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International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States and Japan

Yoshimasa Furuta

INTERNATIONAL PARALLEL LITIGATION: DISPOSITION OF DUPLICATIVE CIVIL PROCEEDINGS IN THE UNITED STATES AND JAPAN

Yoshimasa Furuta†

Abstract: Although duplicative proceedings involve various negative effects, if motivated by legitimate reasons, parallel litigation may be justified. Therefore, regulation of international parallel litigation should be based on a close examination of the legitimacy of the litigants' motives, which should then be balanced against negative effects. In this comparative study of the parallel litigation practice in the United States and Japan, the contrast between the two countries is attributed to the underlying differences in each country's social and legal traditions. Despite the differences in their practice, however, each legal system offers a model that may be successfully adopted by the other for fair and efficient international parallel litigation practice.

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† Associate, Anderson Mōri, Tokyo. Foreign attorney, Whitman Breed Abbott & Morgan, New York. This article is based on the author's LL.M. paper, which received Harvard Law School's 1995 Addison Brown Prize. The author appreciates the invaluable comments and inspiration from Professors Anne-Marie Slaughter, Hideyuki Kobayashi, Kazunori Ishiguro, and Masato Dōgauchi. The author is also indebted to Messrs. Yoshihisa Hayakawa and Ryo Shimanami for their research assistance and Ms. Amy Satin for her editorial assistance.

I. INTRODUCTION

The recent expansion of transnational economic activities has given rise to an increasing number of international business disputes. Not infrequently, international business disputes fall in the adjudicatory jurisdiction of multiple nations or jurisdictions,[1] where parties find themselves litigating overlapping issues in multiple forums.

International parallel litigation consists of the virtually same disputes being litigated simultaneously in courts of multiple jurisdictions, one in a domestic court and the other in a foreign court.[2] The international parallel litigation practice is under substantive development, and the rules are changing rapidly. Yet there is no one authoritative organization or comprehensive set of international conventions, rules, or practices regarding international parallel litigation. Instead, each jurisdiction imposes its own rules and practices that tend to restrict parallel litigation.

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[1] *See* Israel Leshem, Forum Non Conveniens and Beyond: Judicial Intervention in the Choice of Forum in Multinational Litigation 275 (1985) (unpublished S.J.D. dissertation, Harvard Law School) ("[T]he trend has been for quite some time in the direction of expanding the available forums for plaintiffs to sue in."). In *Gau Shan*, the Sixth Circuit pointed out that "[t]he modern era is one of world economic interdependence, and economic interdependence requires cooperation and comity between nations. In an increasingly international market, commercial transactions involving players from multiple nations have become commonplace. Every one of these transactions presents the possibility of concurrent jurisdiction in the courts of the nations of the parties involved concerning any dispute arising in the transaction." Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354 (6th Cir. 1992).

[2] *See, e.g.*, Interstate Material Corp. v. Chicago, 847 F.2d 1285, 1288 (7th Cir. 1988) ("[S]uit is 'parallel' when substantially the same parties are litigating substantially the same issues in another forum."), *quoting* Calvert Fire Ins. Co. v. American Mutual Reinsurance Co., 600 F.2d 1228, 1229 n.1 (7th Cir. 1979).

As a threshold matter, one might ask why parallel litigation should be restricted. Those advocating restriction cite three undesirable effects: financial burden, waste of judicial resources, and contradictory judgments.

First, the parties are forced to bear the added costs in bringing multiple proceedings in different courts.[3] The burden will be especially onerous on an individual plaintiff bringing a tort action in her home forum under a contingent fee arrangement. If she has to defend a mirror image declaratory action in a foreign forum, she would be forced to bear a great financial burden she probably cannot afford, and eventually she may be forced to abandon her claim. Second, parallel litigation consumes judicial resources in multiple jurisdictions. Docket congestion and resulting delays are a major problem in most jurisdictions.[4] Further, when both litigations reach final judgments, there is no assurance that such judgments will be consistent with each other.[5] The practical inconvenience of this is especially intolerable in domestic relations matters, such as divorce litigation. Thus, there are good reasons for restricting parallel litigation.[6]

Under certain circumstances, however, litigants may have legitimate motivations that can justify a parallel litigation. It is the thesis of this article that regulation of parallel litigation should consist of balancing the undesirable effects against the extent of the legitimacy of the motivations,[7] and that a fair balancing can occur only if there is a degree of uniformity in the legal system between the competing foreign courts.

There are a variety of possible ways and devices to facilitate the interest-balancing approach in parallel litigation. As shown below, U.S. and Japanese courts have developed their own frameworks to deal with parallel litigation, both of which were developed under different historical backgrounds.

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3 Allan D. Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11, 16 (1961) ("Reactive litigation with its waste and duplication surely is an anomaly.").

4 Richard D. Freer, *Avoiding Duplicitive Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 811 (1989) ("Relitigating of identical issues wastes scarce judicial resources . . . .").

5 Tetsuya Ōbuchi, International Lis Pendens and Conflict of Judgments 4 (1987) (unpublished LL.M. thesis, Harvard Law School); Takao Sawaki, *Battle of Lawsuit—Lis Pendens in International Relations*, 23 JAPANESE ANN. INT'L L. 17, 20 (1980) ("[T]he double institution of actions might result in a conflict of judgments, which we should endeavor to avoid.").

6 *See* Vestal, *supra* note 3, at 15 ("The policy of the law generally seems to be that all facets of a controversy should be tried in a single action.").

7 *See* Ōbuchi, *supra* note 5, at 69 ("Here, 'legitimate' interest means an interest worth being legally protected, but it does not necessarily mean that this interest alone can justify the foreign *lis pendens*, because we should balance the plaintiff's legitimate interest in initiating the second action with the disadvantages that would be caused by initiating the second action.").

In this comparative study of international parallel litigation practices in the United States and Japan,[8] emphasis will be placed on recent case law, as well as legislative proposals. For each jurisdiction, this article will examine the contrast between the international practice and the respective domestic parallel litigation practice. It will next compare and contrast the U.S. and Japanese practices. This article ends with a discussion of an ideal solution, as well as practical suggestions for establishing a workable framework for regulating parallel litigation.

II. THE NATURE AND PRACTICE OF PARALLEL LITIGATION

Parallel litigations fall under two categories: "repetitive suits"[9] and "reactive suits."[10] In a repetitive suit, the plaintiff in one litigation commences another litigation in a different jurisdiction against the same defendant, seeking the same kind of monetary payment or specific performance. In a reactive suit, the defendant in the first litigation commences the second litigation in another court against the plaintiff in the first litigation, typically seeking a mirror-image declaratory judgment.

In a repetitive suit, the plaintiff institutes parallel litigations in different jurisdictions because (1) the defendant has assets in multiple jurisdictions and the plaintiff wishes to eventually enforce the judgment in all jurisdictions;[11] (2) the plaintiff believes the first litigation is proceeding against her favor, and wishes to recover her disadvantage in the second litigation in a different jurisdiction; (3) the plaintiff intends to harass the defendant;[12] or (4) a combination of the foregoing.

In ordinary repetitive suits, a foreign judgment will be enforced only if another jurisdiction recognizes and enforces it. Where the defendant is in a critical financial condition, it would be too late if the plaintiff first obtains the judgment in one jurisdiction and then proceeds to enforce it in another

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8 For purposes of this article, U.S. practice shall be confined to federal practice only. State practice as such will not be addressed.

9 Michael T. Gibson, *Private Concurrent Litigation in Light of* Younger, Pennzoil, *and* Colorado River, 14 OKLA. CITY U. L. REV. 185, 202-03 (1989); Allan D. Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525, 525 (1960).

10 Gibson, *supra* note 9, at 196; Vestal, *supra* note 3, at 11.

11 Vestal, *supra* note 9, at 527 ("The plaintiff might start another action in a jurisdiction where additional property can be found . . . .").

12 *Id.* at 526 ("It seems apparent that in many instances the plaintiffs have started a number of law suits to harass the defendants. If actions are brought in a number of different jurisdictions, the defendant is forced to hire additional attorneys and spend more time in handling the numerous law suits. Such harassment might tend to force the defendant to settle.").

jurisdiction. In such a case, the plaintiff is justified in instituting the repetitive suit in multiple jurisdictions, where the defendant's assets are located. Similarly, when the assets are located in the jurisdiction where the recognition and enforcement will not be available, or when it is feared that the statute of limitations may run, it is necessary to bring a repetitive suit as a parallel litigation.[13]

In contrast, courts do not readily recognize the need for recovering a disadvantage in the first forum by instituting another suit in a different forum. This is because once the plaintiff makes the mistake in choosing a forum that is not favorable to her cause, resorting to parallel litigation, which places on the defendant the burden of dual defense, will not be justified.[14] Otherwise, the plaintiff would be encouraged to forum shop and to try to obtain an advantage by multiple litigations of the same matter.[15] Similarly, the third concern, that of instituting a parallel litigation to harass the defendant, is not legitimate, as civil litigation should not be a device for harassment.[16]

In a reactive suit, the defendant institutes the second litigation because (1) she thinks the first forum is inadequate, or at least disadvantageous, and wishes to dispute the case in a more favorable forum,[17] (2) she simply intends to place the burden on the plaintiff in anticipation of a favorable settlement of the dispute, or (3) both of the above.

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[13] Ōbuchi, *supra* note 5, at 71-72 ("(1) when the institution of recognition of foreign judgment is not available, the plaintiff may assert a legitimate interest . . . (2) a plaintiff can have a legitimate interest . . . when getting enforcement judgment or their equivalents is very time-consuming or costly."). In *Inoue v. K.K. Korean Air Line*, the Tokyo District Court held that the parallel litigation should be permitted under a certain circumstance because the judgment rendered in one country will not necessarily be enforceable in another country. Interlocutory Judgment of June 23, 1987 (Inoue v. K.K. Korean Air Line), Tokyo District Ct., 1240 HANREI JIHŌ 27, 639 HANREI TAIMUZU 253, *summary English translation in* 31 JAPANESE ANN. INT'L L. 224 (1988).

[14] Hajime Sakai, *Kokusaiteki Nijū Kiso ni kansuru Kaishakuron Kōsatsu* [*Constructive Study Concerning International Duplicative Suit*], 829 HANREI TAIMUZU 39, 42 (1994). *See also* Caspian Invs., Ltd. v. Vicom Holdings, Ltd., 770 F. Supp. 880, 885 (S.D.N.Y. 1991) ("Deference to the suit first filed is particularly appropriate where, as here, the plaintiff itself commenced the original suit.").

[15] RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 147 (2d ed. 1992). *See also* Ōbuchi, *supra* note 5, at 73 ("Usually the plaintiff does enjoy the opportunity to forum-shop. Allowing him to institute the second action results in giving him additional opportunities to forum-shop. Therefore, this opportunity should not be given to the plaintiff of the first litigation without strong reason.").

[16] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 n.15 (1981) (The *forum non conveniens* dismissal "may be warranted where a plaintiff chooses a particular forum in order to harass the defendant or to take advantage of favorable law."). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1981) (lawyers can be disciplined for taking actions designed simply to harass or maliciously injure others).

[17] Vestal, *supra* note 3, at 14 ("By starting a separate action the plaintiff can initiate the action in his choice of courts, where he thinks he will get the most favorable treatment.").

The first concern regarding the adequacy of the forum is considered a legitimate motivation.[18] At the outset of a civil litigation, the plaintiff usually has the choice of selecting the forum. She will select the most favorable forum in terms of the availability of a jury trial, discovery, contingent fee arrangements, conflict of law and other procedural rules, convenience, and costs.[19] Should the first concern regarding the adequacy of the forum be held illegitimate, the defendant will more likely be subjected to the plaintiff's choice of forum. That is, the parties may be compelled to rush into a favorable court before the other party does, rather than negotiating an amicable settlement.[20] In contrast, the second concern of placing the burden on the plaintiff to coerce a favorable settlement is considered illegitimate, since it is not consistent with the principle of a fair resolution of disputes.[21]

III. RULES AND PRACTICES IN U.S. FEDERAL COURTS

A. Parallel Litigation within Federal Courts

Statute does not prohibit parallel proceedings within the U.S. federal courts.[22] There are, however, some statutory and other provisions which may be useful in regulating parallel litigation among federal courts.

First, Federal Rule of Civil Procedure 13(a), addressing compulsory counterclaims, requires a defendant in a federal action to state in a pleading as a counterclaim any claim he may have against the plaintiff which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim.[23] The purpose of this provision is "to prevent multiplicity of

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[18] KAZUNORI ISHIGURO, KOKUSAI MINJI FUNSŌ SHORI NO SHINSŌ [AN IN-DEPTH STUDY OF DISPOSITION OF INTERNATIONAL CIVIL DISPUTES] 101 (1993) (explicitly appreciating this concern).

[19] Ōbuchi, *supra* note 5, at 74-75.

