
181. *See Karaha Bodas* Petition, *supra* note 162, at 18–20.

order or the federal court expressly retains jurisdiction over subsequent disputes.[182]

D. Flying Too Close to the Sun, Part Two: The Limits of International Comity

This section addresses the limits comity places on anti-foreign-suit injunctions. First, this section briefly examines the origins and meaning of international comity. It then discusses the role of comity in anti-foreign-suit injunctions through an examination of an ongoing circuit split on the question.

1. International Comity

Comity is a vague and indeterminate doctrine under which courts must sometimes apply foreign law or decline jurisdiction in favor of a foreign forum.[183] In general, the doctrine of comity exists in recognition of the effects that private disputes can have on the interests of foreign sovereigns.[184] For example, the Act of State doctrine and foreign sovereign immunity, are rooted in international comity.[185]

The Supreme Court has consistently held that U.S. courts must respect international comity.[186] Recently, the Supreme Court held in *Republic of the Philippines v. Pimentel* that "[t]here is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts

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182. *See id.*

183. *See* Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS., Summer 2008, at 19, 19 (2008).

> Scholars and courts have characterized international comity inconsistently as a choice-of-law principle, a synonym for private international law, a rule of public international law, a moral obligation, expediency, courtesy, reciprocity, utility, or diplomacy. Authorities disagree as to whether comity is a rule of natural law, custom, treaty, or domestic law . . . . Although other jurisdictions sometimes employ the term comity as a synonym for diplomatic immunity, in the United States comity has served as a principle of deference to foreign law and foreign courts.

Id. at 19–20.

184. *See id.* at 19.

185. *See* BORN & RUTLEDGE, *supra* note 50, at 765 (mentioning comity as a justification for the Act of State doctrine). The Act of State doctrine prevents U.S. courts from "sit[ting] in judgment on the validity of the public acts of foreign sovereigns within their own territory." *Id.* at 751. The doctrine of foreign sovereign immunity, codified at 28 U.S.C. § 1602 (2006), holds that, subject to exceptions, U.S. courts lack subject matter jurisdiction over foreign sovereigns. *See id.* at 219–23; *see also* Republic of the Philippines v. Pimentel, 553 U.S. 851, 852 (2008) ("Giving full effect to sovereign immunity promotes the comity and dignity interests that contributed to the development of the immunity doctrine.").

186. *See, e.g.*, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004) (holding that comity requires U.S. courts to apply a limited interpretation of U.S. antitrust laws to foreign anticompetitive conduct); Hilton v. Guyot, 159 U.S. 113, 165 (1895) ("'[Comity] contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations.'" (quoting Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839)).

without right or good cause."[187] The Supreme Court also noted that comity is such an important policy that the U.S. should apply the principle even if it may leave a party "with no immediate way to recover on its judgment."[188]

2. The Conservative-Liberal Circuit Split

a. Genuflecting Before Omnipotent Comity: The Conservative Approach

A majority of federal circuits, including the U.S. Courts of Appeals for the First,[189] Second,[190] Third,[191] Sixth,[192] Eighth,[193] and D.C. Circuits,[194] follow the conservative approach to anti-foreign-suit injunctions.[195] Under the conservative approach, a court may issue an anti-foreign-suit injunction only if: (1) an action in a foreign forum would thwart U.S. jurisdiction or would threaten vital U.S. policy and (2) the domestic concerns outweigh considerations of international comity.[196]

While the circuits have articulated slightly different tests,[197] the conservative approach's key feature is its substantial deference to international comity, mandating that injunctions be used sparingly and in

187. *Pimentel*, 553 U.S. at 866.

188. *Id.* at 872.

189. *See, e.g.*, Quaak v. KPMG Bedrijfsrevisoren, 361 F.3d 11, 18 (1st Cir. 2004).

190. *See, e.g.*, Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 119–20 (2d Cir. 2007); China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 34, 36–37 (2d Cir. 1987).

191. *See, e.g.*, Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118, 127 (3d Cir. 2002).

192. *See, e.g.*, Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1351, 1355 (6th Cir. 1992).

193. *See* Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 361 (8th Cir. 2007).

194. *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927–33 (D.C. Cir. 1984).

195. *See generally* Taryn M. Fry, Note, *Injunction Junction, What's Your Function? Resolving the Split over Antisuit Injunction Deference in Favor of International Comity*, 58 CATH. U. L. REV. 1071 (2009) (discussing the conservative–liberal split on anti-foreign-suit injunctions). The terms "conservative" and "liberal" should not be understood in a political sense. Rather, they refer to the relative willingness of courts to issue anti-foreign-suit injunctions. *See, e.g.*, *Goss*, 491 F.3d at 359 (discussing the "conservative" and "liberal" approaches to anti-foreign-suit injunctions); Quaak v. KPMG Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004) ("For ease in reference, we shall call the more permissive of these views the liberal approach and the more restrictive of them the conservative approach."). The heading for this section refers to a critique of the conservative approach in Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996) ("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.").

196. *See, e.g.*, *Goss*, 491 F.3d at 359.

197. *See, e.g.*, Jonathan I. Blackman, *Provisional Measures in Cross-Border Cases*, *in* INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, *supra* note 45, at 71 ("The First Circuit . . . has taken what can be characterized as an 'intermediate' approach to antisuit injunctions against foreign litigation."); Nelson, *supra* note 24, at 4 ("The First, Second, and District of Columbia Circuits endorse a slightly less radical version . . . of the conservative approach to comity . . . .").

only the most compelling situations.[198] The conservative approach maintains that even though an anti-foreign-suit injunction binds individual parties, it "effectively restricts the jurisdiction of the court of a foreign sovereign."[199] Consequently, anti-foreign-suit injunctions always implicate international comity.[200] Nevertheless, while some courts have advocated for international comity in passionate and even moralistic terms,[201] the conservative approach's "rebuttable presumption against issuing international antisuit injunctions"[202] is not insurmountable.[203]

b. Imposing the Hegemon's Will: The Liberal Approach

A minority of circuits, including the U.S. Courts of Appeals for the Fifth,[204] Seventh,[205] and Ninth Circuits,[206] follow the liberal approach to anti-foreign-suit injunctions.[207] Under the liberal approach, a court may issue an anti-foreign-suit injunction if it is necessary to prevent vexatious and oppressive litigation or if the foreign action would result in inequitable hardship or delay, or would frustrate the efficient determination of the case.[208] While the liberal approach does not completely disregard international comity, it gives it little deference in disputes that implicate

198. *See Goss*, 491 F.3d at 360; China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35–36 (2d Cir. 1987); *Laker Airways*, 731 F.2d at 927.

199. *China Trade*, 837 F.2d at 35–36.

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

201. *See Laker Airways*, 731 F.2d at 941 (justifying deference to international comity by reference to Kant's "ethical imperative that everyone should act as if his actions were universalized"); Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354 (6th Cir. 1992) ("The days of American hegemony over international economic affairs have long since passed. The United States cannot today impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could. The modern era . . . requires cooperation and comity between nations.").

202. *See Goss*, 491 F.3d at 360 (quoting Quaak v. KPMG Bedrijfsrevisoren, 361 F.3d 11, 18 (1st Cir. 2004)).

