FORGING FINALITY: SEARCHING FOR A SOLUTION TO THE INTERNATIONAL DOUBLE-SUIT DILEMMA

I. INTRODUCTION

> We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[1]

Justice Burger noted in *The Bremen* majority opinion over twenty years ago what has become today a mere truism. Transnational transfers of goods, services, people, and judicial judgments are now common in the modern global market. Litigants are more frequently seeking remedies in foreign courts, and in this age of transnational investment, losing parties are rarely caught with substantial assets in more than one country.[2]

Executing judgments abroad becomes more difficult when the parties take advantage of the principle of comity and pursue concurrent parallel suits in different forums.[3] In these parallel proceedings the parties reverse their roles as plaintiff and defendant, and the proceedings are often sought by each party in the forum most favorable to its cause of action. The problems caused by these concurrent parallel suits, or "double-suits," arise where one party seeks a negative declaration of liability in a different forum. This situation exists among the states of the United States as well as between independent nations. The problems caused by double-suits include elimination of a plaintiff's relief, breach of comity, inconvenient litigation, and difficulty in preserving the local forum's impor-

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1. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1971).

2. As used in this Note, 'foreign' refers to courts other than those of the nation being discussed.

3. Comity is a procedure by which courts of one state or jurisdiction defer to the laws or judicial decisions of another state or jurisdiction based on mutual respect rather than obligation. BLACK'S LAW DICTIONARY 267 (6th. ed. 1990).

tant public policies.[4] These problems seem to have been largely alleviated within the United States by the federal court rules of procedure.[5]

The Federal Rules of Civil Procedure do not apply to proceedings in foreign courts, however, and thus far, no firm rules beyond the nebulous notion of international comity exist between sovereign nations to promote similar judicial restraint. Hence, when a defendant in a United States civil suit subsequently sues in a foreign court for a declaration of nonliability, an unpredictable and often tenuous judicial dilemma arises. Among United States courts, action or inaction in these cases is governed purely by nonstatutory law. "The law [regulating this situation] is somewhat less developed . . . [which] is somewhat surprising, given the fear that parties embarking on litigation with foreign parties must often have that, unless restrained, their adversaries will take actions that will make ultimate victory pyrrhic."[6]

A declaration of nonliability issued by a foreign court on the same issues involving the same parties as a suit in the United States is a powerful litigation tool: a foreign negative declaratory judgment will form a barrier to any later attempts by the United States plaintiff to secure recognition or enforcement of a contrary United States judgment in the foreign forum.[7] When the defendant's assets are within that foreign forum, a victorious plaintiff from a United States court is left with a hollow judgment and no remedy; the United States court has not protected its litigants and has not protected its judgment.

One of the most harmful effects of foreign declarations of a foreign declaration of nonliability is that this form of individual relief

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4. *See* George A. Bermann, *The Use Of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L. L. 589, 594-599, 606-609 (1990).

5. *See* FED. R. CIV. P. 13(a) (requiring that related claims between the same parties be joined into a single suit as a rule of compulsory counterclaims); 28 U.S.C. § 2201 (1982) (allowing any United States court with proper jurisdiction to declare with the force and effect of a final judgment the rights and other legal relations of any party seeking such a declaration, regardless of whether further remedies are sought); Anti-Injunction Act, 28 U.S.C. § 2283 (1978) (foreclosing from federal courts the equitable power to enjoin state court proceedings except where specifically authorized by Congress or where necessary to preserve its jurisdiction or the effect of its judgments).

6. David Westin & Peter Chrocziel, *Interim Relief Awarded by U.S. and German Courts in Support of Foreign Proceedings*, 28 COLUM. J. TRANSNAT'L L. 723, 723 (1990).

7. *See* Yasuhiro Fujita, *U.S.-Japanese Transactions and Litigation: The* Kansai Iron Works *Case, in* CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 196, 200-201 (John O. Haley ed., 1978).

has the potential to alter trade patterns.[8] "International commerce depends in no small part on the ability of merchants to predict the likely consequences of their conduct in overseas markets. Predictability depends in turn on an atmosphere of cooperation and reciprocity between nations."[9] Savvy businesses will most likely steer away from transactions involving nationals of forums which regularly allow this double-suit tactic. Similarly, businesses in countries which benefit from reciprocal judicial enforcement guarantees with many other nations, as in trading blocs like the European Union (EU), may opt to deal exclusively with those blocs. Loss of international trade and cooperation harms the entire global economy.[10] Particularly in light of strong trading blocks like the EU,[11] all efforts must be made to invite trade outside of and between trading blocks. Impediments such as these protective judicial procedures and the absence of recognition and enforcement of foreign judgments should be eliminated before too many corporations and individuals feel the sting of unsatisfactory legal relief and turn away from those markets.[12]

Although the broad-based consequences of negative declaratory judgments arising in double-suits stem from judicial action, solving the international dilemma should not be left to the judiciary to adjudicate on a case-by-case basis. In the United States, the powers to formulate and regulate foreign policy are given to the legislative and executive branches of our government.[13] Litigants must know they can rely on the dictates of the federal methodology: the judiciary follows the international policy and rationale set by the legislative and executive branches and applies it in each case with consistency.

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8. *See* Gau Shan Co., Ltd. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992) (dissolving a preliminary injunction which would have prevented an American lender from initiating legal action against a Hong Kong borrower in Hong Kong courts).

9. *Id.*

10. *Id.* at 1354.

11. The European Union is moving toward its goal of a united Western Europe by planning for additions to its current 12-nation membership on January 1, 1995. Sweden, Austria, Finland, and possibly Norway will be the newest members since 1986 when Spain and Portugal joined the group, formerly known as the European Community. *Europe Opens Way to Three New Members*, N.Y. TIMES, March 2, 1994, at A11. The addition of all four countries would bring the bloc's population to 375 million. *Id.*

12. *See* Preliminary Document No. 17 for the Attention of the Special Commission of June 1992 on General Affairs and Policy of the Hague Conference on Private International Law, *Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments* 4 (May 1992) (on file with author) [hereinafter *Reflections on a General Convention*].

13. U. S. CONST. art. I, § 8, cls. 3, 10; *id.*, art. II, §§ 2, 3.

The courts alone cannot establish rules which will be binding in other sovereign nations and cannot expect to elicit reciprocity from other courts without an international agreement made by the leaders of foreign nations and our own executive branch.[14] A multilateral agreement, formulated by the executive branch and approved by the Senate, is the only solution which could formalize the notion of comity between nations and assure reciprocity, consistency, predictability, judicial efficiency, and equity between and among international judicial forums.

This Note will argue that the myriad legal problems caused by foreign negative declaratory judgments and the implications these declarations have for international comity can be assuaged only by international cooperation in a convention that commits nations to the elimination of the exercise of negative declaratory judgments. Part II will examine the current international legal situation regarding double-suits from the perspective of United States litigants. Part III explores the response of the EU to the dilemma. The ultimate solution advocated in Part IV is to utilize the structure of a multilateral convention to address the problems raised by preemptive declaratory judgments and double-suits and to improve the current notions of comity. Only this firm multilateral action will successfully and equitably serve litigants who take their judgments abroad for enforcement.

II. THE DOUBLE-SUIT AND JUDICIAL INEFFECTIVENESS

A. Comity and the Parallel Proceeding Rule

The doctrine of comity is pervasive in judicial decisions involving international issues or multinational parties in courts of many countries. It has been noted that "comity is to be preferred to combat."[15] The customary international law principle of comity has

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14. *See* Masaki Bussan Corp. v. Nanta Seimei Col, 1390 HANJI 98, 764 HANTA 98 (Tokyo Dist. Ct., Jan. 29, 1991), *translated in* 35 JAP. ANN. INT'L L. 171. The court in that case, acknowledging the place of the policy-making branches of Japanese government due to the sensitive international factor inherent in transnational double-suits, stated that "In consideration that the present-day huge volume of international transportation and trade is accompanied by a lot of international civil disputes, we have to attach importance to the legislative reasons for the recognition of foreign judgments . . . and the avoidance of double examinations and conflicts of judgments." 35 JAP. ANN. INT'L L. at 174.

15. Hayes Indus., Inc. v. Carribbean Sales Assocs., Inc., 387 F.2d 498, 502 (1st Cir. 1968).

historically been relied upon as an argument for judicial restraint. Comity is the general notion of "friendly dealing[s] between nations at peace,"[16] and as such, it applies not just to the judiciary, but also to the policy-making bodies of the nations. It is not a written law, but a duty:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. . . . it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[17]

United States judicial policy has traditionally been supportive of the notion of comity, presuming its applicability and its necessity to the functioning of the international legal system. One circuit court described the integral nature of this principle as "the mortar which cements together a brick house."[18] However, although United States and foreign courts stress the importance of adhering to this doctrine with vigor, they are deficient at defining comity with any specificity. The inherent difficulty behind following such an amorphous, purely voluntary policy of noninterference with other sovereign forums lies in its character as a "never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith."[19] For the United States, these "fuzzy lines" have been drawn in such a way that final judgments of competent courts in foreign nations are enforced in a generally reciprocal fashion.[20] Although reciprocity is no longer a prerequisite to recognition in the United States,[21] the normal

16. Hilton v. Guyot, 159 U.S. 113, 162 (1895) (Mr. William G. Choate, argument for defendants in error).

17. *Id.* at 163-64.

18. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

19. *See* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982).

20. *See, e.g., Hilton*, 159 U.S. at 166 (determining that a judgment rendered in France against a United States citizen was only *prima facie* evidence in an action brought upon the judgment in the United States because French courts do not recognize the judgments of United States courts as conclusive).

21. *See* Charles L. Rosenzweig et. al., *The Need For Treaties Governing the Recognition and Enforcement of Foreign Country Judgments*, N.Y. STATE BAR ASS'N, COM. & FED. LITIG. SEC. 5 (1991-1992) [hereinafter N.Y. STATE BAR REPORT].

interplay between United States courts and those of other nations still places a predominant emphasis on comity.[22]

A common law doctrine related to comity is the parallel proceeding rule.[23] This rule, like comity, is not found in any statute or treaty, but provides guidance where jurisdictional overlaps occur with foreign courts. The rule is considered well-established by United States case law and is followed consistently, such that "where judgment sought is strictly in personam, both [courts], having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."[24] Because of this principle, United States courts rarely issue restraining injunctions that would prevent litigants from bringing the same suit in foreign courts.[25]

While this policy does serve the fundamental goals of comity by counseling noninterference in the proceedings of other sovereign states, its effectiveness depends upon the soft ground of foreign res judicata. All jurisdictions do not, with any degree of predictability, grant res judicata effect to other nations' judicial judgments.[26] When a victorious plaintiff in a United States court brings the judgment to a foreign jurisdiction to collect from the defendant's assets, the litigant

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22. *But see* Smith Kline & French Lab. Ltd. v. Bloch, [1983] 2 All E.R. 72, 78-79 (Eng. C.A.) (decision of Lord Denning). A British citizen filed suit in the United States, and the defendant petitioned the British court to enjoin the plaintiff from pursuing its pending suit abroad. Lord Denning acknowledged in his opinion that a conflict of jurisdiction existed between the United States and British courts, but caustically noted that comity necessitates that one court give way. He based his decision to uphold the anti-suit injunction in part on his distaste for the United States judicial system and on his belief that the defendant desired to prosecute in the United States for purely selfish reasons: "[a]s a moth is drawn to the light, so is a litigant drawn to the United States." *Id.* at 74.