[20] *See* Gibson, *supra* note 9, at 198 ("When both the initiating party and the reacting party have related causes of action against the other, but different preferences as to which court should hear those disputes, the reacting party is merely the party who lost the race to the courthouse.").

[21] Gibson, *supra* note 9, at 196-98 ("The reactive party often is trying to vex or harass the original plaintiff. . . . Reactive litigation generated by these illegitimate motives serves no useful purpose and often creates significant problems.").

[22] As stated above, the scope of this article will be confined to federal practices and will not cover state practices. For parallel litigation among state courts, see generally George T. Conway III, *The Consolidation of Multistate Litigation in States Courts*, 96 YALE L.J. 1099 (1987).

[23] FED. R. CIV. P. 13(a) provides that: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader

actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters."[24]

Second, if a federal court is convinced that another court is a more convenient forum, the federal court can transfer its proceeding to the other federal court.[25] This allows "the consolidation of duplicative or related litigation by transferring related cases to the same federal district."[26]

Third, under the proper circumstances, the judicial panel on multidistrict litigation can transfer a parallel litigation to a single court for coordination or consolidation.[27] Additionally, a federal court may grant a preliminary injunction against suits in other federal courts.[28]

B. Federal-State Parallel Litigation

Within the federal court system, the principal concerns regarding parallel litigation are efficiency, economy, and justice.[29] As outlined in *Colorado River,* the underlying concerns for federal-state parallel litigation

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need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13."

[24] Southern Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962).

[25] 28 U.S.C.A. § 1404(a) (West 1994) provides that: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Although this provision was drafted in accordance with the doctrine of *forum non conveniens*, it was intended to be a revision rather than a codification of the common law. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981).

[26] MARCUS & SHERMAN, *supra* note 15, at 172-73.

[27] 28 U.S.C.A. § 1407(a) (1995) provides that: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of the parties and witnesses, and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded." It should be noted that a transfer under § 1404(a) or § 1407 will be workable only when both proceedings are pending in the federal courts. When parallel litigations are pending in a federal court and a state court, or in a federal court and a foreign court, the federal court cannot transfer the proceeding to the state or foreign court. MARCUS & SHERMAN, *supra* note 15, at 177, 208.

[28] *See, e.g.*, William Gluckin & Co. v. International Playtex Corp., 407 F.2d 177 (2d Cir. 1969); Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572 (Fed. Cir. 1990). Note that "even though the order would be directed toward the parties in effect it acts to restrain the other court and therefore represents an interference with the jurisdiction of another tribunal." 11A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2942, at 58 (2d ed. 1995).

[29] MARCUS & SHERMAN, *supra* note 15, at 148.

are "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[30] However, when both federal and state courts have concurrent jurisdiction over a certain subject matter, and the parallel litigation is pending in the state court, federalism may require the federal court to abstain from exercising jurisdiction.[31]

The abstention rule for the federal court is an exception, not the rule, however, and is appropriate in only three categories: (1) in cases presenting a "federal constitutional issue which might be mooted or presented in a different posture by a state court";[32] (2) in cases presenting "difficult questions of state law bearing on policy problems of substantial public import";[33] and (3) in cases where federal jurisdiction has been invoked to restrain state criminal proceedings.[34]

In contrast to abstention, federal courts can enjoin the state court from proceeding, albeit with significant statutory limitations.[35] The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[36] The Supreme Court confirmed that "the Act is an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act. The Act's purpose is to forestall the

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[30] Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1975). For more detailed analysis of the *Colorado River* decision, see James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049 (1994); David A. Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 TUL. L. REV. 651 (1985). This rationale is equally applicable to the international litigation context. In fact, the Ninth Circuit once reversed the district court's grant of a stay order in deference to the Swiss litigation, finding that "there are no 'exceptional circumstances' justifying the invocation of the *Colorado River* abstention doctrine." The Ninth Circuit specifically observed that "the fact that the parallel proceedings are pending in a foreign jurisdiction rather than in a state court is immaterial. We reject the notion that a federal court owes greater deference to foreign courts than to our own state courts." Neuchatel Swiss Gen. Ins. v. Lufthansa Airlines, 925 F.2d 1193, 1195 (9th Cir. 1991). Nevertheless, in dealing with international parallel litigation, some federal courts are reluctant to rely on the *Colorado River* abstention doctrine. *See, e.g.*, Louise E. Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21, 49 (1992).

[31] MARCUS & SHERMAN, *supra* note 15, at 148, 208.

[32] *Colorado River*, 424 U.S. at 814.

[33] *Id.*

[34] *Id.* at 816.

[35] MARCUS & SHERMAN, *supra* note 15, at 208.

[36] 28 U.S.C.A. § 2283 (1995).

inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court."[37]

C. *Federal-Foreign Parallel Litigation*

When a parallel litigation is pending in a foreign court, a federal court will, in principle, allow the foreign parallel litigation to proceed simultaneously with the federal litigation, unless and until a judgment on the merit is reached in one court.[38] This premise is consistent with the statutory structure concerning domestic parallel litigation, in which the parallel proceedings are not *per se* prohibited. That is, since there is no statute or treaty which explicitly restricts international parallel litigation, it is natural for a federal court to conclude that international parallel litigation is basically permissible.

However, the magnitude of the undesirable effects of parallel litigation, such as the duplication of the litigants' costs, the waste of judicial resources, and the possibility of contradictory judgments, will be greater for international parallel litigation than for domestic parallel litigation. Accordingly, under certain circumstances, federal courts endeavor to restrict international parallel litigation by resorting to *forum non conveniens*, international comity, *lis alibi pendens*, or antisuit injunction.

1. *Forum Non Conveniens*

Under the doctrine of *forum non conveniens*, even when a case falls within its jurisdiction, a federal court may dismiss the case if (1) the court deems itself as a seriously inconvenient forum, and (2) the court is satisfied that an adequate alternative forum exits.[39] In endorsing the doctrine of *forum non conveniens* in *Gulf Oil Corp. v. Gilbert*,[40] the Supreme Court

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[37] Vendo Co. v. Lektro Vend Corp., 433 U.S. 623, 630 (1977).

[38] When the foreign court reaches a judgment on the merit, international comity becomes relevant. *See infra* part III.C.2.

[39] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied.").

[40] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

established the interest-balancing approach, which gives more weight to private interests than to public interests.[41]

In *Gilbert*, the private interest factors to be considered include: (1) the relative access to source of proof; (2) the availability of compulsory process for attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) the possibility of viewing the premises, if this would be appropriate to the action; (5) all other practical problems that make trial of a case easy, expeditious and inexpensive; and (6) the enforceability of a judgment if one is obtained.[42]

Factors of public interest to be weighed are: (1) the administrative difficulties which follow for the courts when litigation is piled up in congested centers instead of being handled at its origin; (2) the burden of jury duty, which ought not to be imposed upon the people of a community which has no relation to the litigation; (3) in cases which touch the affairs of many persons, the desirability of holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only; (4) the interest in having localized controversies decided at home; and (5) the appropriateness of having the trial of a diversity case in the forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of law, and in foreign law itself.[43]

Gilbert dealt with a choice between two U.S. courts. Today, the issue is covered by statutory transfer under 28 U.S.C.A. § 1404(a) (1995). In other words, where more than one federal court is concerned, the *forum non conveniens* dismissal will no longer be an issue.[44] In the context of international litigation, however, the doctrine of *forum non conveniens* is still operative.[45] The Supreme Court dealt with this issue in *Piper Aircraft*,[46] involving an air crash in Scotland.[47] A representative of the Scottish

41 *Id.* at 508 ("If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and one likely to be most pressed, is the private interest of the litigant.").

42 *Id.* at 508.

43 *Id.* at 508-09.

44 *See* 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828, at 278-79 (2d ed. 1986 & Supp. 1995) ("The doctrine of *forum non conveniens* has only a limited continuing vitality in federal courts. If the more convenient forum is another federal court, since 1948 the case can be transferred there under § 1404(a) and there is no need for dismissal.").

45 *Id.* § 3828, at 279-80 ("It is only when the more convenient forum is a foreign country—or perhaps, under rare circumstances, in a state court or a territorial court—that a suit brought in a proper federal venue can be dismissed on grounds of *forum non conveniens*.").

46 Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

47 *Id.* at 238.

victims killed in the accident brought wrongful-death actions in a federal court against Piper Aircraft, a manufacturer of the crashed airplane.[48] Piper Aircraft moved to dismiss on the ground of *forum non conveniens*.[49] The district court relied on the balancing test set forth in *Gilbert*, and found both private and public interest factors strongly pointed toward Scotland as the appropriate forum.[50] The Third Circuit reversed on the ground that (1) the district court abused its discretion in conducting the *Gilbert* analysis, and (2) the dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.[51]

The Supreme Court first found that the Third Circuit "erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum," and held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."[52] As for the appellate review of the *Gilbert* analysis, the Supreme Court formulated a restrictive set of criteria.[53] Based on these criteria, the Supreme Court found that the district court's analysis of the private and public interest factors was reasonable,[54] and, therefore, the Third Circuit has erred in rejecting the district court's *Gilbert* analysis.[55] Thus, the Supreme Court confirmed the legitimacy of the *Gilbert* interest-balancing approach in the international litigation context.

However, *Piper Aircraft* did not involve an international parallel litigation situation and did not address how foreign parallel litigation affects the *forum non conveniens* analysis. Following the *Piper Aircraft* decision, several federal courts addressed the *forum non conveniens* issue in international parallel litigation.

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48 *Id.* at 235.

49 *Id.* at 241.

50 *Id.* at 241-43.

51 *Id.* at 244.

52 *Id.* at 247. Nevertheless, the Tenth Circuit recently held that "*forum non conveniens* is not applicable if American law controls." Rivendell Forest Products v. Canadian Pacific, 2 F.3d 990, 994 (10th Cir. 1993). It might be difficult to reconcile this Rivendell holding with the above cited Piper Aircraft holding.

53 *Piper Aircraft*, 454 U.S. at 257. ("The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.").

54 *Id.* at 257-58.

55 *Id.* at 261.

In *Picaso-Anstalt*,[56] Pierre Cardin, a French individual, sued Shulton, a New Jersey corporation in Paris, seeking, *inter alia,* a declaration that a certain licensing agreement was validly terminated.[57] Three days later, Shulton, joined by its parent corporation, American Cyanamid, instituted a reactive suit in a federal court against Cardin and Picaso-Anstalt, a French foundation related to Cardin, seeking, *inter alia,* a declaration that the licensing agreement was still in force.[58] Picaso and Cardin filed a motion to stay or dismiss.[59]

The federal court noted that "[i]n determining whether or not to grant a motion to dismiss for *forum non conveniens*, the court must first ascertain whether there is an adequate alternative forum in which the suit may be brought."[60] In accordance with *Gilbert* and *Piper Aircraft*, the court then balanced the private and public interest factors.[61] The court concluded that "[w]hile the private interest factors are roughly balanced, the public interest factors are not, with the latter weighing heavily in favor of retention of jurisdiction in this forum."[62] As a result, the court denied the defendants' motion to dismiss.

In *Picaso-Anstalt*, the federal litigation was filed as a reactive suit against the French litigation. Nevertheless, while discussing *forum non conveniens*, especially while balancing the private and public interest factors, the court failed to consider whether Shulton had a legitimate interest in instituting the reactive suit.[63]

In *Herbstein*,[64] Herbstein, a U.S. resident originally from Argentina, sued Bruetman, also a U.S. resident originally from Argentina, in an Argentinean court, seeking *inter alia* his removal as director of a certain venture company in Argentina.[65] Bruetman then sued Herbstein in Argentina, alleging accounting irregularities in the said venture company.[66]

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56 American Cyanamid Co. v. Picaso-Anstalt, 741 F. Supp. 1150 (D.N.J. 1990).

57 *Id.* at 1154.

58 *Id.*

59 *Id.*

60 As the court eventually denied the motion to dismiss on another ground, it was not necessary to ascertain the adequacy of the French court. The court, however, did not ascertain whether the French court is an adequate alternative forum. Instead, the court just *assumed* that the French court is an adequate alternative forum. *Picaso-Anstalt*, 741 F. Supp. at 1156-58.

61 *Id.*

62 *Id.* at 1158.

63 As a matter of fact, the court's *forum non conveniens* analysis never referred to the presence of the French parallel litigation. *Id.*

64 Herbstein v. Bruetman, 743 F. Supp. 184 (S.D.N.Y. 1990).

65 *Id.* at 186.