203. *Compare* BORN & RUTLEDGE, *supra* note 50, at 542 ("The District of Columbia, Second, Third, and Sixth Circuits have held that foreign anti-suit injunctions *should virtually never be issued*." (emphasis added)), *with Laker Airways*, 731 F.2d at 929 (applying the conservative approach and upholding anti-foreign-suit injunctions against parties seeking to avoid U.S. antitrust laws by bringing declaratory suits in the United Kingdom), *and* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111 (2d Cir. 2007) (applying the conservative approach and upholding an anti-foreign-suit injunction against a party seeking to collaterally attack an arbitral award in a foreign court).

204. *See, e.g.*, Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626–27 (5th Cir. 1996).

205. *See, e.g.*, Allendale Mut. Ins. Co. v. Bull Data Sys. Inc., 10 F.3d 425, 431 (7th Cir. 1993).

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

207. *See* Fry, *supra* note 195, at 1079 (listing the circuits following the liberal approach). The heading for this section is based on the critique of the liberal approach found in *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992). *See also supra* note 201 (quoting *Gau Shan*).

208. *See* Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 360 (8th Cir. 2007) (considering, but ultimately rejecting, the liberal approach); *Kaepa*, 76 F.3d at 626–27.

only the interests of private parties.[209] According to the Ninth Circuit, "[t]he strict cases [following the conservative approach] presume a threat to international comity whenever an injunction is sought," while courts following the liberal approach require evidence "that comity is likely to be impaired in *this* case."[210]

In spite of the professed allegiance of certain circuits to either the liberal or conservative approach, it is not always possible to predict the degree of deference that district courts will grant to comity. For example, both the Second and Eighth Circuits follow the conservative approach,[211] yet the courts reached starkly different conclusions in *Goss* and *Karaha Bodas*. These two cases suggest that the issue of comity in anti-foreign-suit injunctions continues to vex courts. The possibility of post-satisfaction anti-foreign-suit injunctions further complicates matters.

II. CONFLICTING APPROACHES TO JURISDICTION AND COMITY

Part II examines the conflict arising from the circuit split between the Eighth and Second Circuits on the question of whether a court may maintain an anti-foreign-suit injunction after the satisfaction of judgment. This part separately addresses the questions of jurisdiction and comity in each decision. It then briefly discusses the respective petitions for certiorari in *Goss* and *Karaha Bodas*, as well as the aftermath of each case.

A. Goss*: Courts May Not Grant Anti-foreign-suit Injunctions After Judgment Is Satisfied*

1. Facts

Goss International Corporation, a company based in the United States, and Tokyo Kikai Seisakusho, Ltd. (TKS), a Japan-based company, were in the business of manufacturing and supplying printing presses for newspapers in the U.S.[212] In the 1970s, TKS entered the U.S. market and within a decade had obtained contracts with major newspapers such as the *Wall Street Journal* and the *Washington Post*.[213] TKS's success continued between 1991 and 2000, due in large part to its practice of selling printing presses in the U.S. at prices significantly lower than the Japanese market price—a practice known as "dumping."[214] During this period, TKS sold

209. *See Kaepa*, 76 F.3d at 626–27 (noting that comity concerns are diminished because "no public international issue is implicated by the case").

210. Allendale Mut. Ins. Co. v. Bull Data Sys. Inc., 10 F.3d 425, 431 (7th Cir. 1993).

211. *See, e.g.*, *Goss*, 491 F.3d at 355, 368 (adopting the conservative approach for the Eighth Circuit); China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 40 (2d Cir. 1987) (adopting a form of the conservative approach for the Second Circuit).

212. *See Goss*, 491 F.3d at 356–57.

213. *See id.*

214. *See id.* Dumping is "[t]he act of selling a large quantity of goods at less than fair value" or "[s]elling goods abroad at less than the market price at home." BLACK'S LAW DICTIONARY 576 (9th ed. 2009).

$125 million worth of printing presses in the United States, while Goss lost contracts because it was unable to compete.[215]

In 2000, Goss brought a federal civil action against TKS in the Northern District of Iowa[216] alleging violations of the Anti-Dumping Act of 1916,[217] which made it unlawful to sell "articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production."[218] The law subjected violators to treble damages, costs, and attorney's fees.[219]

In 2003, a jury returned a verdict in favor of Goss, awarding $10,539,949 in damages.[220] After trebling this amount and adding attorney's fees and costs, the district court awarded Goss $35,785,480.05.[221] TKS appealed to the Eighth Circuit.[222]

In December 2004, while appeal was pending, Congress repealed the Anti-Dumping Act.[223] The repeal was prospective and therefore did not affect the outcome of the Goss-TKS litigation.[224] Congress repealed the law in compliance with a determination of the World Trade Organization (WTO), which found that the U.S. anti-dumping law violated agreements committing disputes over dumping to the jurisdiction of the WTO.[225]

Japan argued that the U.S. repeal did not comply with the WTO's requirements because it did not affect pending litigation.[226] Consequently, Japan enacted the Special Measures Law, a clawback statute granting Japanese citizens a cause of action in Japanese courts to recover the full amount of judgments paid out under the Anti-Dumping Act.[227] The law held parent companies and subsidiaries of the prevailing party in U.S. court jointly and severally liable.[228] Accordingly, Tokyo-based Goss Graphic Systems Japan, a wholly-owned subsidiary of Goss, would have faced exposure under the Special Measures Law.[229]

TKS agreed not to file suit under the Japanese law while appeal was pending in U.S. courts.[230] In January 2006, the Eighth Circuit affirmed the

215. *See Goss*, 491 F.3d at 357.
216. *See id.*
217. Pub. L. No. 64-271, §§ 800–01, 39 Stat. 756, 798, *repealed by* Pub. Law 108-429, § 2006, 118 Stat. 2434, 2597 (2004).
218. *Id.*
219. *See id.*
220. *Goss*, 491 F.3d at 357.
221. *See id.* at 357–58.
222. *See id.* at 358.
223. *See id.*
224. *See id.*
225. *See id.* at 358 & n.3.
226. *See id.* at 358; *see also* Nelson, *supra* note 24, at 2. The judgment in *Goss* was the only relief ever granted under the Anti-Dumping Act. *See Goss*, 491 F.3d at 358 n.3.
227. *See Goss*, 491 F.3d at 358; *see also supra* note 27.
228. *See Goss*, 491 F.3d at 358.
229. *See id.*
230. *See id.* at 358–59.

jury verdict.[231] The Supreme Court denied certiorari in June 2006.[232] When the Supreme Court denied TKS's petition, TKS informed Goss that it intended to file suit in Japan under the Special Measures Law.[233] The district court granted Goss's motion for an anti-suit injunction prohibiting TKS from bringing suit in Japan.[234] TKS quickly satisfied the judgment and then appealed the anti-suit injunction.[235] The Eighth Circuit vacated the injunction.[236]

2. *Goss*'s Treatment of Jurisdiction

The Eighth Circuit began its analysis of ancillary jurisdiction by observing that the All Writs Act, which gives courts the power to issue anti-suit injunctions, "does not create an independent source of federal jurisdiction."[237] The court noted that while the district court had maintained jurisdiction over the parties under 28 U.S.C. § 1331, this jurisdiction ceased once TKS paid the judgment, inferring that ancillary jurisdiction must logically conclude upon satisfaction.[238] The Eighth Circuit noted that the judgment "is rendered, paid and satisfied. No pending litigation, other than this appeal, remains in the United States courts . . . . Neither the All Writs Act nor the court's ancillary enforcement jurisdiction provides the district court with a separate source of jurisdiction to enjoin TKS under these circumstances."[239]

While the Eighth Circuit did not address the jurisdictional issue in depth, it clearly adopted the restrictive rule.[240] The court quoted an 1867 Supreme Court decision, *Riggs v. Johnson County*,[241] which stated that "the jurisdiction of a court is not exhausted by the rendition . . . but continues until that judgment shall be satisfied."[242] The court interpreted *Riggs* to suggest that jurisdiction must not only continue until the satisfaction of judgment but also that it must *cease* at the satisfaction of judgment.[243] The court did not discuss *Peacock* or *Kokonnen* in any detail, but cited *Peacock* favorably in its adoption of the restrictive rule.[244]

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231. Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 434 F.3d 1081 (8th Cir. 2006).