23. *Laker Airways*, 731 F.2d at 929; GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 319 (2d ed. 1992).

24. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466 (1939). *See also* Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am., 651 F.2d 877, 887 (3d Cir. 1981); *Laker Airways*, 731 F.2d at 926-927; Black & Decker Corp. v. Sanyei Am. Corp., 650 F.Supp. 406, 408 (N.D. Ill. 1986).

25. This doctrine of judicial restraint is hardly absolute, and its application is even less predictable. *See Laker Airways*, 731 F.2d at 931 n.73. United States courts sometimes utilize the tool of anti-foreign suit injunctions in order to protect against the evasion of their judgments, to prevent vexatious litigation, to prevent relitigation of issues abroad, or to protect their own jurisdiction when foreign courts attempt to "carve out exclusive jurisdiction over concurrent actions." *Id.* at 927-28, 930. While these anti-suit injunctions are issued *in personam*, they clearly affect foreign sovereign judicial activity. *See Compagnie des Bauxites*, 651 F.2d at 887. Therefore, they should be issued "only with care and great restraint." Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969).

26. *See* BORN & WESTIN, *supra* note 23, at 337.

has moved into very unsure judicial territory. Regardless of customary international law, if the defendant has sought and gained a negative declaratory judgment in that forum, the United States plaintiff's judgment is worthless.[27] The irony is in the result: claiming preservation of comity principles, United States courts generally refuse or hesitate to issue anti-foreign suit injunctions[28] in order to prevent defendants from pursuing declaratory judgments of nonliability abroad.[29] This hesitancy allows a foreign court to breach comity with the United States at the expense of individual United States plaintiffs. The entire principle of comity has been undermined and the plaintiff ultimately has no means of recovery.

Where foreign jurisdictions issue declaratory judgments of nonliability in favor of a defendant in an American suit,[30] the traditional United States non-response which relies on these common law precepts, maintaining the expectation that or disregarding whether its judgment will be reciprocally upheld abroad, does not best serve the United States plaintiff or the United States courts.

B. United States Courts: Inconsistent Responses to Double-Suit Threats

United States courts currently tend to recognize only two classifications of threats to their jurisdiction: where the basis for jurisdiction is *in rem* or *quasi in rem*, or where the foreign court is not merely exercising parallel jurisdiction, but is attempting to acquire exclusive jurisdiction over the action.[31] The courts have traditionally protected their jurisdiction and the plaintiff's case if either of these situations is proven, even if it has been at the expense of comity.

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27. *See infra* notes 46-54 and accompanying text.

28. An *anti-foreign suit injunction* is the same as an *anti-suit injunction* issued by a foreign court (enjoining a party from filing suit in another jurisdiction), but it describes the judicial action from the perspective of the domestic jurisdiction and specifically enjoins the filing of a suit in a *foreign* jurisdiction.

29. *See supra* note 25.

30. United States courts have also issued declarations of nonliability in highly unique situations which have effectively stymied a foreign plaintiff's case abroad. *See* McDonnell Douglas Corp. v. Islamic Republic of Iran, 591 F. Supp. 293, 295-97, 308 (E.D. Mo. 1984) (involving a contract with the Iranian Air Force and the intervention of the Iranian Revolution in 1978); however, this Note only addresses the situation in which United States plaintiffs are affected by foreign declarations of nonliability.

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

The "role of the judiciary in *any* system [is] the protection of the litigants."[32] The United States judiciary is also expected to protect itself, however, as shown by Article III of the United States Constitution, which grants powers to federal courts which extend to all cases or controversies,[33] and by Congress, which has granted the federal courts the related power to protect their jurisdiction and effectuate their judgments.[34] United States courts have issued anti-foreign suit injunctions for that protective purpose where direct aggressive moves have been made by foreign courts.[35] However, United States courts have generally ignored or have been unaware of the fact that even if their proceedings are concluded without intrusion from a foreign court, their judgments may not be honored due to a double-suit with preemptive effects.[36] They have been mostly concerned about their immediate ability to continue their hearing and render a judgment.[37]

The United States Circuit Courts are currently split regarding the potential detrimental effects of foreign declarations of nonliability as well as the proper weight with which to assess comity.[38] Thus, even when similar balancing tests are applied, each United States court may arrive at different results. Cases which have dealt with this equitable dilemma in United States courts vary greatly and therefore

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32. Richard G. Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229, 231 (1969).

33. U.S. CONST. art. III., § 2, cl. 1.

34. Anti-Injunction Act, *supra* note 5.

35. *See* Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 853, 856 (9th Cir. 1981) (enjoining defendants from prosecuting a claim in Canada on the grounds that the Canadian claim must be pleaded as a compulsory counterclaim to plaintiff's claims in United States court); Terry Kelly, Note, *The Power of a Federal District Court to Enjoin an Action, Grounded on a Compulsory Counterclaim, in the Court of a Foreign Country*, 2 CAN.-AM. L.J. 211 (1984) (discussing *Seattle Totems* case). The court in *Seattle Totems* relied on the general choice of law principle stated in RESTATEMENT (SECOND) OF CONFLICT OF LAWS §122 (1971) that courts will apply their own rules of procedure to the cases before them, 652 F.2d at 853-54.

36. *See, e.g., China Trade,* 837 F.2d at 37 (reversing a district court anti-suit injunction because the possibility that the United States judgment would be unenforceable in Korea was mere speculation and regardless of this, enforcement of the judgment might require relitigation in Korea); Gau Shan Co., Ltd. v. Bankers Trust Co., 956 F.2d 1349, 1356 (reversing a preliminary injunction because Banker Trust's ability to appoint a receiver of its choice for Gau Shan in Hong Kong court, thereby gaining control of Gau Shan, did not threaten the jurisdiction of the United States court, merely Gau Shan's interest in prosecuting the lawsuit).

37. *See, e.g., Gau Shan*, 837 F. 2d at 1356; Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 938.

38. *See Laker Airways,* 731 F.2d at 937-45; *infra* notes 89-91 and accompanying text; *China Trade,* 837 F.2d at 35-37; *infra* notes 39-41 and accompanying text; Mutual Service Casualty Ins. Co. v. Frit Indus., Inc., 805 F. Supp. 919, 922-23 (M.D. Ala. 1992) (upholding one injunction and rejecting two others based in part on the interests of the foreign jurisdictions).

merely contribute to the international confusion surrounding the issue. For example, in *China Trade and Development Corp. v. M.V. Choong Yong*, the Second Circuit reversed a District Court's ruling issuing an anti-foreign suit injunction to enjoin the defendant from prosecuting a parallel action in its home forum of the Republic of Korea.[39] The Court of Appeals in this case did acknowledge that if a foreign court were to effectively usurp the United States court's jurisdiction, or the defendant was seeking to evade its public policies by litigating in a foreign court, an injunction would be necessary.[40] However, it did not find that the Korean litigation, amounting to a suit for negative declaratory judgment, was sufficiently frustrating to its own proceedings to justify the issuance of an anti-suit injunction.[41] Another District Court reached a substantially similar conclusion based on a slightly different set of considerations in the recent case of *Mutual Service Casualty Ins. Co. v. Frit Industries, Inc.*[42] That court focused on the singular fact that a foreign declaratory judgment allows the United States to retain the ability to hear the case.[43] It did not consider the actual effects of that foreign declaration on the authority of a United States judgment abroad.

In contrast to these rationales, foreign declarations of nonliability affecting United States plaintiffs and ultimately the power of the United States courts themselves must be viewed from the perspective of their *effects*. When analogized to the recognized effects of anti-suit injunctions, their potential for causing harm becomes clear. Anti-suit injunctions are correctly understood as

> deny[ing] foreign courts the right to exercise their proper jurisdiction. . . . [and] convey[ing] the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility.[44]

Although foreign declarations of nonliability do not rob United States courts of the opportunity to hear and judge a case, they do strip any resulting judgment of effect in that foreign jurisdiction—the forum in which the defendant most likely holds his or her assets. The result in

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39. 837 F.2d at 34-35, 37.

40. *Id.* at 36-37.

41. *Id.*

42. 805 F. Supp. at 921-25.

43. *See id.* at 924-25; *see also Gau Shan*, 956 F.2d at 1355 (focusing on whether a parallel action in Hong Kong would threaten the jurisdiction of the United States court or cause the important policies of the United States court to be evaded).

44. *Gau Shan*, 956 F.2d at 1355.

both foreign declarations of nonliability and foreign anti-suit injunctions involving a United States plaintiff is the stymieing of that plaintiff's United States suit at one stage in the action.[45]

Despite the existing judicial disagreement on the importance of the effects of foreign declarations of nonliability, once successful plaintiffs attempt to have their judgments enforced, there is no doubt as to the *actual* harmful effects of a foreign court's negative declaratory judgment on the viability of a United States judgment. Cases that arise under these circumstances clearly demonstrate the impotence of United States judgments abroad if prior domestic declaratory judgments of nonliability have been issued by a foreign court.[46] The *Deutsch v. West Coast Machinery Co.* case[47] and the parallel suit filed in Japan for a negative declaratory judgment, *Marubeni America v. Kansai Iron Works*,[48] provide the best illustration of a United States judgment's ineffectuality in the foreign court which has issued a contrary declaration of nonliability. In the United States case, Deutsch sued West Coast Machinery Company, a Washington corporation; Marubeni-Iida ("Marubeni America"), a New York subsidiary of Marubeni-Iida Co., Ltd. in Japan, importer of the defective power press which caused the injury; and Kansai Iron Works, Ltd. ("Kansai"), a Japanese corporation which manufactured the press.[49] Marubeni America filed a cross-claim for indemnification against Kansai.[50] Kansai attempted to have the cross-claim

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45. *See Laker Airways*, 731 F.2d 909 (upholding District Court's injunction against the defendants in order to preserve its own jurisdiction, and interpreting the English court's issuance of a declaratory judgment of nonliability and of anti-suit injunctions as a threat to the United States court's jurisdiction). The history of the *Laker Airways* litigation includes the following cases: Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp 1124 (D.D.C. 1983); British Airways Bd. v. Laker Airways Ltd., [1983] 3 All E.R. 375 (Q.B.); British Airways Bd. v. Laker Airways Ltd., [1984] 3 All E.R. 39 (H.L.). For a more extensive description of the sequence of events in this case, see Bermann, *supra* note 4, at 591-94; Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1043-1046 (1985); *Court Bars Six Airlines Sued by Laker from Seeking Relief from Foreign Forums*, 18 Int'l Trade Rep., Mar. 22, 1983, no. 24, at 989, *available in* LEXIS, BNA Library, INTRAD File (quoting Judge Harold Greene that the British court's acts were a "denigration of American law" and set a "dangerous precedent" with the potential to affect international trade and friendly foreign relations).