66 *Id.*

In turn, Herbstein sued Bruetman and other defendants in a federal court, alleging that they misrepresented and defrauded him in funding the said venture company.[67] The defendants moved to dismiss the federal litigation on the grounds of comity or *forum non conveniens,* or to stay the federal litigation pending the litigation in Argentina.[68]

As for *forum non conveniens,* citing *Piper Aircraft* and *Gilbert,* the court first noted that "[t]he plaintiff's choice of forum should only be disturbed if the balance of factors strongly favors the defendants."[69] The court then considered the private and public interest factors set out in *Gilbert,* and concluded that both the private and public interest factors weighed in favor of the plaintiff.[70] The court denied the defendants' motion to dismiss, without addressing whether the Argentine court would be an adequate alternative forum. Moreover, as in *Picaso-Anstalt,* in analyzing *forum non conveniens,* the court did not consider whether Herbstein had a legitimate interest in filing the parallel litigation in the federal court.

In *Jayaraman,*[71] the court paid some attention to the special issues involved in foreign parallel litigation. In this case, Cocoa Merchants Limited ("CML"), a British corporation, sued Jayaraman, a Malaysian business person, in Malaysia, seeking payment of his promissory note.[72] Jayaraman then sued Philipp Brothers, Inc. ("Phibro"), CML's parent and a New York corporation, and Salomon, Phibro's parent and a Delaware corporation, alleging violations of RICO, the Commodity Exchange Act, breaches of fiduciary duties, breaches of contractual obligations, negligence, and infliction of emotional and physical harm.[73] As noted by the court, several of Jayaraman's claims in the federal suit were "strikingly similar to his defenses and counterclaims in the Malaysian action."[74] The defendants filed a motion to dismiss on the ground of *forum non conveniens.*[75]

At the outset, the court noted that it "must first decide whether an adequate alternative forum exists," and found that "Malaysia is an available

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67 *Id.* at 186-87.
68 *Id.* at 185.
69 *Id.* at 188.
70 *Id.* at 189-90.
71 K.R. Jayaraman v. Salomon Inc., No. 87 Civ. 2781 (MJL), 1991 WL 61071, 1991 U.S. Dist. LEXIS 4205 (S.D.N.Y. Apr. 3, 1991).
72 1991 WL 61071 at *3.
73 *Id.* at *1-*3.
74 *Id.*
75 *Id.* at *1.

and adequate alternative forum for this action."[76] Next, relying on *Piper Aircraft* and *Gilbert*, the court balanced the relevant interests and found that "both the private and public interest factors articulated in Gulf Oil [v. Gilbert] weigh in favor of dismissal of this action."[77] The defendants' motion was granted.

As for *forum non conveniens*, the court considered the last element of *Gilbert*'s private-interest factors: "all other practical problems that make trial of a case easy, expeditious and inexpensive."[78] Since the Malaysian parallel litigation was factually related to the federal litigation and some duplication was inevitable, the court held that "the similarities in the claims and the identity of certain important evidence provides an indication that the Malaysian Court is a convenient forum to try these issues."[79] This court, too, did not consider whether Jayaraman had a legitimate interest in filing the reactive suit with the federal court.

2. *International Comity*

In dealing with various aspects of international litigation, the Supreme Court has also relied on the theory of international comity,[80] such as recognition of foreign judgments,[81] enforcement of forum selection or arbitration clauses,[82] and the act of state doctrine.[83] In *Hilton*, the Court defined the concept of "comity" as follows:

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

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76 *Id.* at *4.
77 *Id.* at *4-*8.
78 *Id.* at *7.
79 *Id.*
80 GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 22-26 (1992).
81 Hilton v. Guyot, 159 U.S. 113 (1895).
82 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).
83 First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

> citizens, or of other persons who are under the protection of its laws.[84]

Before the Supreme Court dealt with the issues of comity and international parallel litigation, however, the Eleventh Circuit considered the subject in *Turner*.[85] In that case, Degeto and other German broadcasters filed a declaratory judgment action against Turner in Germany, seeking judicial support for their interpretation of a certain broadcast license agreement.[86] A week later in a state court, Turner filed an instant breach of contract action, which was then removed to a federal court based on diversity.[87] In the federal action, Turner sought an injunction to enjoin the use of certain technology to broadcast licensed works.[88] Degeto countered with a motion to dismiss, or, alternatively, a stay in deference to the parallel proceedings in Germany.[89] However, the district court granted Turner's motion for a preliminary injunction and denied Degeto's motion to dismiss or stay.[90] Degeto appealed.

The German court then rendered a decision on the merits.[91] In view of this development, and citing *Hilton*,[92] the court noted:

> While courts regularly permit parallel proceedings in an American court and a foreign court . . . once a judgment on the merits is reached in one of the cases, as in the German forum in this case, failure to defer to the judgment would have serious implications for the concerns of international comity. For example, the prospect of "dueling courts," conflicting judgments, and attempts to enforce conflicting judgments raise major concerns of international comity.[93]

Accordingly, the Eleventh Circuit granted the stay based on international comity, fairness, and efficiency considerations.[94]

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84 *Hilton*, 159 U.S. at 163-64.
85 Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512 (11th Cir. 1994).
86 *Id.* at 1516.
87 *Id.* at 1517.
88 *Id.* at 1514.
89 *Id.* at 1517.
90 *Id.*
91 *Id.* at 1518.
92 Hilton v. Guyot, 159 U.S. 113 (1895).
93 Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512, 1521 (11th Cir. 1994).
94 *Id.* at 1523.

Note that, unlike *forum non conveniens*, abstention for international comity is limited to cases in which the foreign court has already rendered its judgment.[95] In addition, "comity requires that the parties and issues in both litigations are the same or sufficiently similar, such that the doctrine of *res judicata* can be asserted."[96]

3. *Lis Alibi Pendens*

Lis alibi pendens, meaning "a suit pending elsewhere,"[97] is a common law rule.[98] As such, there is no statutory provision to empower the federal courts to stay their proceedings.[99] The Supreme Court has held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[100] The doctrine allows a federal court to stay its proceeding in favor of a foreign parallel litigation, so that it can "prevent needlessly duplicative discovery and proceedings, thus conserving judicial resources and sparing the parties the expense of pursuing and defending two like actions."[101]

When a federal litigation is stayed, it is anticipated that a foreign parallel litigation shall proceed to a final judgment, which shall be recognized in the United States. Otherwise, the federal litigation will be revived.[102] Thus, stays will not be granted in international litigation when (1) the foreign litigation will not provide a complete resolution of the issues

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95 *See, e.g.*, Herbstein v. Bruetman, 743 F. Supp. 184, 188 (S.D.N.Y. 1990) ("If a judgment is reached first in the foreign court, it can be pled as *res judicata* in the domestic court. Without a final judgment from another court, surrender of jurisdiction is justified only under exceptional circumstances.")

96 *Herbstein*, 743 F. Supp. at 188. In *Boushel v. Toro Co.*, a federal district court stayed the federal litigation after having found that the operative facts supporting the claims in the federal litigation were exactly the same as those in Canadian litigation. The Eighth Circuit dismissed the appeal against the district court's stay order on the ground that the decision of the district court staying the federal litigation is not a final order subject to appellate review. Boushel v. Toro Co., 985 F.2d 406, 410 (8th Cir. 1993).

97 BLACK'S LAW DICTIONARY 931 (6th ed. 1990).

98 BORN & WESTIN, *supra* note 80, at 320.

99 *Id.*

100 Landis v. North Am. Co., 299 U.S. 248, 254 (1936).

101 Heuft Systemtechnik, GmbH v. Videojet Systems Int'l, Inc., No. 93-C0935, 1993 WL 147506, at *3 (N.D. Ill. May 6, 1993). *See also* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1360, at 439 (2d ed. 1990 & Supp. 1995) (Federal courts consider stay motions in an effort to maximize the effective utilization of judicial resources and to minimize the possibility of conflicts between different courts).

102 BORN & WESTIN, *supra* note 80, at 320.

between the parties, or (2) the foreign litigation is still in its preliminary stage.[103]

In granting a stay, the court considers five factors: (1) similarity of parties and issues, (2) promotion of judicial efficiency and economy, (3) adequacy of relief available in the alternative forum, (4) possible prejudice to any party, and (5) the order in which the actions were filed.[104] These factors can overlap with those to be considered in a *forum non conveniens* dismissal. For instance, in *Caspian*, which involved *forum non conveniens*, the court examined the same factors as those involved "in determining whether to grant a stay or a dismissal because of litigation in an overseas forum."[105] Thus, it is not surprising that a motion to dismiss for *forum non conveniens* is often joined by an alternative motion to stay.[106]

In theory, *lis alibi pendens* and *forum non conveniens* should result in entirely different consequences with regard to the disposition of a federal litigation. In a *forum non conveniens* dismissal, the federal litigation is officially terminated, while in a *lis alibi pendens* stay, the federal litigation is temporarily stopped and is supposed to be revived in the future. In practice, however, at least in international parallel litigation, the *lis alibi pendens* stay and the *forum non conveniens* dismissal produce nearly identical results.

First, a *forum non conveniens* dismissal may work as the equivalent of a stay order when a federal court grants a motion to conditionally dismiss.[107] In *Sussman*,[108] for instance, the court granted a conditional dismissal of the federal proceeding, directing that "an agreement signifying the agreement of the defendant and the Government of Israel to these

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103 Herbstein v. Bruetman, 743 F. Supp. 184, 190 (S.D.N.Y. 1990). *See also* Modern Computer Corp. v. Ma, 862 F. Supp. 938, 949 (E.D.N.Y. 1994) ("Because the proceedings in Taiwan will not resolve all of the issues with which this Court has been presented, the defendant's motion to stay is denied.") (citing *Herbstein*).

104 Caspian Invs., Ltd. v. Vicom Holdings, Ltd., 770 F. Supp. 880, 884 (S.D.N.Y. 1991).

105 *Id.* at 884.

106 Teitz, *supra* note 30, at 31. Because of the similar underlying considerations, courts tend to handle a motion to stay as superfluous to the motion to dismiss. In *Picaso-Anstalt*, for example, the court first considered a motion to dismiss on the ground of *forum non conveniens*, and then addressed a motion to stay using the framework developed for the resolution of the motion to dismiss under *forum non conveniens*. American Cyanamid Co. v. Picaso-Anstalt, 741 F. Supp. 1150, 1154 (D.N.J. 1990). In *Caspian*, the court also addressed the stay and the dismissal within the same framework, although it did not specifically identify the *forum non conveniens* issue. *Caspian*, 770 F. Supp. at 884-85.

107 Many courts have imposed various conditions as requirements for granting a dismissal. *See generally* BORN & WESTIN, *supra* note 80, at 316.

108 Sussman v. Bank of Israel, 801 F. Supp. 1068 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993).

conditions be filed with this Court within sixty (60) days of this Opinion. Upon the filing of that agreement, the conditional order of dismissal will be made absolute."[109] Similarly, in *Borden*,[110] while dismissing the federal litigation on the grounds of *forum non conveniens* in deference to a Japanese court, the Second Circuit allowed the plaintiff to reapply for a preliminary injunction in a federal district court, if the Japanese court did not rule on the plaintiff's application for a preliminary injunction within sixty days after the submission.[111]

Second, if a federal court stays its proceeding in deference to a foreign litigation, it is likely that the foreign litigation would eventually reach a final judgment on the merits, which can be pled as *res judicata*. The federal litigation would then be dismissed for international comity, even though it may have been revived from the stay. Here, the stay order has the same consequence as a dismissal.

4. Antisuit injunction

a. Liberal view

Although there is no direct statutory authorization, U.S. courts have never doubted their authority to enjoin parties from proceeding before foreign courts.[112] To issue an antisuit injunction, a court must first ascertain that (1) the parties to both suits are the same and (2) resolution of the case before the enjoining court would be dispositive of the enjoined action.[113]

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109 *Sussman*, 801 F. Supp. at 1079. In the subsequent history, the undertakings which the court had ordered as a condition for dismissal were in fact filed, and as a result the dismissal became absolute. Letter from Angela G. Garcia, Attorney-at-law, Skadden, Arps, Slate, Meagher & Flom, to the author (Mar. 2, 1995) (on file with author).

110 Borden, Inc. v. Meiji Milk Products Co., 919 F.2d 822 (2nd Cir. 1990), *cert. denied*, 500 U.S. 953 (1991).

111 *Id.* at 829.

112 Teresa D. Baer, *Injunctions Against the Prosecution of Litigation Abroad: Towards a Transnational Approach*, 37 STAN. L. REV. 155, 155 (1984). A federal court may also issue an anti-antisuit injunction, which enjoins a party from applying for an antisuit injunction in a foreign litigation. *See, e.g.*, Laker Airways v. Pan Am. World Airways, 559 F. Supp. 1124 (D.D.C. 1983), *aff'd*, 731 F.2d 909 (D.C. Cir. 1984). In addition, when a foreign court has already issued an antisuit injunction against the federal proceeding, the federal court may issue a counter injunction, which restrains a party before the court from enforcing a foreign antisuit injunction. There have been no reported cases in which a federal court actually issued a counter-injunction. *See, e.g.*, James v. Grand Trunk W. R.R., 14 Ill. 2d 356, 152 N.E.2d 858 (1958), *cert. denied*, 358 U.S. 915 (1958).