232. Tokyo Kikai Seisakusho, Ltd. v. Goss Int'l Corp., 547 U.S. 1180 (2006).

233. *See Goss*, 491 F.3d at 359.

234. *See id.* at 357.

235. *See id.*

236. *See id.*

237. *See id.* at 364 (citing Syngenta Crop Prot., Inc., v. Henson, 537 U.S. 28, 31 (2002)); *see also supra* notes 126–28 and accompanying text.

238. *See Goss*, 491 F.3d at 365.

239. *Id.* This language echoes *Syngenta*, which held that "[t]he All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute" for independent subject matter jurisdiction. *Syngenta*, 537 U.S. at 34.

240. *See supra* Part I.C.4.b.

241. 73 U.S. 167 (1867).

242. *Id.* at 187; *Goss*, 491 F.3d at 365.

243. *Goss*, 491 F.3d at 365 ("Thus, the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment.").

244. *See id.* at 365.

3. *Goss*'s Treatment of International Comity

Prior to *Goss*, the Eighth Circuit had not had the occasion to adopt a standard for anti-foreign-suit injunctions.[245] Consequently, the decision includes significant treatment of the degree to which a court should defer to international comity, both as a general matter and when a party has already satisfied judgment.[246]

The Eighth Circuit observed that the circuit split regarding anti-foreign-suit injunctions revolves around the respective degrees of deference that courts afford international comity.[247] The court noted that "[a]though comity eludes a precise definition, its importance in our globalized economy cannot be overstated,"[248] and cited cases describing comity as "'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation'"[249] or the equivalent of "'courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or consideration of high international politics concerned with maintaining amicable and workable relationships between nations.'"[250] The Eighth Circuit ultimately adopted the conservative approach to international comity, noting that "the Congress and the President possess greater experience with, knowledge of, and expertise in international trade and economics than does the Judiciary. The two other branches, not the Judiciary, bear the constitutional duties related to foreign affairs."[251]

The Eighth Circuit found that considerations of comity required it to vacate the district court's anti-suit injunction. The court declined to enjoin the Japanese action because it involved different issues than the litigation in the Eighth Circuit.[252] The court also noted that while the doctrine of res judicata normally outweighs issues of comity once one court reaches judgment in parallel proceedings, this concept was inapplicable because the Japanese action regarded a completely different issue.[253]

The court then contended that the Japanese action did not threaten any vital U.S. policies. The court distinguished *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, which involved "a head-on collision between the diametrically opposed antitrust policies of the United States and United Kingdom"[254] from *Goss*, which involved the first and only application of

245. *See id.* at 359 ("The propriety of issuing a foreign antisuit injunction is a matter of first impression for our circuit.").
246. *See id.*
247. *See id.*; *see also supra* Part I.D.
248. *Goss*, 491 F.3d at 360.
249. *Id.* (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)).
250. *Id.* (quoting Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512, 1519 n.10 (11th Cir. 1994)).
251. *Id.* at 361.
252. *See id.* at 366.
253. *See id.* at 365–66.
254. Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 916 (D.C. Cir. 1984).

the Anti-Dumping Act.[255] Consequently, the court concluded that "the district court . . . placed too much emphasis on the impact of the Special Measures Law on United States public policy" in issuing the anti-foreign-suit injunction.[256]

B. Karaha Bodas*: Federal Courts May Grant Post-satisfaction Anti-foreign-suit Injunctions*

1. Facts

In 1994, Karaha Bodas Company (KBC), a Cayman Islands limited liability company owned by American power companies and other investors, entered into a joint venture with Pertamina, an Indonesian state-owned and controlled oil and gas company.[257] The purpose of the joint venture was to explore and develop geothermal resources in Indonesia.[258] The joint venture was to be governed by Indonesian law, and the parties agreed to settle all disputes through binding arbitration according to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in Geneva, Switzerland.[259]

In 1998, the Indonesian government suspended the joint venture and KBC began arbitration proceedings in Switzerland demanding $600 million in damages and lost profits.[260] Although Pertamina argued that KBC lacked a bona fide intention to carry out the project and induced the contract through faulty representations, the arbitration panel found for KBC and awarded $261 million in damages, lost profits, costs of arbitration, and interest.[261]

In 2001, KBC brought suit in the Southern District of Texas to confirm the arbitral award under the New York Convention.[262] The district court confirmed the award and entered judgment for $261 million plus interest.[263]

While Pertamina appealed the Texas district court's decision, it also filed an action in Jakarta, Indonesia, collaterally attacking the arbitral award and seeking to enjoin KBC from enforcing judgment.[264] The Texas district court issued an anti-suit injunction in the form of a temporary restraining order prohibiting Pertamina from seeking relief in Indonesia.[265] Meanwhile, in Indonesia, Pertamina obtained nullification of the arbitral award and an injunction prohibiting KBC from enforcing the arbitral award

255. *See Goss*, 491 F.3d at 366.
256. *See id.* at 366.
257. *See* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 113 (2d Cir. 2007).
258. *See id.*
259. *See id.*
260. *See id.*
261. *See id.* at 114.
262. *See id.*; *see also supra* notes 97–100 and accompanying text (discussing the New York Convention).
263. *See Karaha Bodas*, 500 F.3d at 114.
264. *See id.*
265. *See id.*

and exacting a fine of $500,000 for each day of non-compliance.[266] The Texas district court responded by issuing a counter-injunction prohibiting Pertamina from enforcing the Indonesian injunction or collecting penalties under the injunction.[267]

While the Indonesian court's injunction was on appeal before the Indonesian Supreme Court, the Fifth Circuit vacated the district court's anti-suit injunction. The Fifth Circuit ruled that since the Texas District Court was only a court of secondary jurisdiction under the New York Convention, it was not the court's role to protect KBC from every legal hardship, especially since the New York Convention anticipates and provides for multiple and simultaneous proceedings.[268]

In 2004, three years after KBC initiated proceedings in Texas, the litigation reached a degree of resolution. The Indonesian Supreme Court vacated the Indonesian trial court's anti-suit injunction and held that only a Swiss court could annul the arbitral award.[269] In addition, the Fifth Circuit affirmed the district court's confirmation of the arbitral award and also concluded that only a Swiss court could annul the award.[270]

Because Pertamina did not post a supersedeas bond following the Texas district court's confirmation of the arbitral award, it was not able to obtain a stay of judgment pending its appeal in the Fifth Circuit.[271] Consequently, in 2002, KBC sought registration and enforcement of the arbitral award in the Southern District of New York, where Pertamina maintained bank accounts containing hundreds of millions of dollars.[272]

After four years of litigation regarding the ownership of the bank accounts in question, the Southern District of New York ordered Pertamina to pay KBC $319 million from the accounts.[273] The Second Circuit affirmed in March 2006.[274] The Supreme Court denied certiorari on October 2, 2006[275] and on October 10, 2006, Pertamina satisfied most of the judgment.[276]

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266. *See id.*

267. *See id.*

268. *See* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 364–65 (5th Cir. 2003); *Karaha Bodas*, 500 F.3d at 114–15.