46. *See* Marubeni America, Inc. v. Kansai Iron Works, 361 Hanta 127 (Osaka Dist. Ct., Dec. 22, 1977), *translated in* 23 JAP. ANN. INT'L L. 200, 206-07 (1980) [hereinafter *Kansai Iron Works*]; Laker Airways v. British Airways Board, [1984] 3 All E.R. 39; *Laker Airways*, 731 F.2d 909.

47. Deutsch v. West Coast Machinery Co., 497 P.2d 1311 (Wash. 1972).

48. *Kansai Iron Works*, *supra* note 46.

49. 497 P.2d at 1312-13.

50. *Id.* at 1313.

dismissed, but was denied.[51] The parties entered into a settlement agreement totalling $75,000 in damages for the plaintiff in September 1974. Marubeni America then obtained a Washington State court judgment for the settlement amount and attorneys' fees from Kansai.[52] Marubeni America attempted to enforce the United States judgment in Japan because Kansai had no assets in the United States. However, Kansai had instituted an action and received a declaration in December 1974 from the Osaka District Court that it had no obligation to indemnify Marubeni America.[53] Although this action was entered two months *after* the judgment in the United States for indemnification was secured, it was made final before Marubeni America could secure a judgment in Japan for the recognition and enforcement of its United States judgment.[54]

This case demonstrates that United States courts cannot ignore the international community in which they operate. No positive law exists in this heretofore little-known area of transnational litigation to guide United States courts in formulating uniform approaches to their balancing of issues. The unfortunate result is that far too many cases demonstrate the courts' unresponsiveness to this subtle, though effective, legal tactic.

The unpredictability underlying any United States case considering parallel foreign proceedings is only exacerbated by the fact that the default opinion in the United States judiciary favors international comity.[55] A hollow United States judgment issued by a United States court and rendered impotent by a foreign forum neither preserves the principle of comity, nor protects the power of plaintiffs or the court.

This disempowering of the plaintiff's suit seems contrary to the interpretation consistently given to Article III as restricting federal

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51. *Id.* at 1318.

52. Fujita, *supra* note 7, at 197.

53. *Kansai Iron Works, supra* note 46, at 206-07.

54. *Id.* at 202-03, 206-07.

55. Where United States courts are satisfied that foreign proceedings appear to have been conducted in a fair manner, they will not usually admit fact or law to be relitigated in enforcement proceedings and will ordinarily grant recognition and enforce the foreign judgment due to comity. *See, eg.,* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440-41, 444 (3d Cir. 1971), *cert. denied,* 405 U.S. 1017 (1972) (recognizing and enforcing an English judgment without allowing defendants to dispute the law or facts of the case where defendants had refused to appear before the English court with valid jurisdiction which had issued the default judgment).

courts from deciding cases when their judgments will not be executed.[56] A court in these cases is effectively only offering an opinion, not a conclusive resolution.[57] There are some exceptions to this judicial rule of self-restraint,[58] however, "the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect."[59]

In addition, United States courts remain hampered by a paucity of guidance from the legislative and executive branches. These factors combine to form a situation ripe for abuse of judiciaries like United States courts when potential litigants become aware of the possibilities for evasion.

C. Ineffective United States Judicial Tools

Currently, United States courts follow no uniformly accepted course when a case arises posing these international complexities. Courts tend to favor the principles espoused under comity: to refrain from actions which would affect courts of other jurisdictions.[60] However, where a United States court is motivated to address these international problems, it generally has two broad policy options: the anti-foreign suit injunction or the *lis pendens* doctrine.

1. *The Anti-Suit Injunction.* Courts have historically employed the anti-suit injunction as a tool of last resort to protect their own jurisdiction and the claims of their litigants against foreign legal actions like declarations of nonliability.[61] This tactic is invasive, but has nevertheless been employed to prevent the frustration of the forum's public policy, vexatious litigation, removal of a court's jurisdiction, or an offensive outcome.[62] As potent instruments of the

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56. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-241 (1937).

57. *See* Muskrat v. United States, 219 U.S. 346, 362 (1911).

58. These exceptions include boundary disputes, naturalization proceedings, suits determining matrimonial or other status, and similar suits which do not require damage payments or performance of specific acts. *See* Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 263 (1933).

59. *Id.*

60. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

61. *See* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 927; *see also Note, supra* note 45, at 1047-49, 1051.

62. *See,* Unterweser Reederei & GMBH, 428 F.2d 888, 890 (5th Cir. 1970) *aff'd on rehearing en banc,* 446 F.2d 907 (5th Cir. 1971) (per curiam), *vacated on other grounds sub nom;* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Bethell v. Peace, 441 F.2d 495, 498 (5th Cir. 1971) (affirming the issuance of an anti-suit injunction to restrain party from pursuing an action in the Bahamas because it would pose a hardship of expense and vexatious foreign

destruction of international comity, however, the use of anti-suit injunctions is cautioned against even in situations satisfying these criteria.[63]

Motions for anti-suit injunctions are granted most frequently when "an action is pending in one court and the defendant seeks, or the plaintiff fears the defendant will seek, declaratory relief on the same issues against the plaintiff in a second forum."[64] Injunctions issued in these cases are largely defensive measures and are directed against private litigants, not foreign courts. However, serious conflicts arise out of their issuance nonetheless because they *effectively* curtail a foreign court's jurisdiction in the process.[65]

Although international anti-suit injunctions have been deemed necessary in certain limited and highly offensive situations[66] such as when a foreign court obstructs a court's jurisdiction, their use and inherent characteristics render them flawed tools of equity.[67] Anti-suit injunctions necessarily impinge upon the principles of international comity which are crucial to successful international relations.[68] These injunctions, while issued *in personam*, directly compromise "the comity which the federal courts owe to courts of other jurisdictions,"[69] and can be interpreted as judicial overreaching.[70] Due to the delicate nature of the injunction, United States courts have attempted to equate the balance of comity and equity according to the facts of the case presented and each court's own view of the proper result.

Concurrent foreign proceedings involving the same issues and parties are not themselves offensive enough to cause a United States

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litigation on the plaintiff). *Cf.* Sperry Rand Corp. v. Sunbeam Corp., 285 F.2d 542, 545 (7th Cir. 1960) (refusing to uphold an injunction against prosecuting a foreign case because the United States case would not dispose of the issues to be litigated in the foreign action and the foreign litigation was neither vexatious nor harassing).

63. *See* Kelly, *supra* note 35, at 213. For a more recent court opinion recognizing this call for judicial restraint, see Gau Shan Co., Ltd. v. Bankers Trust Co., 956 F.2d 1349, 1354 (6th Cir. 1992).

64. Note, *supra* note 45, at 1041; *see, e.g.*, Laker Airways Ltd., v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) (enjoining defendant from commencing suit in England); Cargill, Inc. v. Hartford Accident & Indem. Co., 531 F. Supp. 710 (D. Minn. 1982) (enjoining defendant from proceeding with parallel suit in England).

65. *See Laker Airways*, 731 F.2d at 927.

66. *See id.*

67. *See* Bermann, *supra* note 4, at 589-90.

68. *Id.* at 590.

69. Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969).

70. *See, e.g., id.* at 579 (vacating a district court's summary injunction of a Canadian suit involving a separate, independent foreign patent right).

court to issue an anti-suit injunction.[71] Beyond this basic premise, United States courts also generally agree that factors such as convenience are not, in and of themselves, sufficient to justify breaching international comity.[72] When courts do grant requests for international anti-suit injunctions, their concern largely centers around "the belief that the [foreign] proceedings have as their purpose and will have as their probable effect interference with the local court's own prescriptive and adjudicatory jurisdiction."[73]

Broad criteria for United States courts considering the balance of comity and equity in determining whether anti-suit injunctions are warranted have included the following: whether the parties and issues would be the same in both actions,[74] whether the conclusion of the United States action will terminate the controversy,[75] whether the foreign proceedings would "frustrate" a public policy of the enjoining forum,[76] whether the foreign action will be "vexatious" or "oppressive,"[77] whether the parallel suit would affect the issuing court's jurisdiction,[78] and whether the foreign action would prejudice other equitable concerns.[79] However, even when courts employ similar criteria, they have inevitably arrived at different, and thus, inequitable results.

Cases that involve conflicts between United States federal and state jurisdictions are governed by specific legislation in the Anti-Injunction Statute.[80] This legislation provides some guidance for the use of anti-suit injunctions in cases involving foreign litigants, although Congress has not spoken on the power of federal courts to enjoin parties from initiating or participating in foreign proceed-

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71. *See supra* notes 23-25 and accompanying text.

72. *See, e.g., Laker Airways*, 731 F.2d at 928 (finding that hardship to litigants and the economics of consolidated suits are issues for a *forum non conveniens* motion rather than an anti-suit injunction).

73. Bermann, *supra* note 4, at 623.

74. *See* Western Elec. Co., Inc. v. Milgo Elec. Corp., 450 F. Supp. 835, 837 (S.D. Fla. 1978), *appeal dismissed,* 568 F.2d 1203 (5th Cir. 1978).

75. *See id.*

76. *See* Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 855 (9th Cir. 1981).

77. *See id.*

78. *See id.*

79. *See id.*

80. 28 U.S.C. § 2283 (1978) (denying Article III courts the equitable power to issue injunctions to stay state court proceedings unless specifically authorized by federal legislation or in order to protect its jurisdiction or judgments).

ings.[81] Principles of comity loom behind every court decision with international implications, but these principles are assigned varying weight and used in different ways by each court.

In England, anti-suit injunctions are subject to a comparable restraint necessitating that "an injunction will only be granted where the ends of justice so require."[82] However, where the anti-foreign suit injunction is employed, as in the *Laker Airways* litigation, "[i]t is remarkable that almost all of the modern decisions in England on the exercise of this power concern proceedings in the United States."[83] One British legal scholar describes the United States-British jurisdictional tension as rooted in differences between the methods of each system.[84]

One of the fundamental problems creating tensions between forums is a foreign perception of the United States legal system as one in which a plaintiff can sue for a claim without having to relinquish more than contingent fees and with the expectation of great rewards.[85] The wide divergence in laws in areas such as antitrust and in the exercise of extraterritorial jurisdiction between countries such as the United Kingdom and the United States also contribute to an undercurrent of animosity pervading many cases where these courts have concurrent parallel jurisdiction.[86] While this subtle hostility is clearly present, courts often feel pressure to preface their judicial acts with conciliatory remarks where these actions, "however disguised and indirect," effectively interfere with foreign judicial proceedings.[87] Lord Donaldson of the English Court of Appeal engaged in such fraternal friendliness in one of the *Laker Airways* cases:

> [N]either the English courts nor the English judges entertain any feelings of hostility towards the American antitrust laws or would ever wish to denigrate that or any other American law. Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards. In the context of the United Kingdom and the United

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81. *See Seattle Totems Hockey Club.*, 652 F.2d at 855 n.5.