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

In federal practice, injunctions against state proceedings are significantly restricted by statute.[114] In contrast, there are no statutory restrictions on injunctions against foreign proceedings, and until recently the federal courts granted antisuit injunctions against foreign proceedings in a relatively free manner. For instance, in *Seattle Totems*,[115] the owners of a Seattle hockey team brought a federal antitrust action against the owners of a Vancouver team and other defendants. The owners of the Vancouver team then filed a reactive suit in Canada against the owners of the Seattle team.[116] The central issue in both suits was the validity of a certain agreement.[117] Therefore, the parties and the issues in both litigations were the same and the resolution of one litigation would be dispositive of another.

Under these circumstances, the Ninth Circuit relied upon *Unterweser Reederei*.[118] In *Unterweser Reederi*, the Fifth Circuit noted that a foreign litigation may be enjoined when it will (1) frustrate the policy of the forum issuing the injunction, (2) be vexatious or oppressive, (3) threaten the issuing court's *in rem* or *quasi in rem* jurisdiction, or (4) prejudice other equitable considerations.[119]

Similarly, the Ninth Circuit reasoned that adjudicating the same central issue in two separate actions is likely to result in unnecessary delay, and substantial inconvenience and expense to the parties and witnesses. Moreover, separate adjudications could result in inconsistent rulings or even a race to judgment.[120] Noting that the district court had considered the relevant factors, including "the convenience to the parties and witnesses, the interest of the courts in promoting the efficient administration of justice, and the potential prejudice to one party or the other," and concluding that the equitable balance weighs heavily in favor of the plaintiff, the Ninth Circuit affirmed the district court's grant of an antisuit injunction.[121]

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114 28 U.S.C.A. § 2283 (1995).

115 Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852 (9th Cir. 1981), *cert. denied sub nom.* Northwest Sports Enters., Ltd. v. Seattle Totems Hockey Club, Inc., 457 U.S. 1105 (1982).

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

117 *Id.* at 853-54.

118 *In re* Unterweser Reederei GmbH, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom.* Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

119 *Unterweser Reederei*, 428 F.2d at 890.

120 *Seattle Totems*, 652 F.2d at 856.

121 *Id.*

Another example of the liberal view can be found in *Cargill.*[122] In this federal court case, Cargill, a Minnesota insured, sued Hartford Accident and Indemnity Company ("Hartford") and Federal Insurance Company ("Federal"), seeking recovery under two separate policies of insurance.[123] On the same day, Federal filed a declaratory judgment action against Cargill in England.[124] After denying the Federal's motion to dismiss for *forum non conveniens*, the District Court for the District of Minnesota granted Cargill's motion for an antisuit injunction. The court reasoned that:

> For the reasons stated in the discussion of *forum non conveniens*, the convenience of the parties, as well as the interest of judicial economy, weigh in favor of the issuance of the injunction. It would be vexatious to Cargill and a waste of judicial resources to require adjudication of Federal's liability in two separate forums. Separate adjudication could further prejudice Cargill by the risk of inconsistent results and a possible race to judgment.[125]

It is notable that, in both *Seattle Totems* and *Cargill*, the courts have regarded an antisuit injunction as the opposite of the *forum non conveniens* dismissal by employing an analytical approach, which can be described as the mirror image of the *forum non conveniens* doctrine.[126]

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122 Cargill, Inc. v. Hartford Accident & Indem. Co., 531 F. Supp. 710 (D. Minn. 1982).

123 *Id.* at 712.

124 *Id.* at 713.

125 *Id.* at 715.

126 Under this approach, a denial of a *forum non conveniens* dismissal would automatically result in the granting of an antisuit injunction. This indicates that these courts believe that a litigation should take place only in the most convenient court, and a parallel litigation must also be tried in the most convenient court. This type of analysis pays little attention to international comity concerns. Not only does such an approach present a danger of interfering with foreign judicial sovereignty, but it is also inconsistent with the traditional federal practice, which basically allows for parallel proceedings. In *Gau Shan*, the Sixth Circuit reversed the district court's grant of an antisuit injunction, concluding that "the district court's reasoning, in deciding that this case did not violate the dictates of international comity, is more properly the analysis to be used when considering a motion for dismissal of a case on *forum non conveniens* grounds rather than a motion for a foreign antisuit injunction." Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992).

b. Restrictive view

In recent years, federal courts have tended to restrict the granting of antisuit injunctions. The D.C. Circuit in *Laker*[127] exemplified this restrictive view toward the granting of antisuit injunctions. In that case, Laker, a British air carrier, filed a federal antitrust action against a number of major U.S., British and other European airlines and companies, alleging predatory pricing and other unlawful interferences.[128]

In response, British Airways and some of the other European airlines filed a reactive suit in England, seeking a mirror-image declaratory judgment and an injunction prohibiting Laker from proceeding in the federal antitrust action.[129] The High Court of Justice issued an interlocutory injunction, preventing Laker from taking any action in the federal courts or elsewhere to interfere with the British proceedings.[130] Laker then sought a temporary restraining order from a federal district court to prevent the U.S. defendants from instituting similar preemptive proceedings in England. This was granted immediately.[131]

Laker next filed a similar federal antitrust action against KLM Royal Dutch Airlines and Sabena.[132] The district court granted a preliminary injunction against KLM and Sabena, preventing them from taking any action before a foreign court or governmental authority that would have impaired the district court's jurisdiction over the matters alleged in the complaint.[133] KLM and Sabena appealed.

In affirming the lower court's ruling, the D.C. Circuit confined the purpose of an antisuit injunction to "conserv[ing] the court's ability to reach judgment." Thus, a court would grant an injunction only if a foreign court attempts to "interfere with an *in personam* action before the domestic court" or to "carve out exclusive jurisdiction over concurrent jurisdiction."[134] Moreover, the D.C. Circuit maintained that "parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed

127 Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).
128 *Id.* at 917.
129 *Id.* at 918.
130 *Id.* This antisuit injunction, however, was ultimately vacated by the House of Lords. *See* British Airways Bd. v. Laker Airways, Ltd., [1984] 3 W.L.R. 413, 1985 App. Cas. 58.
131 *Laker*, 731 F.2d at 918.
132 *Id.*
133 *Id.* at 918-19.
134 *Id.* at 929-30.

simultaneously, at least until a judgment is reached in one court, which can then be pled as *res judicata* in the other."[135]

The D.C. Circuit clearly denied the liberal approach employed in *Seattle Totems* and *Cargill* by holding that "the possibility of an 'embarrassing race to judgment' or potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings."[136]

Laker involved an antitrust suit. The U.S. government has shown much policy concern over antitrust suits, and the *Laker* court's affirmation of the antisuit injunction parallels this policy. In ordinary civil cases, however, the *Laker* standard will significantly restrict antisuit injunctions. For example, five years after *Laker*, the D.C. Circuit reversed an antisuit injunction order. *Sea Containers*[137] was a case in which the target of a tender offer sued the tender offeror in a federal court, and the tender offeror sued the target in a Bermuda court. In reversing the district court's issuance of the antisuit injunction against Bermuda litigation, the D.C. Circuit first observed that "even if the Bermuda court reached a decision first, it would not deprive the district court of its jurisdiction over the federal securities issues."[138] It then concluded that "[i]n short, because the Bermuda action poses no threat to the jurisdiction of the district court, it is no basis for the anti-suit injunction here."[139]

Several other circuits have followed the D.C. Circuit. In *China Trade*,[140] for instance, the Second Circuit approved of the D.C. Circuit's restrictive view. In this admiralty action arising out of the wreck of a transport ship and the destruction of soybean cargo, the district court issued a permanent injunction enjoining defendant shipowner from bringing a parallel action in Korea. The court reasoned that the Korean litigation would (1) be vexatious to the plaintiffs, and (2) result in added expense and a race to judgment.[141]

Citing the *Laker* decision and after giving due regard to international comity, the Second Circuit focused on two primary issues: (1) whether the foreign action threatened the jurisdiction of the enjoining forum, and (2) whether strong public policies of the enjoining forum were threatened by

135 *Id.* at 926-27.
136 *Id.* at 928-29.
137 Sea Containers Ltd. v. Stena AB, 890 F.2d 1205 (D.C. Cir. 1989).
138 *Id.* at 1214.
139 *Id.*
140 China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987).
141 *Id.* at 34.

the foreign action.[142] The Second Circuit did not find any threat to the district court's jurisdiction. Moreover, the party seeking to litigate in the foreign tribunal was not attempting to evade any important policy of this forum.[143] Accordingly, the Second Circuit reversed the district court's grant of an antisuit injunction, holding that equity relied upon in granting the antisuit injunction was not sufficient to overcome the degree of restraint and caution required by international comity.[144]

The Sixth Circuit also followed the restrictive trend set by the D.C. Circuit. Gau Shan, a Hong Kong borrower, sued Bankers Trust, an American lender, alleging fraud, deceit, and negligence in connection with a note, and sought an injunction to restrain the lender from initiating a legal action in Hong Kong.[145] The district court granted the injunction, and Bankers Trust appealed. For the Sixth Circuit, the issue was whether the district court offended the principles of international comity in issuing a preliminary injunction.[146] Moreover, the Sixth Circuit dictated that because of international comity, courts should issue foreign antisuit injunctions in the most extreme cases where (1) this court's jurisdiction is threatened by the foreign action, or (2) this court's important public policies are being evaded by the foreign action.[147] The Sixth Circuit found that neither of these contingencies had been met.[148] Thus, the court held that international comity precludes the issuance of an antisuit injunction and that the district court abused its discretion in issuing a preliminary injunction order.[149]

c. *Limitation of antisuit injunctions abroad*

In the absence of any statutory sanctions against violation of an antisuit injunction, there is no sure way to enforce an antisuit injunction order in foreign countries.[150] Note that the Federal Rules of Civil Procedure do

142 *Id.* at 36.
143 *Id.* at 37.
144 *Id.*
145 Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349 (6th Cir. 1992).
146 *Id.* at 1351.
147 *Id.* at 1354-55.
148 *Id.* at 1358.
149 *Id.*
150 One commentator asserts that a "domestic court should *never* recognize or enforce a foreign antisuit injunction aimed at a party before the court." Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1066 (1985) (emphasis added). Similarly, one Japanese scholar explicitly argues that, under no circumstances, would a Japanese court recognize or enforce a U.S. antisuit injunction order in Japan, as antisuit injunctions by their nature totally differ from ordinary civil judgments. KAZUNORI ISHIGURO, KOKUSAI MASATSU TO HŌ [LAW AND INTERNATIONAL FRICTION] 53 (1994).

provide for sanctions against a failure to obey a discovery order.[151] Under the federal rules, the sanctions available to a court include (1) an order rendering a judgment by default against the disobedient party,[152] and (2) an order treating the failure to obey as a contempt of court.[153] However, no such sanction is available to a federal court if a party fails to obey an anti-suit injunction order.[154]

Besides, even if sanctions similar to those provided for violating a discovery were available, they would work effectively only against a U.S. resident or a foreign entity with substantial assets in the United States.[155] This is because enforcing U.S. court sanctions would be difficult in a foreign jurisdiction.[156] For instance, Japanese courts are reluctant to recognize and enforce foreign default judgments in Japan.[157] Similarly, where the court orders payment of a fine for civil contempt, such order will not be recognizable in Japan.[158] As a consequence, it would be a feasible option for the Japanese litigants to proceed with the Japanese parallel

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151 FED. R. CIV. P. 37(b)(2) provides that: "If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just."

152 FED. R. CIV. P. 37(b)(2)(C).

153 FED. R. CIV. P. 37(b)(2)(D).

154 One commentator implied that civil and criminal sanctions are available for disobeying a permanent injunction which enjoins the clawback of multiple damages. Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law,* 81 COLUM. L. REV. 1097, 1131 (1981).

155 To issue an antisuit injunction the federal court must have personal jurisdiction over the enjoined party. Having jurisdiction does not necessarily mean that the enjoined party has assets in the United States, as the jurisdiction of the federal court can be inferred by another factor. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 (1971 & Supp. 1995).

156 Professor Ishiguro firmly denies recognizability and enforceability in Japan of such sanctions. Interview with Kazunori Ishiguro, Professor of Law, University of Tokyo, in Tokyo, Japan (Jan. 23, 1995).

157 Article 200, Item 3 of the Code of Civil Procedure of Japan requires that the foreign judgment to be recognized is not contrary to the public order or good morals in Japan. MINJI SOSHŌHŌ [CODE OF CIVIL PROCEDURE], Law No. 29 of 1890. The Supreme Court held that this provision requires that both the contents and the procedure of the foreign judgment are not contrary to the public order or good morals in Japan. Judgment of June 7, 1983 (Tei v. Burroughs Corp.), Saikōsai [Supreme Court], 37 Minshū 611, 614, *translated in* 27 JAPANESE ANN. INT'L LAW 119 (1984). Thus, it is likely that the U.S. default judgment, which is entered as a sanction, would be held unrecognizable in Japan, on the grounds that its procedure is contrary to the public policy in Japan.