269. *See Karaha Bodas*, 500 F.3d at 115.

270. *See id.*

271. *See id.* at 116; *see also* FED. R. CIV. P. 62(d) ("If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ."). A supersedeas bond is "[a]n appellant's bond to stay execution on a judgment during the pendency of the appeal." BLACK'S LAW DICTIONARY, *supra* note 214, at 202.

272. *See Karaha Bodas*, 500 F.3d at 116. KBC also brought actions to confirm the arbitral award in Hong Kong, Singapore, and Canada resulting in the collection of $900,000. *See id.* Over the course of the entire dispute, Pertamina hailed KBC into more than fifteen courts in seven countries over a nine-year period. *See id.* at 127 n.18.

273. *See id.* at 116.

274. *See id.*

275. *See id.* at 117.

276. *See id.* Pertamina paid the small remainder of the judgment on November 29, 2006. *See id.* at 117 n.6.

Pertamina filed an action in the Cayman Islands on September 15, 2006.[277] Pertamina argued that the award was based on fraud and sought damages in the amount of the judgment it had paid to KBC.[278] While Pertamina reprised some of its earlier arguments before the arbitration tribunal, it also claimed that more recent revelations showed that KBC had committed fraud.[279]

Upon KBC's motion, the Southern District issued an anti-suit injunction prohibiting Pertamina from maintaining its action in the Cayman Islands or elsewhere, and allowing KBC to dispose of the judgment collected from Pertamina.[280] On appeal, the Second Circuit affirmed the district court's judgment.[281]

2. *Karaha Bodas*'s Treatment of Jurisdiction

After oral argument, the Second Circuit requested supplemental briefs on the question of whether the district court possessed ancillary jurisdiction to grant an anti-suit injunction.[282] These briefs contained arguments regarding the proper rule for post-satisfaction ancillary jurisdiction and its application to the case. While the Second Circuit ultimately adopted the permissive rule, it unfortunately did not explain its reasoning in depth. It is therefore instructive to examine in some detail the arguments that the parties advanced in their supplemental briefs.

a. Arguments for Ancillary Jurisdiction

The appellee, KBC, presented five main arguments in favor of ancillary jurisdiction. First, KBC contended that Supreme Court precedent authorizes post-satisfaction ancillary jurisdiction. In particular, KBC highlighted *Dietzsch* and *Dugas* in support of its proposition that "[f]ederal courts maintain continuing jurisdiction to protect their final judgments, even after satisfaction."[283] KBC also pointed out that, contrary to the Eighth Circuit's assertion, *Peacock* "did not hold . . . that [ancillary enforcement jurisdiction] automatically ends once the judgment is satisfied."[284] In any event, KBC argued, *Peacock* should be limited to cases involving attempts to bring ancillary claims against third parties.[285]

277. *See id.*
278. *See id.*
279. *See id.*
280. *See id.* at 117–18.
281. *See id.* at 113.
282. *See id.* at 127. The court ordered the supplemental briefs as a result of the *Goss* decision, which the Eighth Circuit decided after oral arguments in *Karaha Bodas*. *See id.*
283. Supplemental Letter Brief for Appellee at 1–2, *Karaha Bodas*, 500 F.3d 111 (No. 07-0065-cv). For a discussion of *Dietzsch* and *Dugas*, see *supra* notes 145–58 and accompanying text.
284. Supplemental Letter Brief for Appellee, *supra* note 283, at 4. For a discussion of *Peacock*, see *supra* notes 172–80 and accompanying text. For a discussion of the Eighth Circuit's reasoning in *Goss*, see *supra* Part II.A.2.
285. *See* Supplemental Letter Brief for Appellee, *supra* note 283, at 4 n.3.

Second, KBC pointed to cases where courts granted injunctions to prevent parties from litigating claims following the dismissal of an action.[286] While res judicata and collateral estoppel should ordinarily suffice to protect the court's final resolution, KBC argued that in some circumstances it may be necessary to enjoin vexatious relitigation such as the litigation in *Karaha Bodas*.[287]

Third, KBC contended that the New York Convention provides an independent source of jurisdiction for anti-foreign-suit injunctions in the arbitration context.[288] The appellee cited a district court decision holding that federal courts have jurisdiction over equitable actions related to arbitration under the New York Convention.[289] Accordingly, even in the absence of ancillary jurisdiction, the district court had original subject matter jurisdiction to protect the foreign arbitral award.[290]

Fourth, KBC claimed that the district court retained jurisdiction because it continued to adjudicate a dispute over attorney's fees and never entered a formal satisfaction of judgment.[291] Finally, KBC argued that *Goss*'s facts, involving a hyper-political trade dispute in which comity interests were more acute, rendered the Eighth Circuit's decision inapplicable to the case on appeal.[292]

b. Arguments Against Ancillary Jurisdiction

The appellant, Pertamina, argued that the Second Circuit should follow the ruling in *Goss* and responded to each of KBC's arguments in favor of ancillary jurisdiction. First, Pertamina pointed to *Kokkonen* and *Peacock* as clear precedential support for a limited conception of post-satisfaction ancillary jurisdiction.[293] According to Pertamina, those cases authorized ancillary jurisdiction only when "truly necessary to protect the court's authority to manage the proceedings properly before it."[294] Because the district court's judgment in *Karaha Bodas* did not contain any ongoing injunctive relief, the judgment was fully satisfied with the payment of the

286. *Id.* at 5 (citing Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1523–24 (9th Cir. 1983) and Covanta Onondaga Ltd. v. Onondaga Cnty. Res. Recovery Agency, 318 F.3d 393, 398 (2d Cir. 2003)).

287. *See id.*

288. *See id.* at 6. See *supra* notes 97–100 for a discussion of the New York Convention.

289. *See* Supplemental Letter Brief for Appellee, *supra* note 283, at 6 (citing Venconsul N.V. v. TIM Int'l N.V., No. 03 Civ. 5387, 2003 WL 21804833, at *3 (S.D.N.Y. Aug. 6, 2003)).

290. *See* Supplemental Letter Brief for Appellee, *supra* note 283, at 6.

291. *See id.* at 6–7.

292. *See id.* at 7–10.

293. *See* Supplemental Letter Brief for Appellant at 2, Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111 (2d Cir. 2007) (No. 07-0065-cv); *see also* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379–80 (1994) (limiting ancillary jurisdiction to two instances: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees" (citations omitted)); *supra* Part I.C.4.b.