82. Soc. Nat. Industrielle Aérospatiale v. Lee Kui Jak, [1987] App. Cas. 871, 895-96 (P.C.), [1987] 3 All E.R. 510, 522 (P.C.).

83. Lawrence Collins, *Provisional and Protective Measures in International Litigation, in* ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 1992-III: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 19, 140 (1993).

84. *See id.* at 140-41.

85. *See* British Airways Bd. v. Laker Airways Ltd., [1983] 3 All E.R. 375, 409 (Q.B.).

86. *See* Note, *supra* note 45, at 1046.

87. Collins, *supra* note 83, at 149 (quoting British Airways Bd. v. Laker Airways, Ltd. [1985] AC 58, 95.

> States, this comes naturally and, so far as we are concerned, effortlessly.[88]

Where anti-suit injunctions are considered ultimately necessary, the potential ramifications lie not only in judicial repercussions, but even in political retaliation. The *Laker Airways* litigation is a dramatic example of the extent to which international politics can be intertwined with judicial action through the thread of international comity.[89] The litigation began when the plaintiff company was forced into liquidation by what it claimed was a price competition conspiracy involving other airlines.[90] A series of conflicting actions issued by English and United States courts initiated a flurry of motions which transformed this litigation into a now infamous confusion of declaratory judgments and injunctions issued from one sovereign court to the next. The effect was that all notions of international comity were ignored and potential relief for the plaintiff from some foreign defendants was denied.[91]

Because of their potential for causing problems in international politics, anti-foreign suit injunctions have been avoided at all costs in the United States since the creation of the United States judicial system. As noted in 1849, "[t]he fact . . . that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."[92] British courts have also noted the understanding that jurisdiction must be exercised cautiously in these cases because "it involves interference with the process of the foreign court concerned."[93]

Foreign courts are not entirely without remedy if an anti-suit injunction is issued. They are under no international obligation to recognize a foreign injunction, although they may do so voluntarily out of respect for international comity.[94] The doctrine of comity is pervasive in United States courts, but where strong United States

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88. British Airways Bd. v. Laker Airways, Ltd., 1984 Q.B. 142, 185-86 (English C.A.).

89. *See* Bermann, *supra* note 4, at 608 n.75.

90. *See Laker Airways*, 731 F.2d at 916-17.

91. *See Court Bars Six Airlines Sued by Laker from Seeking Relief From Foreign Forums, supra* note 45.

92. Peck v. Jenness, 48 U.S. (7 How.) 612, 625 (1849).

93. Collins, *supra* note 83, at 141 (quoting South Carolina Insurance Co. v. "De Zeven Provincien N.V." [1987] AC 14, 40 (per Lord Brandon)).

94. *See* Bermann, *supra* note 4, at 607 ("the anti-suit injunction has its own weaknesses-notably the ease with which it can be ignored by the court to which it is directed").

public policies are affected by foreign anti-suit injunctions, courts are unlikely to recognize or enforce these equitable orders.[95] Any foreign court order which prevents the commencement or continuance of a suit in United States courts aims to deprive United States courts of valid, concurrent jurisdiction. In United States courts, as is likely in most foreign forums, this type of offensive order could arguably "be deemed prima facie contrary to public policy."[96] A legitimate violation of an important public policy of a forum is generally sufficient to outweigh interests in preserving international comity; hence, that preemptive foreign order would not be recognized or enforced in the court asked to enforce it.[97]

A final problem with the anti-suit injunction is that courts may counter anti-suit injunctions granted by courts of a different sovereign by ordering anti-anti-suit injunctions. These orders may be issued to prevent a litigant from obtaining an anti-suit injunction from a foreign court as against a party pursuing litigation in the issuing court[98] or to prevent the enforcement of the original anti-suit injunction itself.[99]

This counter-suit maneuver can cause a spate of judicial orders in equity, resulting in "unfettered chaos brought about by unresolvable conflicts of jurisdiction the world over."[100] District Judge Harold Greene's opinion in one of the suite of *Laker Airways* cases clearly voices the offensive effects of these injunctions: "The Court exceedingly regrets that it must issue an injunction in this case. However . . . [t]he lawsuit pending before it was proceeding in its normal course, . . . when the British court, without appropriate regard to principles of comity, proceeded to interfere with that action."[101]

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95. Note, *supra* note 45, at 1054 (discussing obligations of United States courts); *see also Laker Airways*, 731 F.2d at 938 (British anti-suit injunction enjoining plaintiff's action in the United States conflicts with United States public policy, rendering the injunction unenforceable).

96. Note, *supra* note 45, at 1067.

97. *See* Nanus Asia Co. Inc. v. Standard Chartered Bank, [1990] 1 H.K. L.REP. 396, 405-06 (High Ct. 1988) (refusing to recognize a United States anti-suit injunction because the Hong Kong court denied the validity of the injunction's extraterritorial effects in Hong Kong).

98. *Laker Airways*, 731 F.2d at 930-31. The court reasoned that it

> was threatened with a potential *fait accompli* by the appellants which would have virtually eliminated the court's effective jurisdiction over Laker's facially valid claim. . . . Thus, there was nothing improper in the district court's decision to enjoin appellants from seeking to participate in the English proceedings solely designed to rob the court of its jurisdiction.

Id.

99. BORN & WESTIN, *supra* note 23, at 341.

100. *Laker Airways*, 731 F.2d at 941.

101. Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124, 1138 (D.D.C. 1983), *aff'd sub. nom* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir.

There is a real potential for parties to be caught in the middle of resultant "interjurisdictional judicial warfare"[102] without a legal remedy.[103] Inherent in the very nature of an anti-suit injunction is the potential for foreclosure of suits in courts with valid jurisdiction, "[f]or if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."[104] As in *Laker Airways*, plaintiffs' rights and the court's jurisdiction can be neutralized. Defendants can be sheltered from legitimate legal complaints in the crossfire of often reactionary foreign judicial orders.[105]

Thus, anti-suit injunctions are not an adequate remedy to the problems posed by foreign negative declaratory judgments in double-suit litigation. As equitable tools without clear instructions for their application, judicial actions which inherently constitute a breach of comity, and invitations to "in kind" retaliations by other forums, they are highly suspect in their effect. This conclusion is buttressed by the fact that the anti-suit injunctions' sacrifice of comity and inequality of application may have no real benefit because the injunctions lack the international authority necessary to demand recognition and enforcement. The potential costs to litigants and courts involved could even prove to be greater than those of the double-suit litigation itself.

2. *The Lis Pendens Doctrine.* The judicial doctrine of *lis pendens* advocates a positive action of restraint so that courts with valid concurrent jurisdiction do not try the same cases. The theory behind *lis pendens* was stated in *Crosley Corp. v. Hazeltine Corp.*[106] in 1942:

> "In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it." . . . It is of obvious importance to all the litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals.[107]

1984).

102. Bermann, *supra* note 4, at 631.

103. Note, *supra* note 45, at 1048.

104. *See Peck*, 48 U.S. (7 How.) at 625.

105. *See Laker Airways*, 731 F.2d at 930-31.

106. 122 F.2d 925 (3d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942).

107. *Id.* at 929-30 (quoting Smith v. McIver, 22 U.S. (9 Wheat.) 532, 535 (1824) (Marshall, C.J.)).

The courts have a long-held interest in avoiding vexatious and duplicitous litigation for the sake of the parties involved. United States jurisprudence also emphasizes the policies of avoiding economic waste, promoting judicial efficiency, and upholding the notions of comity and final resolution.[108] These concepts are incorporated internationally into the doctrine of *lis pendens* in two ways: (1) the "first-filed" rule espouses an affirmative action by a court in which the proceedings were first filed to enjoin the same proceedings in another court; and (2) the "first-seised" rule advocates a passive stay action of proceedings by any court other than the one which was first seised of the action.[109] The judgment from the first court is then applied as res judicata to the second action.[110]

a. First-Filed Rule. *Lis pendens* has not been applied with regularity by United States courts concerned with similar and concurrent foreign suits. However, where it is utilized by United States courts, it most frequently takes the form of an affirmative injunction of foreign proceedings.[111] Sometimes courts utilize the theory of *lis pendens* to bolster their justification for injunctions against other actions which were in fact filed first: these second courts are unwilling to accept the fact that a prior filing in a foreign court necessitates the second court's automatic stay of exercise of its jurisdiction.[112] Whether or not the court was the one in which the action was first filed, the court makes the decision to issue an injunction after inquiries into the degree of inconvenience, inefficiency, complexity, and delay which would be caused if the court maintained its concurrent jurisdiction.[113]

One of the early United States cases that specifically employed the first-filed doctrine is *Crosley*.[114] The litigation involved a string of suits, including declaratory judgments of nonliability, filed by each party in two different United States District Courts.[115] The Court

108. *See id.* at 930.

109. *See Bermann, supra* note 4, at 610.

110. *Id.* at 609-10.

111. *See Laker Airways*, 731 F.2d at 956 (affirming district court's issuance of a preliminary injunction restraining foreign defendants from participating in foreign actions which would prevent the district court from hearing Laker's claims); *see also* Bermann, *supra* note 4, at 610-11.

112. *See* Bermann, *supra* note 4, at 610-11; *see, e.g., Canadian Filters,* 412 F.2d at 578.

113. *See* Bermann, *supra* note 4, at 611.

114. 122 F.2d 925 (3d Cir. 1941).