158 Japanese courts will recognize civil judgments only. In *Mansei Kōgyō*, the Tokyo High Court refused to recognize the California State Superior Court's judgment which awarded punitive damages, holding that (i) under Japanese legal order, the punitive damages judgment shall be classified as a criminal judgment rather than a civil judgment, and would not be considered a foreign judgment to be recognized under the Code of Civil Procedures, and (ii) to enforce the punitive damages judgment would violate the public order in Japan. Judgment of June 28, 1993 (Northcon v. Mansei Kōgyō K.K.), Tokyo High Ct., 1471 HANREI JIHŌ 89, 91. *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1986) ("Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.").

litigation, notwithstanding the federal court's antisuit injunction, since the violation of the antisuit injunction will not result in effective sanctions for them.

IV. RULES AND PRACTICES IN JAPAN

A. Statutory Provision, Case Law, and Scholarly Opinions[159]

1. The Statutory Prohibition Against Parallel Litigation

In Japan,[160] parallel litigation is statutorily prohibited by the Code of Civil Procedure.[161] In particular, article 231 provides: "Neither party may file another suit concerning the same case pending in a different court."[162] The rationale behind this provision is that parallel litigation (1) will unjustly waste the time, labor, and expenses of both the parties and the court, (2) may result in contradicting and conflicting judgments, (3) will not facilitate the protection of rights nor the resolution of disputes, and (4) will harm the authority of the court.[163] As a result, if a party to a Japanese litigation files another suit concerning the same subject matter with a different Japanese court, the latter litigation shall be dismissed.[164]

2. Courts' Interpretation of the Statute Against Parallel Litigation

a. Inapplicability of article 231 to foreign parallel litigation

On its face, it is unclear whether article 231 of the Japanese Code of Civil Procedures applies in the international context. However, courts have

159 Citations in this article from Japanese statutes, court decisions and other official documents are the author's English translation from Japanese originals.

160 For a brief outline of the Japanese judicial system and civil procedure, see, e.g., TAKAAKI HATTORI & DAN F. HENDERSON, CIVIL PROCEDURE IN JAPAN (1985).

161 MINJI SOSHŌHŌ [CODE OF CIVIL PROCEDURE], Law No. 29 of 1890.

162 This provision originates from a similar provision in Section 263 of the German Code of Civil Procedure, which also prohibits parallel litigation. *See* Ōbuchi, *supra* note 5, at 6 ("With respect to the domestic *lis pendens* rule, the German Civil Procedure Code (*Zivilprozeßordnung*) . . . Sec. 261 (previously Sec. 263 . . .) provides that *lis pendens* has the effect that the claim (*Streitsache*) cannot be raised by a party in another place during the continuation of the *lis pendens*.").

163 KORECHIKA KIKUI & TOSHIO MURAMATSU, 2 MINJI SOSHŌHŌ [CODE OF CIVIL PROCEDURE] 149 (Revised ed. 1989).

164 HATTORI & HENDERSON, *supra* note 160, § 4.06[5] ("The pendency of an action in a Japanese court, whether or not properly brought, bars the assertion of another claim in another Japanese court on the same subject matter between the same parties.").

interpreted the word "court" in article 231 to denote Japanese courts only and to exclude foreign courts. Under this interpretation, article 231 does not bar international parallel litigation. For example, in *Chūka Kokusai Shimbunsha*,[165] the Republic of China ("ROC") first sued Lin Hei-shuo, as a surety, in Taiwan, seeking repayment of a certain loan.[166] The ROC then filed a repetitive suit in Japan against both Lin and Chūka Kokusai Shimbunsha, the principal debtor.[167] Chūka Kokusai Shimbunsha contended that the Japanese court should dismiss the litigation, since it violates the prohibition of parallel litigation.[168] However, the Tokyo District Court allowed the repetitive suit "because the word 'court' in article 231 of the Code of Civil Procedures, which prohibits so-called parallel litigation, shall be interpreted to denote a Japanese court and not to include the foreign courts."[169]

Until recently, Japanese courts have consistently maintained their interpretation of article 231 as being inapplicable to foreign parallel litigation. For example, in *Kansai Tekkōsho*, a U.S. citizen first filed a product liability suit in King County, Washington, naming both Marubeni-Iida and Kansai Tekkōsho as joint defendants. Marubeni-Iida, a California corporation, then filed a third-party action in the same court against Kansai Tekkōsho, a Japanese corporation, seeking an indemnification of the damages in the event it lost the product liability suit.[170] In response, Kansai Tekkōsho filed a reactive suit with a Japanese court, seeking a mirror-image declaratory judgment.[171] Following the court's interpretation in *Chūka Kokusai Shimbunsha*, the Osaka District Court also held that "the word 'court' in article 231 . . . denotes Japanese courts and does not include foreign courts."[172]

Moreover, as late as June 1989, the Tokyo District Court held in

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165 Judgment of Dec. 23, 1955 (Republic of China v. K.K. Chūka Kokusai Shimbunsha), Tokyo District Ct., 6 Kaminshū 2679, *summary English translation in* 2 JAPANESE ANN. INT'L LAW 138 (1958); *aff'd*, Judgment of July 18, 1957 (K.K. Chūka Kokusai Shimbunsha v. Republic of China), Tokyo High Ct., 8 Kaminshū (vol. 7) 1292.

166 6 Kaminshū at 2681.

167 *Id.* at 2680.

168 *Id.* at 2681.

169 *Id.* at 2683.

170 *See* Deutsch v. West Coast Machinery Co., 497 P.2d 1311, 80 Wash. 2d 707 (1972), *cert. denied sub nom.* Kansai Iron Works, Ltd. v. Marubeni-Iida, Inc., 409 U.S. 1009 (1972).

171 Interlocutory Judgment of Oct. 9, 1973 (K.K. Kansai Tekkōsho v. Marubeni-Iida (America), Inc.), Osaka District Ct., 728 HANREI JIHŌ 76.

172 *Id.* at 79.

Shinagawa Hakurenga that:

> although the defendant asserts that this suit should be dismissed because it is the later suit in international parallel litigation, this allegation cannot be sustained because the word "court" in article 231 of the Code of Civil Procedures does not include foreign courts and there is no practice or logical reason which generally prohibits international parallel litigation.[173]

Recently, however, courts have attempted to restrict international parallel litigation through different frameworks. In *Gould,*[174] for example, a Delaware corporation sued two Japanese corporations and two French defendants in a U.S. federal district court, alleging unfair competition, theft of trade secrets, unjust enrichment, and civil RICO violations.[175] Instead of appearing before the federal court, one of the Japanese corporations filed a reactive suit in a Japanese court, seeking a mirror-image declaratory judgment.

In ruling on Gould's motion to dismiss on the ground of international parallel litigation, the Japanese court held that:

> (i) since "the court" in article 231 of the Code of Civil Procedures means "Japanese courts" and does not include foreign courts, this litigation shall not fall within the parallel litigation barred by article 231;
>
> (ii) in today's world of independent sovereign countries, where no unified judicial system nor generally accepted principle concerning distribution of international jurisdiction exists, it is not adequate to always defer to the preceding foreign litigation;

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173 Interlocutory Judgment of June 19, 1989 (Shinagawa Hakurenga v. Houston Technical Ceramics, Inc.), Tokyo District Ct., 703 HANREI TAIMUZU 246, 248.

174 Interlocutory Judgment of May 30, 1989 (Miyakoshi Kikō K.K. v. Gould, Inc.), Tokyo District Ct., 1348 HANREI JIHŌ 91, 703 HANREI TAIMUZU 240.

175 *See* Gould, Inc. v. Mitsui Mining & Smelting Co., C85-3199, 1990 WL 103155 (N.D. Ohio June 29, 1990) (granting a motion to dismiss for lack of personal jurisdiction as to defendant Mitsui Mining); Gould, Inc. v. Mitsui Mining & Smelting Co., 947 F.2d 218 (6th Cir. 1991) (denying two French defendants' motion to dismiss by virtue of the Foreign Sovereign Immunities Act).

> (iii) nor is it adequate to always neglect the international parallel litigation situation in the present society in which business transactions are conducted worldwide; and
>
> (iv) with due regard to the spirit of article 200 of the Code of Civil Procedures, which allows recognition and enforcement of the foreign judgment, when (a) it can be predicted with reasonable certainty that the preceding foreign litigation will lead to a final and irrevocable judgment, and (b) such judgment will be recognized in Japan, it may be permissible to infer the prohibition of parallel litigation and regulate the later litigation in the international parallel litigation situation to avoid conflicting judgments, and to ensure equity among parties, fair and speedy litigation, and judicial economy.[176]

The court then noted that, at this stage of the case, it was not possible to predict with reasonable certainty (1) whether the U.S. federal litigation would reach a final judgment on the merits, and whether such final judgment would become irrevocable, and (2) whether the U.S. judgment would satisfy the requirement specified in article 200 for recognition in Japan.[177] For these reasons, the court denied the motion to dismiss.

What is significant about the *Gould* decision is that it addressed the international parallel litigation issue separately from the issue of international jurisdiction. Its logic is consistent with the so-called "recognizability doctrine."[178] However, this has not been the mainstream approach in recent Japanese case law. The majority of the recent cases have addressed the issue of international parallel litigation as a part of the international jurisdiction issue.

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176 Miyakoshi Kikō K.K. v. Gould, Inc., 1348 HANREI JIHŌ at 94-95.

177 *Id.* at 95. Following this interlocutory judgment, the Tokyo District Court proceeded with the trial of the case, and two years later, reached a judgment on the merits, in which Miyakoshi Kikō prevailed. Judgment of Sept. 24, 1991 (Miyakoshi Kikō K.K. v. Gould, Inc.), Tokyo District Ct., 1429 HANREI JIHŌ 80, 769 HANREI TAIMUZU 280. Gould once appealed to the Tokyo High Court, but later withdrew the appeal, making the district court's judgment on the merits irrevocable.

178 *See infra* part IV.A.3.

b. Dismissal for lack of international jurisdiction

In the absence of a specific statutory provision on the adjudicative jurisdiction of Japanese courts in international cases,[179] the Supreme Court set forth the standard for determining the international jurisdiction of Japanese courts. In *Malaysia Airline,*[180] a Japanese citizen sued Malaysia Airline for damages incurred from the crash of a domestic airplane in Malaysia. The Supreme Court held that:

> Because the judicial jurisdiction of one country is a part of its sovereignty and the scope of the judicial sovereignty shall be the same as that of sovereignty, the Japanese judicial jurisdiction in principle shall not extend to a foreign corporation, which has its principal place of business in a foreign country, unless such corporation voluntarily submits to the Japanese judicial jurisdiction. As an exception to this principle, however, it would be adequate to assume the Japanese judicial jurisdiction, regardless of defendant's nationality or location, in cases involving land in the Japanese territory or other cases in which defendant has certain legal contacts with Japan. Under the current situation where there is no direct statutory provision, no relevant international treaty, nor a generally accepted, clear international principle concerning international jurisdiction, the courts will have to determine the scope of this exception in accordance with the *Jori* [logical reason] by giving due consideration to facilitating equity among parties, and fair and speedy litigation. The *jori* would dictate that the Japanese court has jurisdiction over a defendant whose place of living, office of a corporation or other entity, place of performance, place of property, place of torts, or any other cause of jurisdiction stipulated in the Code of Civil Procedures, is found within the territory of Japan.[181]

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179 HATTORI & HENDERSON, *supra* note 160, §4.07[1]. *See also* Masato Dōgauchi, *Declining Jurisdiction in Private International Law—Japan, in* DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 303 (J.J. Fawcett ed., 1995).

180 Judgment of Oct. 16, 1981 (Malaysia Airline System Berhad v. Gotō), Saikōsai [Supreme Court], 35 Minshū 1224, *translated in* 26 JAPANESE ANN. INT'L LAW 122 (1983).

181 *Malaysia Airline*, 35 Minshū at 1226-27. *See also* Masato Dōgauchi, *Concurrent Litigation in Japan and the United States,* 37 JAPANESE ANN. INT'L LAW 72, 76 n.11 (1994).