294. Supplemental Letter Brief for Appellant, *supra* note 293, at 3.

money damages.[295] Accordingly, Pertamina argued, there were no longer any proceedings for the court to manage and the court therefore had no ancillary jurisdiction to issue the anti-suit injunction.[296] The appellant also sought to distinguish *Dietzsch* and *Dugas* by noting that in *Dietzsch* the court exercised jurisdiction to remedy non-compliance with a court order, and in *Dugas* the court modified prior injunctive relief included in the final judgment.[297] In addition, Pertamina contended that even if *Dietzsch* and *Dugas* supported KBC's argument, the more recent cases of *Peacock* and *Kokkonen* were controlling.[298]

Second, Pertamina argued that a court may only enjoin relitigation if that relitigation is vexatious to the court issuing the injunction.[299] After all, *Kokkonen* permitted ancillary jurisdiction only when necessary for a "court to function successfully" and "manage its proceedings."[300] Pertamina contended that its subsequent suit would have no effect on the injunction-issuing court, especially since it had fully satisfied the court's judgment.[301]

Third, Pertamina disputed KBC's claim that the New York Convention granted the court original jurisdiction to issue the anti-suit injunction.[302] Instead, Pertamina argued that the New York Convention gives federal courts jurisdiction to provide injunctive relief only to compel arbitration or aid in a pending arbitration, neither of which was the case in *Karaha Bodas*.[303]

Finally, Pertamina rejected KBC's contention that the district court retained jurisdiction over any further disputes. Pertamina pointed out that the court recognized the satisfaction of judgment, even if it did not enter a formal declaration.[304] In addition, Pertamina argued, the existence of subject matter jurisdiction over other matters, such as attorney's fees, did not automatically give the court jurisdiction over all subsequent disputes.[305]

c. The Court's Ruling

The Second Circuit only briefly considered *Goss* in its opinion, summarizing the Eighth Circuit's holding before rejecting it.[306] The court held that

> [w]hile "[t]he boundaries of ancillary jurisdiction are not easily defined and the cases addressing it are hardly a model of clarity" . . . federal courts have continuing jurisdiction, grounded in the concepts of *res*

295. *See id.*
296. *See id.*
297. *See id.* at 4.
298. *See id.* at 4–5.
299. *See id.* at 5.
300. *Id.* (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994)).
301. *See id.* at 5–6; *see also Karaha Bodas* Petition, *supra* note 162, at 21–22.
302. *See* Supplemental Letter Brief for Appellant, *supra* note 293, at 7.
303. *See id.* at 8.
304. *See id.* at 3 n.2.
305. *See id.* at 3, 6.
306. *See* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 129 (2d Cir. 2007).

> *judicata* and collateral estoppel, to enjoin a party properly before them from relitigating issues in a non-federal forum that were already decided in federal court. This source of jurisdiction remains even after a judgment has been satisfied . . . .[307]

The Second Circuit supported this proposition by reference to the power of federal courts to prevent relitigation in state courts of claims and issues already decided in federal court.[308] The court was apparently not persuaded that there was a distinction between exercises of jurisdiction to enforce a judgment or protect a decree of dismissal and post-satisfaction exercises of jurisdiction.[309] The Second Circuit also distinguished *Peacock*, claiming that the case was inapposite because it applied to a putative ancillary claim brought against a third party.[310] Interestingly, the Second Circuit did not rely on KBC's other arguments, including its references to *Dietzsch* and *Dugas*.[311]

3. *Karaha Bodas*'s Treatment of International Comity

The Second Circuit began its analysis of the propriety of the anti-foreign-suit injunction by affirming the test it adopted two decades earlier in *China Trade and Development Corp. v. M.V. Choong Yong*.[312] As stated by the court, the *China Trade* test for anti-foreign-suit injunctions requires a threshold determination of whether "'(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.'"[313] If this inquiry is satisfied, the court must then determine whether the parallel litigation would "'(1) frustrat[e] . . . a policy in the enjoining forum; (2) . . . be vexatious; (3) . . . threat[en] . . . the issuing court's in rem or quasi in rem jurisdiction; (4) . . . prejudice other equitable considerations; or (5) . . . result in delay, inconvenience, expense, inconsistency, or a race to judgment.'"[314] While a court must consider all of these factors, it should place greater significance on whether the parallel suit would frustrate an important policy or threaten the court's jurisdiction.[315] Finally, the Second Circuit held that a court must consider international comity, which allows courts to issue anti-

307. *Id.* (citing Garcia v. Teitler, 443 F.3d 202, 208 (2d Cir. 2006)).

308. *See id.* (citing Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147 (1988)).

309. *Id.* (citing cases and treatises recognizing the ability of courts to enjoin parties from relitigating in other courts).

310. *See id.* at 129 n.19 ("*Peacock*'s statement that federal courts' power to engage in 'supplementary proceedings *involving third parties* to assist in the protection and enforcement of federal judgments' does not 'extend[ ] beyond attempts to execute, or to guarantee the eventual executability of, a federal judgment'" (alteration in original) (quoting Peacock v. Thomas, 516 U.S. 349, 356–57 (1996)).

311. *See id.* at 129–30.

312. 837 F.2d 33, 36 (2d Cir. 1987).

313. *Karaha Bodas*, 500 F.3d at 119 (citing Paramedics Electromedicina Comercial Ltda v. GE Med. Sys. Info. Tech. Inc., 369 F.3d 645, 652 (2004)).

314. *Id.* at 119 (quoting Ibeto Petrochemical Indus., Ltd v. M/T Beffen, 475 F.3d 56, 64 (2d Cir. 2007)).

315. *See id.*

foreign-suit injunctions in only the rarest and most compelling circumstances.[316]

Applying the test, the court first found that the two-pronged threshold requirement was satisfied.[317] Next, the court applied its analysis to the other factors. The court noted that the Cayman Islands action threatened the court's jurisdiction because it clearly sought to reverse the judgment of the district court.[318] The Second Circuit also found that the Cayman Islands action would be vexatious because it intended to further elongate a dispute over an arbitral award that had already been adjudicated in Switzerland, confirmed in Texas, and enforced in New York.[319] For similar reasons, the court found that the parallel Cayman Islands proceeding would lead to delay and inconveniences and upset other equitable considerations.[320]

The Second Circuit expressed particular concern with the possibility that the Cayman Islands suit would undermine the international regime for the enforcement of arbitral awards under the New York Convention.[321] According to the court, "the Cayman Islands ha[d] no arguable basis for jurisdiction . . . with respect to the Award" and "no power to modify or annul the Award under the [New York] Convention."[322] Consequently, the court found that, in certain circumstances it might be necessary to protect the Convention through the issuance of anti-foreign-suit injunctions.[323] In sum, the Second Circuit held that the vexatious nature of the Cayman Islands suit, as well as comity considerations connected to the New York Convention, justified an anti-foreign-suit injunction.

C. Petitions for Certiorari

The losing parties in *Goss* and *Karaha Bodas* each filed petitions for certiorari to the Supreme Court.[324] In both cases, the petitioners claimed that the two circuits were in direct conflict on ancillary jurisdiction and comity, while the respondents downplayed the conflict and focused on the unique facts of each case.[325] In *Goss*, the United States submitted an

316. *See id.*
317. *See id.* at 120–25.
318. *See id.*
319. *See id.*
320. *See id.*
321. *See id.* at 125; *supra* notes 97–100 and accompanying text.
322. *Karaha Bodas*, 500 F.3d at 125.
323. *See id.* at 125. The Second Circuit acknowledged the Fifth Circuit's holding, *see id.* at 124–25, that courts of secondary jurisdiction (i.e., courts of states other than the state from which the arbitral award issued) should exercise restraint in issuing anti-foreign-suit injunctions, *see* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 373 (5th Cir. 2003). The Second Circuit, however, argued that "federal courts are not obligated to sit by idly when a party engages in proceedings that undermine the regime governing enforcement of foreign arbitral awards established by the Convention." *Karaha Bodas*, 500 F.3d at 125 n.17.
324. *Goss* Petition, *supra* note 145, at 1; *Karaha Bodas* Petition, *supra* note 162, at 1.
325. *Compare Goss* Petition, *supra* note 145, at 13 ("The Court should grant the petition to resolve conflict among the circuits regarding two important and recurring questions of

amicus brief criticizing the Eighth Circuit's reasoning but nonetheless opposing certiorari.[326] The states of Oregon and New Hampshire, as well as a group of law professors also submitted amicus briefs in favor of certiorari.[327]