115. *Id.* at 926-27.

of Appeals held that in the case of two equal courts, under the same sovereign, which are faced with the same parties and issues, and where the jurisdiction of one court was invoked prior to that of another, the first court abused its discretion if it refused to grant an injunction to prevent or halt the other proceedings.[116] It concluded that as between "courts of equal dignity within the judicial system of a single sovereignty[,] . . . [t]he party who first brings a controversy into a court of competent jurisdiction for adjudication should . . . be free from the vexation of subsequent litigation over the same subject matter."[117] The court cited obvious economic waste, negative effects on the prompt and efficient administration of justice, and public policy as contributing factors to its ultimate decision.[118] The same tactic has been taken in other United States cases and is an established application of the first-filed rule in United States courts.[119]

The affirmative first-filed rule enumerated by the *Crosley* decision and applied there in the case of two equal courts under the same sovereign was extended by *Cargill, Inc. v. Hartford Accident and Indemnity Co.* to a case involving two equal courts under different sovereigns.[120] The court in *Cargill* found that it had concurrent, parallel jurisdiction with an English court hearing a case involving the same parties and issues. The United States District Court adopted the aggressive position of the principle of first-filing. It issued an anti-suit injunction against the defendant to prevent its pursuit of legal actions in the English court which had received initiation motions the same day as had the United States court.[121] The *Cargill* court concluded that parallel proceedings in this case would be so inconvenient and so likely to lead to inconsistent results that restraint of the foreign court's exercise of jurisdiction was necessary.[122] The court stated that a "federal court may, in the exercise of its discretion, control its own proceedings by enjoining parties from bringing proceedings in other courts, including courts of foreign jurisdictions, although this power should be used sparingly."[123] The English action appeared to be a 'pre-emptive strike' against the United States

116. *Id.* at 927, 929.
117. *Id.* at 929-30.
118. *Id.* at 930.
119. *Compagnie des Bauxites de Guinea*, 651 F.2d at 887 n.10 (quoting Triangle Conduit & Cable Co., Inc. v. Nat'l Elec. Prod. Corp., 125 F.2d 1008, 1009 (3d Cir. 1942)).
120. *See* 531 F. Supp. 710, 713-15 (D. Minn. 1982).
121. *Id.* at 715.
122. *Id.*
123. *Id.*

court action, and this latter justification likely caused the court little hesitation in issuing the anti-suit injunction.[124] *Cargill* enumerated criteria for the issuance of an injunction against foreign actions and concluded that when a United States court has first acquired jurisdiction over the issues and parties, "[a]n injunction is in order when adjudication of the same issue in two separate actions will result in unnecessary delay, substantial inconvenience and expense to the parties and witnesses, and where separate adjudications could result in inconsistent rulings or a race to judgment."[125] These factors are substantially similar to those applied in *Crosley* for injunctions issued by and to restrain courts of the same sovereign.[126]

b. First-Seised Rule. The first-seised rule is the jurisprudential mirror image of the affirmative first-filed rule. It is a more passive approach, and is most clearly advanced by the European Community's (EC) Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention).[127] One of the main purposes behind the Brussels Convention is the elimination of concurrent parallel proceedings on the same dispute in different signatory countries.[128]

The Brussels Convention describes which member state has jurisdiction over certain disputes. In Article 21 it mandates that "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall *of its own motion decline jurisdiction* in favour of that court."[129] Where the actions are nearly related, the second court has the discretion to dismiss.[130] If there is a question as to the jurisdiction of the court which was first seised of the dispute, other courts may stay their proceedings until the question is resolved. A court wherein an action

124. Trevor C. Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMP. L. 487, 500 (1987). *See also Bethell*, 441 F.2d at 498 (quoting EHRENZWEIG, CONFLICTS OF LAW 129-30 (1962)).

125. *Cargill*, 531 F.Supp at 715.

126. *See Crosley*, 122 F. 2d at 930.

127. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, arts. 21-23, 1978 O.J. (L 304) 36, 40 [hereinafter Brussels Convention].

128. Westin & Chrocziel, *supra* note 6, at 738.

129. Brussels Convention, *supra* note 127, art. 21, at 40 (emphasis added).

130. Bermann, *supra* note 4, at 610 n.81.

is first filed has the ability to determine its own jurisdictional competence under its own laws.[131]

Articles 21 and 22 of the Brussels Convention, therefore, only mandate that member state courts defer to other member courts in a passive *lis pendens* manner; the Brussels Convention does not grant these courts the power to invoke affirmative actions to halt parallel proceedings.[132] The scope of these articles is limited as well. Where the court first seized is not in a member state, a member state with a parallel proceeding is not required to abide by the Brussels Convention in relation to that proceeding.[133] Also, within the same contracting state, any priority is determined by national law.[134] Where a noncontracting state and a contracting state are involved, national law and any applicable bilateral convention will determine if any priority exists to require or recommend a stay or dismissal of one case.[135] These provisions of the Brussels Convention are functionally effective because they operate within the superstructure of the union. The members are bound together legally, economically, and politically by a complex web of reciprocal and uniform obligations, creating the solidarity that gives the Brussels Convention a workable foundation.[136]

United States courts have been reluctant to follow this passive rule in situations where they have decided concurrent parallel suits are unacceptable. An exception to this jurisprudential trend is *Robinson v. Royal Bank of Canada.*[137] In this case, the Florida District Court of Appeals overturned the Circuit Court's denial of a grant of stay of the United States proceedings. The Florida Circuit Court

131. Westin & Chrocziel, *supra* note 6, at 738 n.57. *See* Case 129/83 Zelger v. Salinitri, 1984 E.C.R. 2397, 2408 (holding that the application of national law is appropriate to determine the point of seizure of a court for the purposes of Article 21).

132. Westin & Chrocziel, *supra* note 6, at 738.

133. *See Reflections on a General Convention, supra* note 12, at 8-10 (describing that no EU country has assumed a duty towards any non-party nation to not recognize or enforce judicial decisions given in another Contracting state against defendants domiciled in the non-party nation).

134. *See* STEPHEN O'MALLEY & ALEXANDER LAYTON, EUROPEAN CIVIL PRACTICE 634 (1989).

135. *See id.* at 634-35.

136. *See* D. LASOK & P.A. STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY 436-37 (1987).

137. 462 So.2d 101, 102 (1985). For other exceptions see Saemann v. Everest & Jennings, Int'l, 343 F.Supp. 457, 461 (N.D. Ill. 1972) (refusal to grant injunction against defendant's pursuit of concurrent suit in England and stay of United States proceedings pending outcome of the litigation in England); and *Canadian Filters*, 412 F.2d at 578-79 (1st Cir. 1969) (vacating district court's grant of injunction concerning Canadian patent suit on the principle of comity).

shared concurrent jurisdiction with a Canadian court in a nearly identical suit which had been filed first in Canada.[138] The Florida District Court of Appeals reasoned that comity counseled that the Circuit Court ought to have declined jurisdiction: "[a] grant of stay is appropriate where two actions are pending simultaneously which involve the same parties and substantially the same causes of action."[139]

Robinson is thus one of a few exceptions to United States judicial action in this area. Largely because *lis pendens* is a purely voluntary and discretionary doctrine in the United States, domestic courts have not often opted to allow foreign proceedings to suffice when they also have valid concurrent jurisdiction and where United States laws are to be applied. United States laws in the area of antitrust, for example, are unique to our judicial system and will not be enforced if the United States courts stay their jurisdiction in favor of a foreign proceeding applying foreign laws.[140]

The *lis pendens* doctrine, like the anti-suit injunction, fails to address all the risks to United States litigants and courts when foreign declarations of nonliability are issued. Within the confines of the trading community of the EU, the doctrine espoused in the Brussels Convention may well work.[141] However, the United States does not share full faith and credit obligations with any other sovereign nation, its domestic laws are not in any way deliberately harmonized to more closely match those of other nations, and there exists no supra-national tribunal reigning supreme over both United States and foreign interpretations of procedure.

Both affirmative and passive *lis pendens* approaches each have their problems: the former due to the breach of comity which is necessitated by its issuance; the latter due to its unsuitability for the judiciary's purpose of upholding and applying United States laws where applicable. Additionally, they both create dilemmas as courts and litigants must guess what action foreign courts or other parties will take to harm a lawsuit. Ultimately, both litigants and United

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138. *Robinson*, 462 So. 2d at 102.

139. *Id.*

140. *See* British Airways v. Laker Airways, [1983] 3 All E.R. 375, 393-95 (denying injunction against antitrust suit in United States District Court because of the uniqueness of United States antitrust laws); British Airways Bd. v. Laker Airways Ltd., [1984] 3 All E.R. 39, 40 (reaffirming the denial of an injunction in *British Airways v. Laker Airways* because the suit was not unconscionable).

141. *See Reflections on a General Convention, supra* note 12, at 8-10.

States laws suffer because the United States courts do not issue preemptive anti-foreign suit injunctions or litigants do not win the race to the courthouse.

Thus, in United States judicial proceedings where a concurrent, parallel action is taking place in a foreign forum, United States courts must rely on general notions of comity for instruction in dealing with international issues. As a result, United States courts usually allow those foreign parallel actions to preempt United States judicial decisions. The courts often do this without closely examining the effects of a negative declaration of liability on their own powers. The current United States judicial treatment has been described as a confusing approach in which procedural and substantive standards are not similar to those of other countries, uniformity is absent among the states, and inconsistent interpretations of common law doctrines by the various courts abound.[142] As a consequence of this confusion, courts' judgments are rendered impotent by contrary foreign judgments and plaintiffs' claims are not relieved with adequate compensation. Solutions to the judicial dilemma created by international double-suits must be sought, and changes must be pursued not only unilaterally within the United States judicial system, but multilaterally among other foreign judicial systems in order to develop a mutual understanding of procedure and effect.[143]

III. THE BRUSSELS CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS

Prior to their accession to the Brussels Convention, the common law in both Ireland and the United Kingdom provided that foreign judgments would act as the basis for their own domestic proceedings if their courts found that the foreign issuing court had proper jurisdiction over the case.[144] The United Kingdom had also relied on its Foreign Judgments (Reciprocal Enforcement) Act of 1933[145] which provided that "a foreign judgment to which a convention concluded by the UK on the mutual recognition and enforcement of

142. *See* David Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 LAW AND POL'Y INT'L BUS., 325, 360 (1987).

143. *See Reflections on a General Convention, supra* note 12, at 2-4.

144. *See* PETER BYRNE, THE EEC CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS 2 (1990).

145. Foreign Judgments (Reciprocal Enforcement) Act, 1933, pt. I, §§I(I), I(3), *reprinted in* 2 HORACE E. REED, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 316-17 app. B (1938).

judgments applied could be enforced simply by registration with the appropriate court" of England, Wales, Scotland, or Northern Ireland.[146]

Finally, they acceded to the European Community's (EC's) Convention of September 27, 1968, on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention),[147] which governed the recognition and enforcement of foreign judgments in the EC member states.[148] The Brussels Convention, Article 55, provides that the Convention will supersede the conventions thereafter listed in that article with respect to the signatory states.[149] As amended after the 1978 Accession Convention, Article 55 includes in its list of superseded treaties those of the United Kingdom which came under the 1933 Foreign Judgments Act.[150]

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146. BYRNE, *supra* note 144, at 3. The United Kingdom had concluded treaties to which this Act applied with France (signed in Paris, January 18, 1934); Belgium (signed in Brussels, May 2, 1934); the Federal Republic of Germany (signed in Bonn, July 14, 1960); Italy (signed in Rome, February 7, 1964, with amending Protocol signed in Rome, July 14, 1970); and the Netherlands (signed at the Hague, November 17, 1967). BYRNE, *supra* note 144, at 3, 171-172. *See also* O'MALLEY & LAYTON, *supra* note 134, at 246-47 (discussing the course of legal proceedings in England and Wales, but noting that the application of the 1933 Act to any of the Contracting States—including all of the nations listed above—of the 1968 Brussels Convention is extremely limited).