The Supreme Court then confirmed the Japanese court's jurisdiction over Malaysia Airline, after finding that, although incorporated and having its principal place of business in Malaysia, one of its offices was located in Tokyo.[182]

The Supreme Court's reasoning in the *Malaysia Airline* decision was severely criticized, although its disposition of that particular case has been basically supported.[183] Most of the criticism focused on the Supreme Court's holding that the Japanese court has jurisdiction over a defendant when any cause of jurisdiction stipulated in the Code of Civil Procedures is found within the territory of Japan. The holding is criticized because it may result in unreasonable consequences, if it were to be literally applied to every case.[184] For example, if the Malaysia Airline decision is literally applied, a person who has ever lived in Japan,[185] a defendant who has nominal assets in Japan,[186] or a defendant jointly sued with a Japanese defendant,[187] will always be subject to the Japanese courts' jurisdiction.[188]

Responding to these criticisms, lower courts in the post-Malaysia-Airline era have modified the Supreme Court's standard by allowing an exception to its literal application.[189] *Mukōda v. Boeing Co.*,[190] which is

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182 *Id.* at 1227.

183 Some commentators, however, did criticize both the reasoning and the disposition of the case in the *Malaysia Airline* decision. These commentators argued that it was improper to confer the Japanese courts' jurisdiction over the domestic airplane crash in Malaysia by virtue of defendant's Tokyo office which was not at all involved in the particular occurrence. Takao Sawaki, *Saiban Kankatsuken Saikō [Judicial Jurisdiction Reconsidered]*, 9 KOKUSAI SHŌJI HŌMU (vol. 12) 611 (1981); Ryōichi Yamada, Note, 88 MINSHŌHŌ ZASSHI (vol. 1) 100 (1983).

184 Hideyuki Kobayashi, *Kokusai Saiban Kankatsu to Malaysia Kōkū Jiken Hanketsu [International Judicial Jurisdiction and the Malaysia Airline Decision]*, 26 HŌGAKU SEMINAR (vol. 2) 20, 24 (1982); Morio Takeshita, Note, 637 KINYŪ SHŌJI HANREI 49, 53 (1982); Sawaki, *supra* note 183, at 613-14.

185 Code of Civil Procedure, art. 2, para. 2 ("In case [a person] has no domicile in Japan or it is unknown . . . his general forum shall be determined by his residence . . . or . . . by his last domicile.").

186 Code of Civil Procedure, art. 8 ("Suit concerning a property right against a person not domiciled in Japan . . . may be brought before the court situated in the place where . . . any attachable property of the defendant is located.").

187 Code of Civil Procedure, art. 21 (providing for jurisdiction by virtue of joinder of claims).

188 Kobayashi, *supra* note 184, at 24.

189 Hideyuki Kobayashi, *Kokusai Soshō Kyōgō [International Parallel Litigation]*, 525 NBL 34, 35 (1993); Kōichi Inoue, *Kokusaiteki Niju Soshō o Meguru Saikin no Hanrei no Dōkō [Trend of Recent Case Law Concerning International Duplicative Litigation]*, 21 KOKUSAI SHŌJI HŌMU (vol. 4) 403, 405 (1993).

190 Judgment of June 20, 1986 (Mukōda v. Boeing Co.), Tokyo District Ct., 1196 HANREI JIHŌ 87, 604 HANREI TAIMUZU 138, *summary English translation in* 31 JAPANESE ANN. INT'L LAW 216 (1988). Prior to this Japanese litigation, strict liability and negligence actions had been filed in a U.S. federal court and the U.S. action had been conditionally dismissed on the ground of *forum non conveniens* in deference to a Taiwanese court. *See* Lui Su Nai-Chao v. Boeing Co., 555 F. Supp. 9 (N.D. Ca. 1982), *aff'd*, 708 F.2d 1406 (9th Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983).

widely known as the *Far Eastern Air Transport* case, is an illustrative example. In this case, an airplane operated by Far Eastern Air Transport, a Taiwanese airline company, crashed in Taipei, killing the passengers and the crew. Heirs to Japanese victims filed a suit with the Tokyo District Court. They named Boeing Co., the manufacturer of the airplane, and United Airlines, Inc., the distributor of the airplane to Far Eastern Air Transport, as co-defendants. The Tokyo court declined jurisdiction, although it found that United Airlines had an office in Japan.[191] The court held that:

> Under the current situation where there is no direct statutory provision, relevant international treaty, or a generally accepted, clear international principle confirming international jurisdiction, due concern for equity, and fair and speedy trial should determine jurisdiction for cases in which a foreign corporation is a defendant. Moreover, unless extraordinary circumstances exist, the same logic confers Japanese judicial jurisdiction over the defendant when any cause of jurisdiction stipulated in the Code of Civil Procedures is found within the territory of Japan. The extraordinary circumstances herein stated shall mean such circumstances under which, in light of particular facts in the suit pending, the conference of the Japanese court's jurisdiction will not facilitate equity among parties, and fair and speedy trial.[192]

The court then found that, although important evidence concerning the cause of the accident would likely be located in Taiwan, the Japanese court could not obtain such evidence because there were no diplomatic relations between Japan and Taiwan. Consequently, the court concluded that trying this case in a Japanese court may violate the principle of facilitating equity, and fair and speedy litigation.[193] This approach adopted in *Far Eastern Air*

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191 Accordingly, if the court had literally applied the *Malaysia Airline* standard, its jurisdiction would have been conferred due to the location of defendant's office and the joinder of claims. *See* The Code of Civil Procedure, art. 4, para. 1 ("General jurisdiction of a corporation, other associations, or a foundation shall be conferred by the place of its office. If it has no office, general jurisdiction shall be conferred by the place of living of a principal person in charge of its business.") and art. 21 (providing for jurisdiction by virtue of joinder of claims).

192 Mukōda v. Boeing Co., 1196 HANREI JIHO at 92.

193 *Id.* at 93.

Transport, which can be characterized as a modified *Malaysia Airline* approach, now seems to be in the mainstream of Japanese case law.[194]

Several recently reported cases have also addressed foreign parallel litigation as a factor to be considered by courts in determining whether such extraordinary circumstances exist.

In *Shinagawa Hakurenga*,[195] Houston Technical, a Texas corporation, sued Shinagawa Hakurenga, a Japanese corporation, in a federal district court in Houston.[196] Houston Technical alleged that Shinagawa Hakurenga had willfully or negligently supplied Houston Technical with defective products. Shinagawa Hakurenga instituted a reactive suit with the Tokyo District Court, seeking a mirror-image declaratory judgment. Houston Technical filed a motion to dismiss for lack of jurisdiction.

Reciting the *Malaysia Airline* standard,[197] the Tokyo court held that jurisdiction is conferred by article 15 of the Code of Civil Procedures,[198] based on its finding that the alleged tortious conduct of manufacturing defective products had been committed in Japan. The court then determined that litigating the case in Japan would not interfere with the principle of fair trial, since (1) witnesses reside in Japan, and (2) although currently located in the United States, the product at issue can easily be moved to Japan. The court also held that resolution of the dispute in Japan would not be contrary to the parties' expectations. Therefore, the Tokyo court denied Houston Technical's motion to dismiss.[199]

With regard to the parallel litigation issue, the *Shinagawa Hakurenga* court analyzed only whether the Japanese parallel litigation would place undue negative effects upon Houston Technical.[200] It thus failed to address

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194 Toshio Miyatake & Takashi Wakai, *Saiban Kankatsu* [*Jurisdiction to Adjudicate*], *in* 10 SAIBAN JITSUMU TAIKEI [COMPLETE LITIGATION PRACTICE] 3, 4 (Shin Motoki & Kiyoshi Hosokawa eds., 1989).

195 Interlocutory Judgment of June 19, 1989 (Shinagawa Hakurenga K.K. v. Houston Technical Ceramics, Inc.), Tokyo District Ct., 703 HANREI TAIMUZU 246, *summary English translation in* 33 JAPANESE ANN. INT'L LAW 202 (1990).

196 *See* Houston Tech. Ceramics, Inc. v. Shinagawa Refractories Co., 745 F. Supp. 406 (S.D. Tex. 1990) (denying both (i) defendant's motion to dismiss for lack of personal jurisdiction and (ii) defendant's motion to stay pending the outcome of the declaratory judgment action in the Tokyo District Court).

197 Shinagawa Hakurenga K.K. v. Houston Tech. Ceramics, Inc., 703 HANREI TAIMUZU at 247 ("There is no statutory provision, no universally accepted international treaty and no practice conceding international civil jurisdiction. Therefore, international jurisdiction over a foreign defendant shall be determined by logical reason as evidenced by jurisdictional provisions in the Code of Civil Procedure.").

198 The Code of Civil Procedure, art. 15, para. 1 ("A suit relating to a tort may be brought before the court of the place where the act was committed.").

199 Shinagawa Hakurenga K.K. v. Houston Tech. Ceramics, Inc., 703 HANREI TAIMUZU at 246.

200 *Id.* at 248.

whether Shinagawa Hakurenga had a legitimate motivation in filing the reactive suit.

In contrast, in what may be the most comprehensive and sophisticated decision on parallel litigation, the court in *Mazaki Bussan*[201] analyzed both the negative effects and the legitimacy of motivations for parallel litigation. In this case, a U.S. citizen filed a product liability suit in California, naming both Mazaki Bussan and Nanka Seimen as joint defendants. Nanka Seimen, a U.S. distributor, then filed another suit in the United States, seeking an indemnification from Mazaki Bussan, a Japanese manufacturer. Mazaki Bussan filed a reactive suit with the Tokyo District Court, seeking a mirror-image declaratory judgment. Nanka Seimen filed a motion to dismiss for lack of jurisdiction.

Using the *Malaysia Airline* standard, modified by the "extraordinary circumstances" consideration, the Tokyo court found Nanka Seimen's claim to be closely related to the U.S. product liability suit. It thus held that the court's jurisdiction was conferred by article 15 of the Code of Civil Procedures,[202] since the product liability suit was classified as an action in tort, alleging the manufacturing of defective products in Japan.[203]

The court then addressed whether there were extraordinary circumstances under which the conference of international jurisdiction based on article 15 would violate the principle of equity, and fair and speedy trial. The court found that (1) Nanka Seimen's indemnification claim was conditional upon the outcome of the U.S. product liability suit; (2) because the U.S. litigation was filed first and a considerable amount of the exchange of briefs and the collection of evidence had been done, and because almost all of the evidence was located in the United States, the United States was the more convenient forum than Japan; and (3) Mazaki Bussan should have expected a product liability suit in the United States, while Nanka Seimen may not have had any reason to expect a suit related to product liability to be filed in Japan.[204] Given these extraordinary circumstances, the court found that it was logical to try the case in the United States.[205]

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201 Judgment of Jan. 29, 1991 (Mazaki Bussan K.K. v. Nanka Seimen Co.), Tokyo District Ct., 1390 HANREI JIHŌ 98, *summary English translation in* 35 JAPANESE ANN. INT'L LAW 171 (1992).

202 The Code of Civil Procedure, art. 15, para. 1 ("A suit relating to a tort may be brought before the court of the place where the act was committed.").

203 Product liability suits as such did not exist in Japan until *Seizōbutsu Sekinin Hō* [*Product Liability Act*], Law No. 85 of 1994, was enacted on July 1, 1994. This Act became effective as of July 1, 1995.

204 Mazaki Bussan K.K. v. Nanka Seimen Co., 1390 HANREI JIHŌ at 100-01.

205 *Id.* at 99.

Moreover, in determining the "extraordinary circumstances" in the case, the court considered the legitimacy of Mazaki Bussan's motivation in filing the reactive suit. The court then concluded that Mazaki Bussan instituted the suit to avoid a judgment in the United States with its strict product liability standard, and to obtain a comparably favorable Japanese judgment. Therefore, the court was concerned that:

> if we were to always permit such practice, it may (i) undermine the purpose of the recognition of foreign judgments as stipulated in the Code of Civil Procedures, (ii) hinder the awarding of substantial remedy to the injured . . . and (iii) eventually result in the nonrecognition of Japanese judgments in a foreign country on the ground of reciprocity.[206]

c. Motion to stay and antisuit injunctions

Without statutory authorization, Japanese courts are reluctant to grant a motion to stay. Thus far, no reported case indicates that a Japanese court granted a motion to stay in deference to a foreign parallel litigation. Typically, the court would deny a motion to stay on the ground that:

> Under the Code of Civil Procedures, the court can stay its proceeding only when the court is unable to perform its function (article 220) or a party cannot proceed with the court proceeding due to an impediment (article 221). There is no statutory authorization which enables the court to stay its proceeding in the international parallel litigation situation.[207]

Likewise, there is no specific statutory provision which authorizes Japanese courts to issue antisuit or anti-antisuit injunction orders.[208] The concept of the antisuit injunction is foreign to the Japanese court, and under no circumstances will a Japanese court issue an antisuit injunction against a

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206 *Id.* at 100-01.

207 Interlocutory Judgment of May 30, 1989 (Miyakoshi Kikō K.K. v. Gould, Inc.), Tokyo District Ct., 1348 HANREI JIHŌ 91, 95.