In *Karaha Bodas*, the United States filed a brief opposing certiorari and defending the Second Circuit's decision on ancillary jurisdiction and comity.[328] The Republic of Indonesia filed an amicus brief in favor of certiorari.[329] Indonesia's brief included strongly worded language condemning the Second Circuit's ruling as a violation of international comity and even a breach of the New York Convention.[330] Indonesia also contended that the anti-suit injunction infringed upon the Cayman Islands' sovereignty by preventing Caymanian courts from applying their own law to a controversy properly before them, and infringed upon Indonesian sovereignty since Pertamina was a state-owned Indonesian company.[331]

While some observers noted that these cases would have provided the Supreme Court with an opportunity to resolve the ongoing circuit split on the role of comity in anti-foreign-suit injunctions,[332] and others expressed concern that *Goss*'s ruling could encourage other foreign states to adopt clawback statutes,[333] the Supreme Court denied both petitions on June 23, 2008.[334]

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federal jurisdiction and international comity . . . ."), *and Karaha Bodas* Petition, *supra* note 162, at 14 ("The Second Circuit's decision . . . squarely conflicts with the Eighth Circuit's decision in *Goss* . . . ."), *with* Brief in Opposition at 9, Goss Int'l. Corp. v. Tokyo Kikai Seisakusho, 554 U.S. 917 (2008) (No. 07-618), 2008 WL 140494, at *9 ("[T]he Eighth and Second Circuits . . . simply reached different conclusions as they applied similar standards to vastly different facts."), *and Karaha Bodas* Opposition, *supra* note 145, at 3 ("[N]one of the . . . circuit splits [petitioner] alleges is ripe for review by this Court on the facts of this case.").

326. Brief for United States as Amicus Curiae in Opposition to Certiorari at 16, *Goss*, 554 U.S. 917 (No. 07-618), 2008 WL 2185728, at *16 (arguing that the Eighth Circuit's "analysis was flawed in several respects" yet the "nature of the dispute counsels against further review").

327. *See* Brief for the States of Oregon and New Hampshire as Amici Curiae in Support of Petition for Writ of Certiorari, *Goss*, 554 U.S. 917 (No. 07-618), 2007 WL 4377583; Brief for Law Professors, *supra* note 135.

328. Brief for United States in *Karaha Bodas*, *supra* note 145.

329. Brief of the Republic of Indonesia as Amicus Curiae in Support of Petitioner, PT Pertamina v. Karaha Bodas Co., 554 U.S. 929 (2008) (No. 07-619), 2007 WL 4350777.

330. *See id.* at 2 ("Unless vacated, the Second Circuit's decision implicates the United States in a breach of its obligations owed to the Republic [of Indonesia] under the [New York] Convention and international law generally.").

331. *See id.* at 4.

332. *See* Kotuby, *supra* note 24.

333. *See* Nelson, *supra* note 24, at 5 ("The Eighth Circuit's decision allowing a litigant to completely claw back a final U.S. judgment . . . could encourage similar clawback legislation abroad with respect to a wide range of U.S. laws found objectionable in other countries.").

334. *See* Goss Int'l. Corp. v. Tokyo Kikai Seisakusho, 554 U.S. 917 (2008); *Karaha Bodas*, 554 U.S. 929.

D. Aftermath

1. *Goss*: Government Intervention and Settlement

While certiorari was pending in *Goss*, TKS proceeded with its litigation in the Japanese courts under the Special Measures law.[335] In response, members of the U.S. government began to pressure Japan and TKS to terminate the proceedings.[336] By October 2008, State Department officials were engaged in talks with Japanese officials in Tokyo and Washington, D.C., and various senators voiced their opposition to the actions of TKS and Japan.[337]

In March 2009, Senators Judd Gregg and Jeanne Shaheen of New Hampshire, where Goss had substantial operations and many employees, introduced two pieces of legislation.[338] The first bill would have nullified any retaliatory action taken by Japanese courts.[339] The second bill would have subjected TKS to a special duty to be collected by the U.S. Customs and Border Protection.[340] Senator Gregg stated:

> It is critical for Goss International, its workers in New Hampshire, and for anyone who believes in fair trade, that foreign companies which have broken our trade laws be brought to justice. TKS has committed fraud against the government, has been found guilty in our courts, and has been ordered to pay over $30 million in damages. TKS should not be allowed to escape punishment, and the Japanese government should not be allowed to nullify this penalty through retaliatory acts that are solely intended to subvert our rule of law.[341]

Legislation proved unnecessary, however, since on September 2, 2009 Goss and TKS reached a settlement.[342] TKS dismissed its action in Japan[343] and Goss agreed not to pursue judicial or legislative action in the United States.[344] After more than a decade of litigation, the dispute finally came to an end.[345]

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335. *See* Denis Paiste, *U.S. Urges Japan on Goss Dispute*, N.H. UNION LEADER, Oct. 23, 2008, at B6.

336. *See id.*

337. *See id.*

338. Press Release, Senator Jeanne Shaheen, Gregg and Shaheen Introduce Two Bills to Support Goss International in Trade Dispute (Mar. 12, 2009), http://shaheen.senate.gov/news/press/release/?id=5cdb5dfd-e4c9-4cec-ad40-e71ee240c46c.

339. *See id.*

340. *See id.*

341. *Id.*

342. *See Goss, Japanese Firm Settle Years-Long Legal Battle*, N.H. BUS. REV., Sept. 11, 2009, at 18.

343. *See id.*

344. *See* Robert M. Cook, *Goss, Japanese Firm Settles Multimillion Dollar Law Suit*, FOSTER'S DAILY DEMOCRAT (Sept. 3, 2009), http://fosters.com/apps/pbcs.dll/article?AID=/20090903/GJBUSINESS_01/709039659.

345. *See Goss, Japanese Firm Settle Years-Long Legal Battle*, *supra* note 342.

2. *Karaha Bodas*: An Effective Injunction

While awaiting the Supreme Court's decision on certiorari, Pertamina complied with the Second Circuit's decision and voluntarily dismissed its Cayman Islands suit on October 11, 2007, a month after the *Karaha Bodas* decision.[346] Subsequently, Pertamina apparently decided to cut its losses and accepted the unfavorable arbitral award. In 2009, Pertamina announced that it would be continuing the geothermal project at Karaha Bodas—without KBC, of course.[347]

III. HEEDING DAEDALUS'S WARNING: COURTS SHOULD REFRAIN FROM ISSUING POST-SATISFACTION ANTI-FOREIGN-SUIT INJUNCTIONS

This part contends that just as Daedalus warned his son Icarus not to fly too close to the sun, federal courts should ordinarily observe the limits of subject matter jurisdiction and international comity, and refrain from granting post-satisfaction anti-foreign-suit injunctions. Part III first contends that the restrictive rule for post-satisfaction ancillary jurisdiction is correct and accordingly, neither the *Goss* nor *Karaha Bodas* courts possessed ancillary jurisdiction to issue an anti-foreign-suit injunction. This part next argues that even if there was jurisdiction, a post-satisfaction anti-foreign-suit injunction in *Goss* would have been improper as a matter of comity because the satisfaction of judgment fundamentally shifts the balance of interests between the U.S. court and the foreign forum. Nonetheless, the arbitration context presented in *Karaha Bodas* may present an exception to the general rule against post-satisfaction anti-foreign-suit injunctions. Finally, Part III suggests that the executive and legislative branches can and should play a greater role in adopting diplomatic solutions to multi-forum litigation affecting the sovereignty of foreign states.