147. Denmark, Ireland, and the United Kingdom acceded to the Brussels Convention, *supra* note 127, in the Convention on the Accession of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on Its Interpretation by the Court of Justice, 1978 O.J. (L 304) 1 [hereinafter Accession Convention]. The Brussels Convention entered into force in the United Kingdom on January 1, 1987, and in Ireland on June 1, 1988. *See* BYRNE, *supra* note 144, at ix. Separate, later accession conventions were signed by Greece, Spain, and Portugal. *See id.* at x, 216-18. A parallel convention was signed by the EC member states and the member states of the European Free Trade Association (EFTA)—Austria, Finland, Iceland, Norway, Sweden, and Switzerland—on September 16, 1988. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1980 O.J. (L 319) 9 [hereinafter Lugano Convention]; BYRNE, *supra* note 144, at 8. While differences exist between the Brussels Convention and the Lugano Convention, the ultimate goal of the Lugano Convention is to provide uniformity between all signatory states. *See id.* The Lugano Convention is open to accession by third states. *Id.*

148. *See* Editions Francis Lefebvre, Mémento Pratique, CEE 1991: Juridique Fiscal, Douane, Social, Comptable, at 114-118 (Reconnaissance et exécution des décisions) (1991).

149. Brussels Convention, *supra* note 127, art. 55 at 44 (Article 55 is subject to limiting provisions in Articles 54 and 56).

150. Accession Convention, *supra* note 147, art. 24 at 8 (assuming a misprint in which the Convention mistakenly substitutes "Republic of Italy" for "Federal Republic of Germany" with respect to the treaty signed in Bonn, July 14, 1960). For a description of the implementing process and application of EC laws to Belgium, Germany, France, Italy, the Netherlands, and England, see INSTITUT EUROPÉEN D'ADMINISTRATION PUBLIQUE, L'APPLICATION DU DROIT

More specifically, Articles 25-51 deal broadly with this issue and Article 26 establishes a "full faith and credit"-like recognition provision which operates exclusively between member states.[151] Article 27 enumerates criteria for denying recognition of a judgment.[152]

Similarly open enforcement procedures exist between the member states. Article 31 states that "[a] judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there."[153] However, these favorable intra-EU provisions in the Brussels Convention and similar European Free Trade Association (EFTA) provisions in the Lugano Convention[154] do not in any way open those states to more ready recognition or enforcement of United States judgments.

The EU formulated its approach for the Brussels Convention with many goals in mind.[155] While it would appear logical for this federation of states to look to other federal structures such as the United States for guidance in its approach, in fact the contrary proved true. The EU found little in the American federal system to use as a model:

> [T]he absence of any substantial federal control over choice of law, coupled with the variety of approaches to the matter which may be adopted by State courts, [and] the ease with which judicial jurisdiction may be established, . . . have given rise to a situation in which there is widespread uncertainty, unpredictability, and scope for manipulation.[156]

COMMUNAUTAIRE PAR LES ETATS MEMBRES 15-101 (1985).

151. *See* Brussels Convention, *supra* note 127, arts. 25-51 at 40-43; JOSEPH M. LOOKOFSKY, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION 30 (1992).

152. Brussels Convention, *supra* note 127, art. 27 at 41.

> A judgment shall not be recognized:
>
> 1. if such recognition is contrary to public policy in the State in which recognition is sought;
> 2. where it was given in default of appearance, if the defendant was not duly served . . . ;
> 3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought. . . .

Id.

Article 27 of the Brussels Convention is comparable to provisions of other nations on the subject of recognition and enforcement of foreign judgments. *See, e.g.* Code of Civ. Procedure Japan, 2 EHS Law Bulletin Series: Japan (Eibun-Horei-Sha, Inc.) art. 200, at LA-41 (1992).

153. Brussels Convention, *supra* note 127, art. 31 at 41.

154. *See* Lugano Convention, *supra* note 147, arts. 25-51 at 15-20.

155. See *supra* notes 127-135 and accompanying text.

156. LASOK & STONE, *supra* note 136, at 142.

The United States might instead do well to study the European plan as a model. The Brussels Convention has thus far proved to be a highly workable model, bringing predictability to the judicial process between the EU member states.[157]

The first goal listed in the Preamble to the Brussels Convention asserts the parties' desire to implement Article 220 of the Treaty of Rome.[158] Thus the parties worked to achieve "reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."[159]

The Brussels Convention, although concluded pursuant to Article 220 of the Treaty of Rome,[160] extends far beyond its intended scope. The Convention specifies provisions regarding subjects such as jurisdiction,[161] determinations of domicile,[162] and its relationship to other conventions.[163] Regarding recognition and enforcement of judicial judgments, Title III[164] of the Brussels Convention does "not merely simplify formalities, but define[s] the substantive conditions of, and regulate[s] in detail the procedure for obtaining, recognition and enforcement."[165] Recognition of judgments between the member states is presumed, unless one of a few limited situations exists, such as a violation of the public policy of that enforcing forum, a lack of due process and timely service, or an irreconcilability with another judgment in a dispute between the same parties in the enforcing forum.[166] If the judgment is enforceable in the originating state, it is enforceable (if recognizable) in the other state.[167] Specific enforcement procedures are elaborated in Title III as well.[168]

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157. *See* Preliminary Document No. 19 for the Attention of the Seventeenth Session of the Hague Conference on Private International Law, *Conclusions of the Working Group Meeting on Enforcement of Judgments* 5 (Nov. 1992) (on file with author) [hereinafter *Conclusions on Enforcement of Judgments*].

158. Brussels Convention, *supra* note 127, pmbl. at 36.

159. Treaty Establishing The European Economic Community [EC Treaty], art. 220.

160. *Id.*

161. *See* Brussels Convention, *supra* note 127, arts. 2-24 at 37-40.

162. *See id.*, arts. 52-53 at 44. The Brussels Convention asserts domicile as the primary basis for establishing jurisdiction. *Id.*, art. 2 at 37.

163. *See id.*, arts. 55-59 at 44-45.

164. *See id.*, arts. 25-49 at 40-43.

165. LASOK & STONE, *supra* note 136, at 151.

166. *See* Brussels Convention, *supra* note 127, arts. 26-30 at 41; *see supra* text accompanying notes 151-152.

167. *See* Brussels Convention, *supra* note 127, art. 31 at 41.

168. *See id.* arts. 31-49 at 41-43. For a detailed analysis of Title III of the Brussels Convention, see LASOK & STONE, *supra* note 136, at 287-324.

Mere recognition without enforcement may be obtained according to Article 26 without any additional proceedings.[169] This article is easily comparable to the full faith and credit clause of the United States Constitution,[170] and forms the fulcrum of the EU judicial recognition approach between member states. Article 26 thus guarantees individuals and businesses that, within the EU, "uniformity of substantive and procedural rules and a tribunal recognized as supreme in the interpretation of those rules" provides a degree of safety and predictability not found between the United States and other nations.[171]

The provisions of the Brussels Convention demonstrate that the EC appreciated that

> "a true internal market between [the Member States] will be achieved only if adequate legal protection can be secured. . . . [S]ince the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments."[172]

The Brussels Convention has facilitated free trade between its member states by enabling free recognition and enforcement of judicial judgments within the block. The members recognize the value of uniform policies for giving effect to judgments and for allowing other states to continue with suits filed first in their jurisdictions. Potential litigants are thus reassured that doing business in these states offers predictability and certainty of enforcement not found in most other nations,[173] and are therefore encouraged to engage in transactions within the Community.

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169. Brussels Convention, *supra* note 127, art. 26 at 41. "A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required." *Id.*

170. *See* U.S. CONST. art. IV, §1.

171. Westin, *supra* note 142, at 359-60.

172. Council Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59) 1, 3 (quoting a European Economic Community Commission note of October 22, 1959, inviting member states to commence negotiations on reciprocal recognition and enforcement of judgments and arbitration awards).

173. *See Conclusions on Enforcement of Judgments, supra* note 157, at 3-5 ("With rapidly expanding commercial contacts worldwide, the legal uncertainty, delays and costs caused by the absence of a general enforcement of judgments convention are likely to interfere increasingly with the needs of trade and business. . . . [A convention like the Brussels and Lugano conventions] provides more information and predictability").

In contrast to the Brussels Convention member states, the United States falls easily into the category of other nations that have far less certainty in legal processes when the litigation involves a foreign party. Thus, the framework for "[t]he most serious legal problem" in United States transnational litigation is established: there is no guarantee that United States judgments will be recognized or enforced abroad.[174] This dilemma is in large part due to the fact that the United States is not a party to any multinational convention, such as the Brussels Convention, which ensures judicial enforcement and recognition of foreign judgments as well as regulation of parallel suits.[175]

Customary international law in this area has traditionally been interpreted by United States courts to recommend reciprocal recognition and enforcement of foreign judgments when certain basic principles of due process are met and recognition would not violate public policy.[176] These voluntary and discretionary international principles are no longer enough to protect plaintiffs in United States courts. The United States needs to take steps to secure a stronger position internationally, following the paths of other major trading nations like those in the EU and EFTA, which have firmly committed themselves to a conclusive resolution through binding treaty obligations.

The Brussels Convention has exacerbated the preexisting double-suit dilemma for United States plaintiffs. A judgment issued

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174. *See* Thomas S. Mackey, *Litigation Involving Damages to U.S. Plaintiffs Caused by Private Corporate Japanese Defendants,* 5 TRANSNAT'L LAW 131, 172 (1992) (describing this legal dilemma in the exclusive terms of Japanese-United States transnational legal interaction).

175. Although the United States has not become party to a multinational convention on the recognition and enforcement of foreign judgments, it has signed the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, 2566 [hereinafter New York Convention] (entered into force with respect to the United States of America Dec. 29, 1970) (binding nations to recognize and enforce commercial arbitration agreements in international contracts and to create uniform standards by which agreements to arbitrate are observed and arbitral awards are enforced in the member states). The New York Convention binds over eighty nations. *Reflections on a General Convention, supra* note 12, at 4. Congress has passed the United States Arbitration Act, 9 U.S.C. §§ 201-208, implementing this Convention and the United States has acceded to the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336, 338 (binding regional members to recognize and enforce international arbitration clauses and awards between member states of the Organization of American States and any other state which accedes to the Convention).

176. *See* Hilton v. Guyot, 159 U.S. 113, 202-03, 205-06 (1895) (stating the broad guidelines that United States courts apply at their discretion to determine whether a foreign judgment or award will be recognized or enforced); *see supra* notes 19-21 and accompanying text.

by one of the convention's signatories which would preempt a United States judgment will now be enforced automatically by all the other signatories.[177] This sweeping consequence has the potential to preclude recognition or enforcement of that United States judgment throughout all the Brussels Convention member states.[178] The United States must create a judicial system as effective as that of its trading partners, so that its litigants are not shut out of multinational groups of nations when they seek recognition and enforcement internationally, and so that double-suit effects can be prevented before they arise. In this way, comity is bolstered, litigants are reassured of their positions, and international business is encouraged.