208 As the domestic parallel litigation is explicitly prohibited and the later litigation will be automatically dismissed in Japan, there is no need for a domestic antisuit injunction. *See supra* part IV.A.1.

foreign litigation.[209] Moreover, there has been no reported case in which a party applied to a Japanese court for an antisuit or anti-antisuit injunction order.[210]

3. *Scholars' Opinions*

Within the tradition of civil law and continental jurisprudence of Japan, the opinions of prominent Japanese scholars are highly respected and have been influential in the Japanese legal practice. Therefore, a discussion of Japanese parallel litigation would be incomplete without an examination of the Japanese legal scholars' views in Japan.

a. Traditional views

In the past, Japanese scholars were reluctant to restrict international parallel litigation.[211] They made a grudging exception in cases where a foreign litigation reached a final and irrevocable judgment prior to the Japanese litigation, and if the foreign judgment satisfied the requirements for recognition in Japan.[212]

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209 *Minji Hozen Hō* [*Civil Preservation Act*], Law No. 91 of 1989, provides for various injunction orders to be issued in preservation of the litigant's legal rights. Professor Dōgauchi has suggested that a Japanese court may issue an antisuit injunction based on this Act. Interview with Masato Dōgauchi, Associate Professor of Law, University of Tokyo, in Tokyo, Japan (Sept. 6, 1995). Also, one commentator has suggested possible application of articles 23 & 24 of the Act. Shigeru Fuwa, *Eibei no Saibanrei ni Miru Kokusaiteki Soshō Sashitome (2)* [*Anglo-American Case Law on International Antisuit Injunctions (2)*], 18 EHIME HŌGAKUKAI ZASSHI (vol. 4) 95, 132 (1992). Note, however, these injunctions are for the preservation of substantive rights only, and not necessarily for the protection of a certain court proceeding. Thus, Japanese courts would be reluctant to use this Act in procedural aspects, such as an injunction against parallel proceedings.

210 Dōgauchi, *supra* note 181, at 92 ("There has been no case in Japan ordering a party not to continue a foreign proceeding or rejecting such an order.").

211 HAJIME KANEKO, MINJI SOSHŌ HŌ TAIKEI [SYSTEMATIC STUDY OF THE CODE OF CIVIL PROCEDURES] 173 (Revised ed. 1967); Akira Takakuwa, *Naikoku Hanketsu to Teishoku suru Gaikoku Hanketsu no Shōnin no Kahi* [*Whether or Not to Recognize the Foreign Judgment which Conflicts with the Domestic Judgment*], 155 NBL 6 (1978).

212 The Code of Civil Procedure, art. 200 provides:

> "An irrevocable judgment rendered by a foreign court shall be valid only if the following requirements are all satisfied:
>
> (i) no law, no regulation, and no treaty denies the jurisdiction of the foreign court;
> (ii) in cases where the Japanese defendant lost the litigation, she had been served a summons by means other than a public notice, or, if not, she had a day in court;
> (iii) the judgment rendered by the foreign court is not contrary to the public order or good morals of Japan; and
> (iv) reciprocity is guaranteed."

However, the courts no longer adhere to the restrictive scholarly view on the subject of parallel litigation. For instance, while both the *Gould* and *Shinagawa Hakurenga* courts held that the word "court" in article 231 of the Code of Civil Procedures does not include foreign courts, they nevertheless restricted international parallel litigation.[213]

b. Recognizability doctrine

Under the "recognizability doctrine," some scholars argue that the Japanese litigation should be dismissed when (1) the foreign parallel litigation was filed prior to the Japanese litigation, and (2) the judgment to be rendered by the foreign court will be recognized in Japan.[214] The underlying premises of this doctrine are that, insofar as article 200 of the Code of Civil Procedures obliges the court to recognize the validity of certain kinds of foreign judgments, Japanese courts should respect certain kinds of foreign proceedings even before a foreign judgment is rendered. In other words, this doctrine purports theoretical consistency with the recognition of a foreign judgment.[215] Therefore, the focus of an analysis under the recognizability doctrine is whether the foreign judgment to be rendered will satisfy the requirements of the recognition in Japan, as articulated in article 200 of the Code of Civil Procedures.[216]

In practice, however, it is difficult for a court to predict the likely outcome of a foreign judgment.[217] For example, the *Gould* court attempted to apply the recognizability doctrine. However, the court could not dismiss the proceeding before it, since the court could not predict with reasonable certainty whether the U.S. parallel litigation would lead to a final and

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It should be noted that in Japan a judgment is not "irrevocable" while an appellate review is pending. *Compare id. with* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481(1) (1987) ("[A] final judgment of a court of a foreign state . . . is conclusive between parties, and is entitled to recognition in courts in the United States.") *and* Comment e to the Restatement § 481(1) ("[a] judgment is subject to appeal or to modification in light of changed circumstances does not deprive it of its character as a final judgment.").

213 *See supra* part IV.A.1. & 2.

214 Masato Dōgauchi, *Kokusaiteki Soshō Kyōgō (5)* [*Concurrent Litigations in Int'l Civil Procedure (pt. 5)*], 100 HŌGAKU KYŌKAI ZASSHI (vol. 4) 715, 755-87 (1983); Takao Sawaki, *Kokusaiteki Soshō Kyōgō* [*International Parallel Litigation*], *in* 7 SHIN JITSUMU MINSO KŌZA [NEW SERIES OF STUDIES ON CIVIL LITIGATION PRACTICE] 105 (1982). In Germany, the recognizability doctrine is upheld by case law and the majority of scholars. Ōbuchi, *supra* note 5, at 8.

215 Dōgauchi, *supra* note 214, at 742.

216 *Id.* at 755.

217 *See infra* part V.C.1.

irrevocable judgment.[218] Because of its practical disadvantage, this doctrine seems hardly dominant in Japan today.[219]

c. *Jurisdictional approach*

Currently, the majority of the scholars take the interest-balancing approach in international jurisdiction.[220] Under this approach, the existence of a foreign parallel litigation is one factor to be balanced against other interests. This approach allows a flexible disposition of the Japanese parallel litigation.[221]

It has been pointed out, however, that the interest-balancing approach hinders the predictability of disposition and may result in conflicting judgments.[222] The recent court cases, including *Shinagawa Hakurenga* and *Mazaki Bussan*,[223] which considered the existence of a foreign parallel litigation as an "extraordinary circumstance" under the modified *Malaysia Airline* standard, can be classified as a corollary to this approach.[224]

B. *Legislative Proposal*

Since July 1990, the Japanese government has been contemplating an amendment to the Code of Civil Procedures.[225] In December 1991, the Ministry of Justice published a paper addressing the various issues to be dealt with in this amendment project (the "Issues to be Examined"),[226] which specifically addressed the following issues concerning international

218 Interlocutory Judgment of May 30, 1989 (Miyakoshi Kikō K.K. v. Gould, Inc.), Tokyo District Ct., 1348 HANREI JIHŌ 91, 95. *See also supra* part IV.A.1.

219 Sakai, *supra* note 14, at 39.

220 Kazunori Ishiguro, *Gaikoku ni okeru Soshō Keizoku no Kokunaiteki Kōka [Domestic Impact of a Litigation Pending Abroad]*, *in* KOKUSAI MINJI SOSHŌ NO RIRON [THEORY OF INTERNATIONAL LITIGATION] 323 (Takao Sawaki & Yoshimitsu Aoyama eds., 1987); Kobayashi, *supra* note 189, at 38; Shigeru Fuwa, *Kokusaiteki Soshō Kyōgō no Kiritsu [Regulation of International Parallel Litigation]*, 17 EHIME HŌGAKUKAI ZASSHI (vol. 1) 135 (1990).

221 Kobayashi, *supra* note 189, at 38.

222 Dōgauchi, *supra* note 214, at 741.

223 *See supra* part IV.A.2.

224 Kobayashi, *supra* note 189, at 38.

225 The Code of Civil Procedure was originally enacted in 1890 and has been amended several times. The currently contemplated amendment will be the most comprehensive in 70 years since the latest comprehensive amendment in 1926. For an outline of the 1926 amendment, see KYŌZŌ YUASA, ON THE REVISED CODE OF CIVIL PROCEDURE OF JAPAN (1929); HATTORI & HENDERSON, *supra* note 160, § 1.03[2].

226 THE CIVIL BUREAU OF THE MINISTRY OF JUSTICE, MINJI SOSHŌ TETSUZUKI NI KANSURU KENTŌ JIKŌ [ISSUES TO BE EXAMINED CONCERNING THE CIVIL PROCEDURE] (1991).

parallel litigation: (1) Should any amendments be made concerning the disposition of international parallel litigation? and (2) For instance, should courts be authorized to stay their proceedings under certain conditions when international parallel litigation is pending?

A variety of opinions have been explored concerning the Issues to be Examined.[227] With regard to the international parallel litigation issue, although a majority concurred in the idea proposed in the Issues to be Examined, a material number of dissenting opinions were also submitted.[228]

Reasons for the dissent include (1) it is not appropriate to enact a provision regarding international parallel litigation under the current situation where scholars' opinions are split, (2) it is not appropriate for Japan to enact a rule unilaterally, as the disposition of international parallel litigation should be regulated in uniformity with other nations, and (3) it will hinder the right of Japanese nationals if a court stays its proceeding because of international parallel litigation.[229]

After reviewing these opinions, in December 1993, the Ministry of Justice published a tentative proposal for a protocol of the amendment (the "Tentative Proposal").[230] However, the Tentative Proposal noted the issues of international parallel litigation in postnotes only, and did not include them in the topics to be covered in the upcoming amendment.[231]

In the postnote, the Ministry of Justice noted that "the issue of authorizing the court to stay its proceeding under certain conditions when international parallel litigation is pending will be further examined."[232] Factors to be examined include (1) possible hindrance to the rights of Japanese nationals if the court stays its proceeding on the grounds of international parallel litigation, (2) adequacy of domestic legislation, in the absence of any assurance that a foreign country will deal with this issue in a similar way, and (3) the formulation of a clear set of standards for granting a

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227 For example, the Japan Federation of Bar Associations published its opinion paper in July 1992. NIPPON BENGOSHI RENGŌKAI [THE JAPAN FEDERATION OF BAR ASSOCIATIONS], "MINJI SOSHŌ TETSUZUKI NI KANSURU KENTŌ JIKŌ" NI TAISURU IKENSHO [OPINION PAPER ON THE ISSUES TO BE EXAMINED CONCERNING THE CIVIL PROCEDURE] (1992).

228 Kōzō Yanagida et al., *"Minji Soshō Tetsuzuki ni kansuru Kentō Jikō" ni taisuru Kakukai Iken no Gaiyō [Outline of the Various Opinions on the Issues to be Examined Concerning Civil Procedure]*, 524 NBL 44, 48 (1993).

229 *Id.*

230 THE CIVIL BUREAU OF THE MINISTRY OF JUSTICE, MINJI SOSHŌ TETSUZUKI NI KANSURU KAISEI YŌKŌ SHIAN [TENTATIVE PROPOSAL FOR THE PROTOCOL OF THE AMENDMENT TO THE CIVIL PROCEDURES] (1993) [hereinafter THE TENTATIVE PROPOSAL].

231 Postnotes denote items to be considered in future amendments to the Code of Civil Procedure.

232 THE TENTATIVE PROPOSAL, *supra* note 230, at 48 n.2.

stay.[233] Out of the various opinions explored concerning the Tentative Proposal, the number of the concurring opinions and dissenting opinions was almost even.[234]

The Ministry of Justice is now working on the final protocol of the amendment, which will be released in January 1996, and the amendment may be enacted as early as summer 1996. Given these concerns, it is unlikely that any provision concerning international parallel litigation will survive the final protocol and be enacted in the course of the currently contemplated amendment to the Code of Civil Procedures.

V. COMPARATIVE ANALYSIS AND SUGGESTIONS

A. U.S. Federal Practice and Japanese Practice

1. Domestic Parallel Litigation Practices

With regard to domestic parallel litigation, Japan's need for domestic parallel litigation is less compelling than that of the United States. That is because the judicial systems of the two countries stand on opposite premises. The foundation for this difference is the existence of the dual system of the federal and state judiciaries in the United States, contrasted with a single judicial system in Japan, as well as the differences in the legal status of the plaintiff.

In Japan, domestic parallel litigation *per se* is explicitly prohibited by the statute, regardless of the legitimacy of the litigants' interests.[235] There has been some concern that this strict prohibition undermines legitimate interests of the litigant to pursue parallel proceedings. However, that has not been the case in Japan. For example, the plaintiff may have a legitimate motivation to file a repetitive suit when the defendant has assets in multiple locations.[236] However, the plaintiff does not need to institute parallel litigations in multiple courts of different locations within Japan, as a judgment

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233 THE CIVIL BUREAU OF THE MINISTRY OF JUSTICE, MINJI SOSHŌ TETSUZUKI NI KANSURU KAISEI YŌKŌ SHIAN HOSOKU SETSUMEI [SUPPLEMENTAL EXPLANATIONS FOR THE TENTATIVE PROPOSAL FOR THE PROTOCOL OF THE AMENDMENT TO THE CIVIL PROCEDURE] 79 (1993) [hereinafter THE SUPPLEMENTAL EXPLANATION].