A. Federal Courts Generally Lack Ancillary Jurisdiction to Issue Post-satisfaction Anti-suit Injunctions

On the question of post-satisfaction ancillary jurisdiction, the permissive rule enjoys the support of the Second Circuit, the United States government, and the states of Oregon and New Hampshire; the Eighth Circuit stands alone in its support of the restrictive rule.[348] Nonetheless, the restrictive rule, which prevents courts from exercising post-satisfaction jurisdiction except when necessary to enforce the strict terms of a final order or when the court has expressly retained jurisdiction, is the correct standard.

The restrictive rule best interprets the holdings of the Supreme Court while recognizing the limited scope of federal subject matter jurisdiction.

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346. PT Pertmamina (Persero) v. Karaha Bodas Co. (Cayman Islands Grand Ct., Oct. 11, 2007), *available at* http://www.caymanjudicial-legalinfo.ky/judgments/Cayman-Islands-Law-Reports/Cases/CILR2008/CILR08N001.aspx.

347. *Government to Resume Karaha Bodas Power Project*, JAKARTA POST (Apr. 3, 2009), http://www.thejakartapost.com/news/2009/04/03/govt-resume-karaha-bodas-power-project.html.

348. *See supra* notes 326–27 and accompanying text.

In *Kokkonen*, the Supreme Court held that courts must narrowly interpret the scope of ancillary jurisdiction.[349] In that case, the district court dismissed claims with prejudice when the parties had reached a settlement.[350] Because the terms of the settlement were not included in the dismissal order and the court did not retain jurisdiction, the Supreme Court held that the district court lacked subject matter jurisdiction to consider a claim arising out of an alleged breach of the settlement agreement.[351] Although it is obvious that the breach of a settlement is to some extent related to the initial action, the Court construed the first action very narrowly and relied on the limited nature of the final order.[352] Similarly, in *Peacock*, the Court held that a claim to collect from a corporate officer was not sufficiently related to the initial claim producing a judgment against the corporation.[353]

The Supreme Court's very strict and narrow analysis of the nexus between subsequent claims and the initial action makes sense in light of the codification of the two purposes of ancillary jurisdiction. Federal courts may exercise jurisdiction over related claims and parties under 28 U.S.C. § 1367, while various Federal Rules of Civil Procedure give courts power to effectuate and modify their judgments.[354] *Kokkonen* and *Peacock* show reluctance on the part of the Supreme Court to extend ancillary jurisdiction beyond those situations that statutes or rules already authorize.[355] Instead, a federal court may only exercise ancillary jurisdiction when the court expressly retains jurisdiction over subsequent disputes or when the subsequent claim is strictly necessary for the court to enforce the terms of its final order.[356]

Applying the restrictive rule to *Goss* and *Karaha Bodas*, neither of the district courts had ancillary jurisdiction to grant a post-satisfaction anti-suit injunction. While the motions for anti-suit injunctions were to some degree related to the initial action, the defendants had fully complied with the relief granted in the court's order by paying the plaintiff a sum of money.[357] Consequently, the subsequent motions for anti-suit injunctions were no more closely related to the initial actions than the breach-of-settlement claim in *Kokkonen*.[358]

While the proponents of the permissive rule rely on other Supreme Court precedents, these cases are distinguishable. *Pacific Railroad* is inapposite because in that case the parties sought subsequent relief based on an allegation that the initial judgment was induced by fraud.[359] Rule 60 of the

349. *See supra* Part I.C.4.b.
350. *See supra* notes 163–65 and accompanying text.
351. *See supra* notes 165–67, 169–71 and accompanying text.
352. *See supra* notes 169–71 and accompanying text.
353. *See supra* notes 172–80 and accompanying text.
354. *See supra* notes 131–33, 136–37, 179–80 and accompanying text.
355. *See supra* notes 179–80 and accompanying text.
356. *See supra* note 171 and accompanying text.
357. *See supra* notes 235, 276 and accompanying text.
358. *See supra* notes 164–71 and accompanying text.
359. *See supra* note 143 and accompanying text.

Federal Rules of Civil Procedure, however, expressly authorizes such an action.[360] Consequently, *Pacific Railroad* only supports a codified and uncontroversial variety of post-satisfaction jurisdiction.

Dietzsch is also distinguishable because it involved an anti-suit injunction against a party that was in strict non-compliance with a federal court order.[361] By trying to collect on the replevin bond in state court, the losing party in *Dietzsch* directly imperiled and flouted the federal court's adjudication of the disputed property.[362]

Finally, *Dugas* does not support the permissive rule because in that case the court expressly retained jurisdiction over subsequent disputes in its final order and had explicit statutory authorization for its exercise of post-satisfaction subject matter jurisdiction.[363] Since the restrictive rule allows for post-satisfaction ancillary jurisdiction under such circumstances,[364] *Dugas* is entirely consistent with the narrower approach.

The restrictive rule is also sound as a matter of policy because it supports the constitutional design establishing federal courts as courts of limited subject matter jurisdiction.[365] The Constitution sought to reserve plenary judicial power to state courts.[366] Accordingly, parties are not left without a remedy if they are blocked from federal court since they may be able to bring their claims in state court. In addition, if a federal court wants to permanently prevent a party from pursuing litigation in other countries, it can include a permanent injunction as part of its final order or retain jurisdiction over any subsequent disputes between parties.[367] Finally, if Congress determines that the restrictive rule unnecessarily restricts federal courts' ancillary jurisdiction, it can pass a statute or approve a new Federal Rule of Civil Procedure adopting the permissive rule.

It is important to reiterate that the absence of ancillary jurisdiction does not preclude federal courts from issuing anti-foreign-suit injunctions when they have original jurisdiction. For example, the appellees in *Karaha Bodas* contended that the New York Convention gave federal courts original jurisdiction to issue a wide range of equitable relief related to arbitral awards.[368] While the merits of this argument are beyond the scope of this Note, such a statutory grant of original jurisdiction would obviate the need for ancillary jurisdiction.

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360. *See supra* note 144.
361. *See supra* notes 145–51, 297 and accompanying text.
362. *See supra* notes 149–51 and accompanying text (discussing *Dietzsch*); *see also supra* note 170 and accompanying text (describing *Kokkonen*'s focus on whether the party to be enjoined flouted or imperiled the final disposition of the case).
363. *See supra* note 158 and accompanying text.
364. *See supra* note 171 and accompanying text.
365. *See supra* notes 119–20 and accompanying text.
366. *See supra* note 120.
367. *See supra* note 171 and accompanying text.
368. *See supra* notes 288–90 and accompanying text.

B. Post-satisfaction Anti-foreign-suit Injunctions Are Ordinarily Inconsistent with International Comity

1. Comity Is Especially Important when a Foreign Forum Would Not Apply Res Judicata or Collateral Estoppel to a U.S. Judgment

While the Eighth Circuit reached the correct conclusion on comity, it sidestepped the main inquiry.[369] The court claimed that it should give special weight to comity because the Japanese lawsuit under the clawback statute was technically litigation over a new and different issue.[370] This analysis is unconvincing, however. While the Japanese action was technically litigation under a different statute, the purpose of the Japanese lawsuit was to litigate the same issue as the action in Iowa, namely, whether TKS should be liable for a violation of the Anti-Dumping Act.[371]

It is possible, however, to cast this argument differently. The Eighth Circuit may have been suggesting that it would not be proper for it to determine the proper res judicata value that the Japanese court should give a U.S. judgment. Once TKS paid the judgment in the U.S., any further injunction would have prevented Japan from applying its own laws and making its own determination on res judicata and collateral estoppel.[372] Comity would be superfluous if it only applied when a foreign country would apply the same legal standards as U.S. courts. As a doctrine designed in part to protect the dignity and interests of other sovereigns,[373] comity seems to be especially implicated when foreign sovereigns have intentionally adopted policies contrary to those of the United States.