IV. PROPOSAL FOR A NEW MULTILATERAL CONVENTION

The growing number of negative declaratory judgments issued abroad brings urgency to this contemporary judicial issue. At the present time, one

> may well doubt the wisdom of suing an alien in [a] country where he has no assets with which to satisfy the prospective judgment. It may just be simpler, easier and cheaper if from the beginning you sue him in his own country where he has ample assets. There, one battle, though in the enemy's camp, will do. If you choose to sue him first here on your home ground it will take, at least, two battles (the original suit and the enforcement suit), and more likely, three battles (the original suit, counter-suit and enforcement suit).[179]

Unless there is a change in the effectiveness of United States judicial judgments in foreign forums, or the ability of those foreign tribunals to issue declarations of nonliability, it would be unwise and inefficient to sue in United States courts when enforcement will be necessary abroad.

A sweeping, integrative solution must be devised because the problem itself is so far-reaching, the outcomes so difficult to predict, and the potential negative effects so harsh. Many who have ap-

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177. *See* LOOKOFSKY, *supra* note 151, at 30-31; *see also Reflections on a General Convention, supra* note 12, at 4-6 (explaining that the Brussels and Lugano Conventions allow Contracting states to use "exorbitant jurisdictional bases against persons not domiciled in a Contracting State" and "require other Contracting States to recognize and enforce the resulting judgment").

178. The Lugano Convention links the EFTA members to the EC member states in this free movement of judicial decisions. Lugano Convention, *supra* note 147, arts. 26-49, at 15-19. Hence, EFTA nations would also be closed to recognition and enforcement of a United States judicial judgment preempted by a state party to the Brussels Convention.

179. Fujita, *supra* note 7, at 200.

proached the dilemma have focused narrowly on one or only a few aspects of the problem and have thus advocated equally limited solutions. For example, a recommendation that "American courts should diligently . . . [dismiss] suits that are more properly tried in other countries," in hopes that "the courts of other countries follow suit,"[180] will not rectify the inconsistent treatment given to double-suits by United States and foreign courts, nor will it establish reliable recognition standards between nations. By maintaining the status quo without harmonizing our procedural standards with those of other nations, the United States courts will merely hold the line. That 'solution' is not good enough.

A case-by-case balancing of the interests at stake is also not the appropriate mechanism for determining the proper approach in these cases. First, while case law has announced various criteria and has suggested factors to incorporate into any judicial decision regarding the issuance of an anti-foreign suit injunction, "lower courts have taken a variety of . . . divergent approaches [which] have had the undesirable effect of treating similarly situated foreign litigants in unpredictable, disparate ways."[181] Cases like *Laker Airways*, *China Trade*, *Mutual Service*, and *Gau Shan* demonstrate that regardless of the similarity of the formula, the courts arrive at consistently inconsistent results.[182]

Second, the types of cases in which these problems arise are sometimes properly classified as involving a "political question" more properly left to the other branches of the United States government.[183] American jurisprudence has long cautioned against courts' consideration of political questions,[184] and it is well settled that the executive and legislative branches of our federal government are

180. Teresa D. Baer, Note, *Injunctions Against the Prosecution of Litigation Abroad: Towards a Transnational Approach*, 37 STAN. L. REV. 155, 186.

181. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 43 (1987).

182. *See supra* notes 35-44 and accompanying text.

183. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (involving the act of state doctrine, under which United States courts are traditionally precluded from questioning the validity of public acts that a recognized foreign sovereign power committed within its own borders); *see generally* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (discussing the role of the courts in deciding political questions).

184. *See* LOUIS HENKIN, FOREIGN AFFAIRS AN THE CONSTITUTION 205, 208-216 (1972); *see also* Baker v. Carr, 369 U.S. 186, 198, 203-04 (1962) (holding that courts should not render decisions on "political questions").

unquestionably in charge of the foreign affairs power.[185] The result is great judicial hesitancy to progress in any one direction without guidance from the political branches.[186]

Finally, the executive and legislative branches have left the courts alone and unguided in this territory thus far. There is no specific provision in the Constitution, no domestic law, and no treaty law which the courts could apply to arrive at uniform procedures with certainty. Diplomacy exercised in individual cases, though not widely utilized at present, has been proposed as an alternative to the judicial abyss created by the lack of political guidance.[187] This approach, however, is unfortunately as tenuous as the current approach of the courts given the considerable amount of political energy, time, and expense required of the executive branch for each litigation. It is likely that this solution would be effective in a few extraordinary cases, perhaps of the magnitude of the *Laker Airways* litigation, and would not be initiated to assist with the majority of international double-suits.

An international convention securing the cooperation of other nations in resolving this dispute is crucial. United States courts cannot act unilaterally on this issue with any success: "a comprehensive, integrated solution ... cannot, however, be achieved by individual legal orders acting independently."[188] Currently, a State Department initiative to devise a multilateral convention on the recognition and enforcement of foreign judgments is being considered by the Hague Conference on Private International Law;[189] a resolu-

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185. *See* U.S. CONST. art. I, § 8, cls. 3, 10; U.S. CONST., art. II, §§ 2,3; HENKIN, *supra* note 184, at 205. *But see* U.S. CONST., art. III, §2, cl. 2 (granting the Supreme Court original jurisdiction in cases affecting ambassadors, ministers, consuls, and where a state shall be a party).

186. *See* HENKIN, *supra* note 184, at 208-16.

187. *See* Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 581-88 (1983).

188. *See* United States Delegation to the Special Commission on General Affairs and Policy of the Hague Conference on Private International Law, Working Document No. 1, *Considerations in Connection with the United States Proposal for Hague Conference Preparation of a Convention on the Recognition and Enforcement of Judgments* 1 (June 1, 1992) (on file with author) (explaining the inefficiency of purely legal, non-integrative solutions by courts to alleviate the problem of recognition and enforcement) [hereinafter United States Proposal].

189. *See* Final Act of the Seventeenth Session of the Hague Conference on Private International Law 17 (May 29, 1993) (Decision b2). The special commission on general affairs and policy of the Hague Conference will likely meet to take up this charge late in 1995 or early in 1996 and will tender its recommendations to the full Hague Conference in 1996 at the 18th session. *See* Memorandum from Peter H. Pfund, Assistant Legal Advisor for Private International Law, U.S. Department of State, to the members of Study Group on Judgments of the Secretary of State's Advisory Committee on Private International Law 1 (July 1, 1993) (copy

tion in support of the initiative was recently approved by the American Bar Association (ABA) House of Delegates.[190] The goal of such a convention would be to facilitate the recognition and enforcement of judicial proceedings in other sovereign tribunals and to remove current inequities in the system.[191] These kinds of sweeping convention mandates would provide for the acceptance of foreign judgments without interfering with domestic judicial proceedings on recognition and enforcement.[192]

Concluding an international convention on recognition and enforcement which will encompass the topic of double-suits and aggressive judicial action will be a difficult task. Historically, lawmaking in the United States demonstrates that recurring themes of "unilateralism, a preference for national over international uniformity, impatience, and penuriousness" have pervaded any United States attempts to form binding international commitments.[193] Our legal institutions have appeared much more ready to respond to domestic political and social needs than to any international crisis.[194] These tendencies have contributed to the limitations on cooperation and dialogue between the United States and other nations which have resulted in relatively few efforts in the area of harmonizing international civil litigation.[195]

However, some developments indicate a gradual increase in United States readiness to cooperate internationally, and thus, an increase in the likelihood that a convention of this nature is possible. United States participation in the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards,[196] the Hague Service[197] and Evidence[198] Conventions, and unilateral

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on file with author) [hereinafter Memorandum on Private International Law].

190. Anthony E. DiResta, *Resolution Urges International Pact on Judgments*, 19 LITIG. NEWS, No. 1, Oct. 1993, at 3.

191. *See id.*

192. *See Conclusions on Enforcement of Judgments, supra* note 157, at 3-5.

193. *See* Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law For International Civil Litigation*, 57 LAW. & CONTEMP. PROBS. (forthcoming Summer 1994, No. 3) (manuscript at 3-4, on file with *Law and Contemporary Problems*).

194. *See id.* (manuscript at 6).

195. *See id.* (manuscript at 4-48) (discussing lawmaking approaches and institutions in historical context); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for The Hague Conference?*, 57 LAW & CONTEMP. PROBS. (forthcoming Summer 1994, No. 3) (manuscript at 5-6, on file with *Law and Contemporary Problems*).

196. New York Convention, *supra* note 175, at 2517, 2566.

197. Multilateral Service Abroad of Judicial and Extrajudicial Documents, *done* Nov. 15, 1965, *entered into force* Feb. 10, 1969, 20 U.S.T. 361, 372.

modifications to the Federal Rules of Civil Procedure[199] demonstrate the viability of multilateral agreements in private international law and the United States government's increasing recognition of the need to engage in dialogue and meaningful international cooperative efforts in this area.

Addressing concerns over the United States judicial treatment of the few already existing treaties in the area of private international law is appropriate before trusting in the success of another convention with an even broader sweep. For example, the Hague Service Convention is not consistently interpreted with the same amount of respect accorded a federal statute.[200] Also, the Hague Evidence Convention has not been interpreted by the Supreme Court to be the exclusive means for obtaining discovery abroad.[201] Optimistically, these problems can be attributed to poor and imprecise drafting. Thus, it does not necessarily follow that future conventions will fall victim to contrary or inconsistent judicial interpretations. At least one commentator believes that many of these problems stem from the speed with which conventions have been concluded, noting that there is "not sufficient time for the process of mutual education necessary for informed cooperation"[202] to expect the terms to sufficiently meet the needs of all the parties. With greater attention to these concerns and with proper drafting and domestic implementation, there is no reason to predict that future treaties in international law to which the United States is a party, will fail.

Recent proposals to build on existing treaties should be noted before analyzing new treaties that would involve the United States as a party. Proposals to further modify the Federal Rules of Civil Procedure have been offered to bolster the effects of the Hague

198. Multilateral Taking of Evidence Abroad, *opened for signature* Mar. 18, 1970, *entered into force with respect to the United States of America* Oct. 7, 1972, 23 U.S.T. 2555, 2556.

199. FOURTH ANNUAL REPORT OF THE COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE, H.R. Doc. No. 88, 88th Cong., 1st Sess. 9-10 (1963); *see also* Burbank, *supra* note 193, (manuscript at 15-19) (discussing changes in Rules 4(i), 28(b), 44, and 44.1 of the Federal Rules of Civil Procedure).

200. *See* Stephen B. Burbank, *The World In Our Courts*, 89 MICH. L. REV. 1456, 1478-80 (1991) (book review) (discussing Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988)).

201. Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. S.D. Iowa, 482 U.S. 522, 533-40 (1987).

202. Burbank, *supra* note 193, (manuscript at 46-47).

Service and Evidence Conventions,[203] but these modest efforts have been met with much criticism and have not yet materialized.[204]

The thrust has thus been shifted to a new multilateral attempt at harmonizing private international law via a convention on the recognition and enforcement of foreign judgments.[205] The discussion surrounding this proposed convention is a useful parallel to the consideration of a multilateral convention regulating the use of negative declaratory judgments and anti-suit injunctions in international double-suits. It also offers the option of incorporating the regulations advocated in this Note with this proposed convention.

The proposal for a convention on recognition and enforcement, initiated by the United States delegation to the June 1992 meeting of the Special Commission on General Affairs and Policy of the Hague Conference on Private International Law (Commission), materialized only after much deliberation surrounding the decision on the best international structure to implement a proposal. The United States State Department had been considering direct negotiations with the EU and EFTA member states on the subject—a seemingly daunting task whereby the United States, on its own, would have faced the block of Brussels and Lugano Convention countries[206]—and finally settled on the Commission as a more appropriate forum to address international recognition and enforcement.[207]

The United States has many reasons to desire the results that only such a multilateral convention could yield, but especially because other countries give less recognition to United States judgments than the United States courts give to foreign judgments.[208] A multilateral treaty, rather than a series of bilateral treaties, is necessary because "[g]enerations would be required for the United States to negotiate on a bilateral basis a reasonably comprehensive judgments regime"

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203. *See* Letter from Charles Platto, Chairman, International Litigation Committee of the International Bar Association, to the Honorable James E. Macklin, Jr., Secretary, Committee on Rules of Practice and Procedure (Mar. 14, 1990) (photocopy on file with author).

204. *See, e.g.*, Memorandum from Lawrence Collins, Partner, Herbert Smith Solicitors, (Apr. 2, 1990) (photocopy on file with author) (responding with strong dissent to the letter written on behalf of the International Litigation Committee of the International Bar Association which supported proposed amendments to the Fed. Rules of Civ. Proc., Rules 4 and 26); *see also* Gary Born, *Fishing for Trouble in Foreign Depths*, LEGAL TIMES, week of Apr. 8, 1991, at 29, 29.

205. Von Mehren, *supra* note 195 (manuscript at 1-5).

206. *Id.* (manuscript at 25-29).

207. *See Conclusions on Enforcement of Judgments, supra* note 157, at 3-5; *Reflections on a General Convention, supra* note 12, at 16-18.

208. *See* von Mehren, *supra* note 195, (manuscript at 18-19); *see also Reflections on a General Convention, supra* note 12, at 4-6.

and because a scheme of bilateral treaties would have to be based on a relatively strict model so that the purpose of uniformity between nations is not ultimately undermined.[209]

Provisions parallel to those of the Brussels Convention would be more likely to result in quick agreement and implementation with convention members. However, modifications to those terms will be necessary in order to integrate the United States into any agreement with the European trading block members, because the United States is "less closely linked economically, geographically, and politically" than are those nations.[210] A successful convention should parallel the Brussels and Lugano Conventions because "[p]arallelism will . . . facilitate uniformity in commercial practices and promote understanding of jurisdiction and recognition problems."[211] A convention with such similar terms would, at conception, possess greater legitimacy and a resulting likelihood of treaty success.[212] The multilateral convention could thus offer the uniformity, predictability, and simplicity sought by the contracting judicial systems and their litigants.[213]

The issues dealt with in this Note, specifically the international treatment of parallel, concurrent suits, could be addressed within the broader structure of a convention on the recognition and enforcement of foreign judgments. The recently proposed convention, however, is not the only possible alternative for confronting these issues. A more narrow convention, loosely based on the Brussels Convention's Articles 21-24, also has the potential to succeed.[214] Because the Brussels Convention does not yet address the aspect of the double-suit dilemma whereby a signatory state and a nonsignatory state are in conflict, Brussels Convention member states (including the Lugano signatories) should be favorably disposed to concluding a uniform agreement with other nations, particularly an agreement which is modeled in some form on their own provisions.

It is beyond the scope of this Note to explore the specific provisions of such a proposed document; however, it is worthwhile to

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209. *See* von Mehren, *supra* note 195, (manuscript at 22).

210. *Id.* (manuscript at 5).

211. *Id.* (manuscript at 41-42); *cf.* Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. (forthcoming Summer 1994, No. 3) (discussing substantive issues which should be included in a new convention on the recognition and enforcement of judgments).

212. *See* N.Y. STATE BAR REPORT, *supra* note 21, at 2-3.

213. *See* United States Proposal, *supra* note 188, at 3.

214. *See supra* notes 127-34 and accompanying text.

consider the underlying goals and broad provisions which ought to be addressed by such a convention. Initially, the United States should seek as many willing signatories as possible, looking first to its major trading partners. The block of EU and EFTA nations should become involved since the proposed convention will largely parallel many of their own already existing convention provisions, and the double-suit dilemma often arises between the United States and members of that bloc. Thus, the Hague may again be a good structure for the convention.[215]

The convention should require that the United States and other signatories abandon the discretionary, ad hoc approach currently employed to dispose of international cases caught in this awkward situation. The provisions should rest on other existing conventions such as those requiring service of process, a concept "closely tied—not only to the *lis pendens* idea—but also to the broader conception of jurisdiction: a court can hardly be competent to decide the rights of a defendant who has not received proper notice of the action against him."[216]

The race to the courthouse to choose the forum in which an action will be heard should be tempered by a provision regulating the use and abuse of preemptive strikes. One way to achieve this is by establishing a presumption against the use of declaratory judgments of nonliability. Negative declaratory judgments should be prohibited except where they are absolutely necessary as a final alternative and where they are the least offensive means to enforce domestic laws. That situation will most often occur where one forum is issuing an anti-foreign suit injunction that ultimately threatens the jurisdiction of another sovereign tribunal. This latter judicial tool should be abandoned in conjunction with the declaratory judgment of nonliability. Without a comprehensive measure of control, one judicial mechanism could exist without the counter-mechanism to control its application and the Convention would prove to be ineffective. If all signatories agree to simultaneously limit the use of both negative declaratory judgments and anti-suit injunctions, neither measure will be needed in any but the most extreme circumstances. When tribunals do utilize their remaining discretion and employ one of these measures, they will be risking condemnation by other signatories if their use is not wholly justified by one of the above-

215. *See supra* notes 206-207 and accompanying text.
216. LOOKOFSKY, *supra* note 151, at 92.

mentioned situations. A system in which neither of these tools is employed with regularity will contribute to the preservation of the integrity of judicial judgments. Consequently, the ability of courts to apply and enforce domestic laws for the foreign defendants over whom they have valid *in personam* jurisdiction will be strengthened.

Problems necessarily arise with this proposal. The greatest potential difficulty is highlighted by an assessment of other countries' positions on this subject. United States courts rarely if ever issue declaratory judgments of nonliability.[217] Although they have issued anti-foreign suit injunctions, it has most often been in instances where the courts have been threatened by these declarations of nonliability from a foreign jurisdiction. Foreign jurisdictions are more likely to make declarations of nonliability, and thus have the leverage in the negotiations. In the context of a broader convention which would address judicial measures like negative declaratory judgments as an aspect of the larger problem of recognition and enforcement, there exists the similar perception that the United States has more to gain than other states whose judgments are largely enforced by United States courts. The other states must be reminded that a convention would benefit all Hague Conference Member States and other states in Eastern Europe.[218] Because it is essential to secure commitments to abstain from these practices by the foreign nations which most frequently utilize such tactics, the foreign parties must perceive some tangible gain from the United States.

United States negotiators need to search for sufficient bargaining chips to offer other nations. For example, they should weigh carefully the real value to our judiciary of such practices as "tag" service to gain jurisdiction over potential defendants.[219] "Tag" service and other similar United States judicial methods are perceived by most other nations as "exorbitant" exercises of jurisdiction and are practices many countries would be glad to see the United States forego.[220] A multilateral agreement clarifying judicially acceptable

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217. One example of the rare exception to this statement is McDonnell Douglas Corp. v. Islamic Rep. of Iran, 591 F. Supp. 293 (E.D. Mo. 1984). However, this case is a unique exception involving an unusual and temporary international political situation requiring preemptive judicial action.

218. Memorandum on Private International Law, supra note 189, at 2.

219. "Tag service" premises jurisdiction to adjudication solely on the fact that the defendant was served in the forum state. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990).

220. The subject of "tag" jurisdiction was raised in the Working Group Meeting on enforcement of judgments, and listed as one ground for jurisdiction which may be excluded. *Conclusions on Enforcement of Judgments, supra* note 157, at 11.

activities could be formulated to benefit all nations, for "all sovereign states . . . [do] have a substantial interest in regulating the progress of litigation in [their] own courts."[221]

United States courts exist to uphold and enforce the laws of the United States and to protect the litigants who come before them. They have an interest in protecting their jurisdiction and the force of their subsequent judgments. Inconsistency due to lack of understanding about the full ramifications of foreign declarations has caused divergent case resolutions ranging from the issuance of offensive anti-suit injunctions to the lack of any action taken with regard to foreign proceedings for negative declarations. Reliance on comity and judicial interest balancing has proven ineffective for United States courts. An international understanding must be reached to achieve the reciprocity now absent in the international arena.

V. CONCLUSION

The time has come for the United States to take affirmative steps toward merging with other foreign jurisdictions in these key areas of international civil procedure.[222] The proposal for a multilateral convention on the recognition and enforcement of foreign judgments could provide the framework into which provisions regulating the use of declaratory judgments of nonliability and its counterpart, the anti-foreign suit injunction, could be incorporated. A convention which addresses only the limited issues involved in double-suits may prove to be more successful and less offensive to United States judicial policy, however, and should be considered as a valid alternative.

Perhaps with ingenuity and a willingness to bargain on the part of all nations concerned, the United States can succeed in forging a multilateral convention to halt these offensive judicial practices. Such a multilateral approach, creating uniformity of substantive and procedural rules and enforcement mechanisms, should "in itself be sufficient to provide certainty and efficiency to those in international business."[223] In conjunction with an encouraged, though not mandated, principle of passive *lis pendens* and the prohibition of anti-suit

221. United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985).

222. While this Note does propose that the United States initiate a multinational effort to stem international double-suits, it does not premise this position on solely nationalistic motivations. The international double-suit harms litigants and tribunals irrespective of the country concerned; their regulation should be an international judicial priority.

223. Westin, *supra* note 142, at 360.

injunctions except in the most extreme circumstances, declaratory judgments of nonliability should rarely, if ever, be necessary.

Courts and their litigants will benefit from clearly defined international rules which neutralize differing cultural, legal, and economic expectations and create a more uniform judicial system to encourage effective business and trade. Any further confusion about judicial recognition and authority in foreign tribunals will only further "disserve[] the goals of fairness, sound judicial administration, and friendly international relations."[224] An effective, yet focused multilateral convention controlling the use of offensive judicial weapons like the anti-suit injunction and the negative declaratory judgment would serve the common interest of all sovereign tribunals.

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224. Born, *supra* note 181, at 1.