2. The Satisfaction of Judgment Shifts the Balance of Domestic and Foreign Interests

While U.S. courts must take into account the policy objectives of foreign sovereigns, federal courts also have an obligation to advance the policies of the United States and to adjudicate the disputes before them.[374] For this reason, courts have held that comity becomes less relevant once a court reaches judgment and, under such circumstances, U.S. courts should be more willing to enforce judgments by issuing anti-foreign-suit injunctions.[375]

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369. *See supra* Part II.A.3.

370. *See supra* notes 252–53 and accompanying text.

371. *See supra* notes 226–27 and accompanying text (noting that Japan passed the statute under the belief that Congress's merely prospective repeal of the Anti-Dumping Act breached the United States' WTO obligations).

372. *See supra* notes 252–53 and accompanying text; *see also* Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 366 (8th Cir. 2007) ("Our consideration of international comity must allow the Japanese courts, in the first instance, to determine the enforceability of the Special Measures Law, which will undoubtedly involve application of Japanese precedent and domestic policy, and the Japanese courts' own consideration of international comity.").

373. *See supra* notes 183–88 and accompanying text.

374. *See supra* note 65.

375. *See supra* notes 69–70 and accompanying text.

However, once a party satisfies judgment the comity analysis should shift. In such situations, the losing party has fully complied with the federal court's order, the winning party has been made whole, and the court has successfully vindicated and enforced United States law. The U.S. court's only interest in the dispute is to protect the permanence of the judgment. While this is a valid interest, it cannot and should not overcome the interests of a foreign court that wants the opportunity to apply its own laws to the dispute and advance its own policies. As the Supreme Court noted in *Pimentel*, "There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause."[376]

In *Goss*, Japan had a strong interest in protecting its nationals from a judgment that it believed to be in violation of WTO obligations.[377] In *Karaha Bodas*, the Cayman Islands had an interest in resolving a dispute involving KBC, a limited liability company organized under its laws.[378] In addition, both the Eighth and the Second Circuits follow the conservative approach to anti-foreign-suit injunctions, under which anti-foreign-suit injunctions are only permitted when domestic interests outweigh the comity interests of the foreign forum.[379] Once judgment is satisfied, the balance of interests shifts decidedly in favor of the foreign forum.

3. An Anti-foreign-suit Injunction May Have Been Justified in *Karaha Bodas*

Although an examination of international comity should ordinarily prevent courts from issuing post-satisfaction anti-foreign-suit injunctions, *Karaha Bodas* may be an exception to the rule. In that case, Pertamina sought to nullify the arbitral award through unceasing litigation in several different countries.[380] Pertamina's highly vexatious behavior and its consistent record of failure gave the Second Circuit good reason for concern. While an injunction may have been inappropriate if Pertamina had brought an action in Indonesia—given that country's strong interest in adjudicating a dispute involving a state-run company—the Cayman Islands was entitled to considerably less deference.[381] The Cayman Islands' interest was limited to a generic interest in applying its laws to disputes involving its citizens. While such a broad, generalized interest may often be enough to preclude an anti-foreign-suit injunction, it should not outweigh countervailing comity concerns in *Karaha Bodas* where KBC

376. Republic of the Philippines v. Pimentel, 553 U.S. 851, 866 (2008); *see also supra* note 187 and accompanying text.
377. *See supra* notes 226–27 and accompanying text.
378. *See supra* note 257 and accompanying text.
379. *See supra* notes 195–203 and accompanying text.
380. *See supra* note 272 and accompanying text.
381. *See supra* notes 321–23 and accompanying text.

sought to confirm and enforce a foreign arbitral award under the New York Convention.[382]

The New York Convention is a mechanism designed to further comity by establishing a regime for the confirmation of foreign arbitral awards.[383] Under the New York Convention, only the courts of the state where the arbitration took place may nullify the award.[384] Thus, in protecting the fruits of the arbitral award, the Second Circuit was not only advancing the policies of an international regime grounded in comity, but was also protecting the interests of the courts of Switzerland (the country of arbitration), which had previously refused to nullify the award. [385] These countervailing comity concerns unique to *Karaha Bodas*, may have been strong enough to outweigh the Cayman Islands's limited interest in the litigation.

C. The Executive and Legislative Branches Are Better Equipped to Manage Disputes Implicating the Sovereignty of Foreign States

A court will not necessarily deprive a victorious plaintiff of its judgment if it refuses to grant an anti-foreign-suit injunction against a losing party who seeks to continue litigation in a foreign forum. The aftermath of *Goss* demonstrates just the opposite. There, several senators as well as various executive branch departments intervened and urged Japan to reconsider its application of the clawback statute.[386] In the face of this pressure from the U.S. government, as well as the threat of punitive retaliatory legislation, TKS withdrew the Japanese suit and settled with Goss.[387]

By vacating the anti-foreign-suit injunction, the Eighth Circuit allowed the executive and legislative branches of the U.S. government to use their superior expertise in foreign affairs as well as their wider range of policy-making tools to reach a resolution. Had the Eighth Circuit upheld the injunction, it is unlikely the dispute would have ceased. Given the circumstances, it is possible that Japan may have pursued further retaliatory measures. But since the Eighth Circuit removed itself from the political fray, the other branches of government were able to resolve a complex and difficult situation.

Of course, the aftermath of *Goss* may not be typical. After all, Goss had important allies in the United States government.[388] If the Second Circuit had vacated the anti-suit injunction against Pertamina's suit in the Cayman Islands, KBC may not have had the same support from the government. Nevertheless, it makes more sense both constitutionally and as a matter of policy for courts to defer to the executive and legislative branches when it

382. *See supra* note 323 and accompanying text.
383. *See supra* notes 97–100, 321–23 and accompanying text.
384. *See supra* text accompanying notes 269–70.
385. *See supra* text accompanying notes 269–70.
386. *See supra* notes 336–41 and accompanying text.
387. *See supra* notes 343–45 and accompanying text.
388. *See supra* notes 336–41.

comes to making decisions that will deprive a foreign court of jurisdiction.[389]

CONCLUSION

For federal courts engaged in the often Sisyphean task of managing multi-forum international commercial litigation, anti-foreign-suit injunctions are a powerful measure that can bring finality to a case by effectively stripping foreign courts of jurisdiction over a dispute. Courts must be careful, however, not to trade the fate of Sisyphus for that of Icarus. Like Icarus, who perished when he flew too close to the sun, federal courts exceed the limits of subject matter jurisdiction and international comity when they grant post-satisfaction anti-foreign-suit injunctions. As this Note has argued, a federal court generally lacks ancillary subject matter jurisdiction to issue anti-suit injunctions once judgment has been satisfied. Moreover, considerations of international comity will ordinarily militate against the issuance of anti-foreign-suit injunctions after the satisfaction of judgment. Finally, the executive and legislative branches of the U.S. government should take a larger role in addressing complicated and seemingly endless litigation that creates tension between the United States and foreign governments.

389. *See supra* note 251 and accompanying text.