234 Kōzō Yanagida et al., *"Minji Soshō Tetsuzuki ni kansuru Kaisei Yōkō Shian" ni taisuru Kakukai Iken no Gaiyō [An Outline of the Various Opinions on the Tentative Proposal for the Protocol of the Amendment to the Civil Procedure]*, 570 NBL 57, 60 (1995).

235 *See supra* part IV.A.1.

236 *See supra* part II.

rendered by any Japanese court is enforceable throughout Japan, as long as the judgment is final and irrevocable, or accompanied by a declaration for temporary enforcement.[237]

On the other hand, a defendant may have a legitimate motivation to file a reactive suit when she thinks the first forum is inadequate, or at least disadvantageous, and she wishes to dispute the case in a more favorable forum.[238] In Japan, however, this purpose would be served by a statutory transfer under the Code of Civil Procedures. When a defendant believes that (1) the court does not have jurisdiction to adjudicate,[239] or (2) such transfer is necessary to avoid "extreme damage or delay,"[240] the defendant can move to transfer the case to another competent court. Accordingly, the defendant would not have a legitimate motivation to file a domestic parallel litigation in Japan.

By contrast, in the United States, litigants are basically free to institute a parallel litigation, subject to certain restrictions.[241] The reason for this relative freedom is the federal system of the United States. As the United States has both a federal judiciary and a state judiciary, a federal court plaintiff whose claim is based on diversity will be advised to file a backup action in a state court to prevent the statute of limitations from expiring in the event the federal court finds no diversity.[242] Or, when a federal court has exclusive jurisdiction over a part of the plaintiff's claim, the plaintiff may be required to file a part of her claim in a federal court and the rest in a state court.[243] These concerns make it necessary for a plaintiff to file a repetitive suit in the United States.

Moreover, in Japan, all courts will apply virtually the same law. Furthermore, judges are highly homogeneous, as they are mostly composed of career judges, who were appointed as associate judges immediately upon completing their legal studies, and thereafter, under the administration of the Supreme Court of Japan, have been periodically relocated

237 *Minji Shikkō Hō* (Civil Execution Act; Law No. 4 of 1979, as amended), art. 22.

238 *See supra* part I.

239 Code of Civil Procedure, art. 30, para. 1 provides that: "If a court finds that the whole or a part of a suit does not come under its jurisdiction, it shall transfer such suit to the proper court by ruling."

240 Code of Civil Procedure, art. 31, provides that: "If a court deems it necessary to avoid considerable loss or delay concerning a case over which it has jurisdiction, such court may, upon a party's motion or upon its own initiative, transfer the whole or a part of the case to another competent court, unless the case falls under its exclusive jurisdiction."

241 *See supra* parts III.A. & B.

242 Gibson, *supra* note 9, at 203.

243 *Id.* at 204.

nationwide.[244] Accordingly, a choice of forum in Japan simply means the location of the court.

In contrast, in the United States, each state has its own conflict of law rules and its own substantive law. Not only does the state court apply its own law, but the federal courts are also obliged to apply the state's conflict of law rules and substantive law.[245] Moreover, judges are relatively localized, as has been the tradition in common law countries.[246] In addition, jurors are most likely selected locally, and are usually said to be less sympathetic to aliens. Under these circumstances, the choice of forum may not be only an issue of location, but can be also an issue of the applicable law, quality of the judges, and desirability of the jury.[247]

Another reason for the differences in the two systems can be attributed to the relative significance of the plaintiff's status. In the United States, as one commentator noted, "there would seem to be a tactical advantage in being a plaintiff."[248] He specifically pointed out that: (1) juries normally react in a more favorable manner to requests for relief from a plaintiff than from a defendant; (2) there are some procedural advantages for the plaintiff in the conduct of a lawsuit; and (3) the plaintiff has more control over the suit than does the defendant.[249] These concerns will encourage the defendant to file a reactive suit in the United States. In contrast, there is no jury system in Japan, and, due to the continental civil law tradition, the judge will assume relatively extensive responsibility and initiative in managing the lawsuit. Accordingly, being a plaintiff or a defendant makes little difference in Japan.

Because of the fundamental differences in the judicial systems of the two countries, litigants in the United States have greater incentives to file a parallel litigation in another court than is the case in Japan. The greater the incentives for a parallel litigation, the greater the necessity to authorize it.

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244 *See, e.g.*, HATTORI & HENDERSON, *supra* note 160, § 3.02[4].

245 *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (extending *Erie* doctrine to require that federal courts also apply the forum state's choice of law rules).

246 *See* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1678 (1990) ("[U]nlike the civil law system, in which the identity of the judge is much less a matter of public record or significance, the common law system's focus on the judge increases the availability of forum shopping.") (footnote omitted).

247 *See id.* ("Among the considerations that may motivate a forum shopper are the convenience or expense of litigating in the forum, the inconvenience to one's adversary, the probable or expected sympathies of a potential jury pool, the nature and availability of appellate review, judicial calendars and backlogs, local rules, permissibility of fee-splitting arrangements, and virtually any other interjurisdictional difference.").

248 Vestal, *supra* note 3, at 13.

249 *Id.* at 13-14.

2. *International Parallel Litigation Practices*

a. *Structural similarities*

Within the international parallel litigation context, the United States and Japan start from a similar premise. That is, international parallel litigation is in principle permissible, but both countries lack statutory provisions which specifically deal with international parallel litigation. From this starting point, the U.S. federal courts and Japanese courts have developed frameworks to restrict international parallel litigation, which resemble each other to some extent.

The structural similarity between the U.S. and Japanese international parallel litigation practices is in contrast to the domestic parallel litigation practices, where two countries start from completely opposite premises. The reason for this contrast can easily be identified. In dealing with foreign parallel litigation issues, the Japanese courts abandon the basic premises of domestic parallel litigation and take the opposite propositions, while U.S. federal courts maintain the basic premises of domestic parallel litigation.

As noted above, the rationale for prohibiting domestic parallel litigation in Japan is the presumption that domestic litigants would have no legitimate interest in filing a parallel litigation.[250] However, in an international context, a judgment rendered by a Japanese court is not necessarily enforceable in a foreign jurisdiction as such, without a special and time-consuming proceeding. Further, there is no assurance that the Japanese judgment will be eventually recognized by a foreign court. Accordingly, under certain cases, a plaintiff may have a legitimate motivation to file a parallel international litigation in Japan.[251]

Moreover, the statutory transfer under the Japanese Code of Civil Procedures is limited to another Japanese court only.[252] Therefore, a defendant may have a legitimate motivation to file a reactive suit, if she believes the first forum is inadequate or disadvantageous, and she wishes to dispute the case in a more favorable forum.[253]

In addition, compared to domestic parallel litigation, there may be a greater incentive to file a foreign parallel litigation. In international

250 *See supra* notes 236-40 and accompanying text.
251 *See supra* part II.
252 *See supra* notes 239-40.
253 *See supra* part II.

litigation, it is conceivable that the qualification and characteristics of the judges are widely varied. Furthermore, it is highly likely that a foreign court will apply its own conflict of law rules and may choose its own substantive law, which the Japanese court will not choose.

There is another reason that compels U.S. federal and Japanese courts to allow the filing of a domestic litigation in cases where a parallel litigation is pending abroad. In the domestic parallel litigation situation, another domestic forum is available if a court declines to adjudicate a case before it. Restriction of domestic parallel litigation does not deprive a national of the right to litigate in her home forum. In contrast, in the international parallel litigation situation, if a court declines to adjudicate a case, litigants are forced to litigate the case in a foreign forum. In other words, if a court restricts international parallel litigation, the court may fail to provide a forum to its national.

In several cases, U.S. federal courts have shown a strong presumption for U.S. courts' obligation to provide a home forum to U.S. citizens.[254] Although Japanese courts have never explicitly referred to such presumptions, reactions to the Ministry of Justice's legislative proposal indicate that the Japanese legal community is also concerned about the Japanese national's right to sue in a Japanese court.[255] Accordingly, the protection of the court's own national would be another rationale for the similar premises of U.S. and Japanese international parallel litigation practices.

Under these circumstances, the choice of forum may not be only an issue of location, but can be also a question of the applicable law and of the quality of judges and the jury.[256] As a result, there is a greater necessity to authorize a foreign parallel litigation than there is for domestic litigation. These considerations justify the Japanese courts' willingness to allow international parallel litigation. In contrast, U.S. federal courts need not change their premises because the foregoing is the very logic underlying the domestic parallel litigation practice.

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254 *See, e.g.*, Fields v. Sedgwick Associated Risks, 796 F.2d 299 (9th Cir. 1986); DeMelo v. Toche Marine, 711 F.2d 1260 (5th Cir. 1983). *See also* Keeton v. Hustler Magazine, 465 U.S. 770, 780 (1984) ("Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum.").

255 Yanagida et al., *supra* note 228, at 48 ("If a Japanese court stays its proceeding on the ground of international parallel litigation, it will hinder the rights of Japanese nationals."); THE SUPPLEMENTAL EXPLANATION, *supra* note 233, at 79 ("It should be further considered whether it will hinder the right of Japanese nationals if the court stays its proceeding on the ground of international parallel litigation.").

256 *Cf. supra* notes 244-47 and accompanying text.

b. Differences between U.S. and Japanese practices

Although the basic premises are similar, there are some remarkable differences between the U.S. and Japanese practices. The U.S. federal courts are eager to exercise their "inherent" power and are flexible in the disposition of their proceedings. On the contrary, the Japanese courts confine their power within the statutory authorization, as the courts are reluctant to exercise power not explicitly granted by a statutory provision.

First, to defer to a proceeding of a foreign court, U.S. federal courts have employed the doctrines of *forum non conveniens* and *lis alibi pendens*, which are addressed separately from the issue of the federal court's international jurisdiction. The consequence of a *forum non conveniens* dismissal may be equivalent to that of a *lis alibi pendens* stay, insofar as the federal court often grants a conditional dismissal.

In Japan, courts have recently taken the jurisdictional approach, under which the issue of foreign parallel litigation is addressed within the framework of the Japanese court's international jurisdiction. The core of this approach is interest balancing, which is largely similar to the U.S. doctrine of *forum non conveniens*.[257] However, the consequence of the jurisdictional approach will be more drastic than that of *forum non conveniens*. Because Japanese courts have only the simple choice of granting or denying an unconditional dismissal, Japanese courts cannot grant a conditional dismissal while U.S. federal courts can. In addition, Japanese courts decline to grant stays without an explicit statutory authorization.

Second, to protect their own proceedings, U.S. federal courts may issue antisuit or anti-antisuit injunction orders, while no such device is available to Japanese courts to protect their own jurisdiction against foreign proceedings.

B. Suggestions Concerning U.S. Federal Practices

1. Consideration of Legitimate Motivations and Negative Effects

For the most part, the doctrines of *forum non conveniens*, international comity, and *lis alibi pendens* have enabled the U.S. courts to reach a fair and just disposition of their cases. In particular, private and public interest factors, which the courts balance under the doctrine of *forum non*

257 Dōgauchi, *supra* note 181, at 85.

conveniens dismissal or *lis alibi pendens* stay, adequately address any negative effects that may prompt the restriction of an international parallel litigation. Negative effects include duplicative costs and other burdens, and the waste of judicial resources.[258]

In most cases, however, federal courts have failed to consider one important aspect: the possibility of contradicting judgments.[259] When considering a dismissal or stay for international comity, the federal courts should carefully examine whether a foreign judgment on the merits will eventually be recognized and enforced in the United States.[260] If the foreign judgment does not meet the requirements for recognition and enforcement,[261] there will be no danger to international comity.[262] Rather, under such circumstances, it would be necessary for the plaintiff in the foreign litigation to file a repetitive suit in the United States, as long as she wishes to enforce a judgment against the defendant's assets both in the United States and in the foreign country. The federal litigation should not be stayed or dismissed for international comity, where the prospective foreign judgment on the merits would lack the requirements for recognition in the United States. As the federal court will face the international comity

258 *See supra* parts I.B. & C.

259 Ōbuchi, *supra* note 5, at 3 ("[T]he Anglo-American position, in most cases, fails to take into account the probability of recognizability of an expected foreign judgment . . . ."). *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(e) (1987) ("A court in the United States need not recognize a judgment of the court of a foreign state if . . . the judgment conflicts with another judgment that is entitled to recognition . . . .").

260 The Seventh Circuit is an exception in this regard. The court observed that "consideration of judicial economy, especially the need to avoid piecemeal litigation strongly favored staying the district court proceedings. The Belgian suit, which had begun before the American action was filed, had been brought to a conclusion in the trial court. Absent reversal on appeal, that judgment would adjudicate the rights of the parties. At that point, *unless there was a barrier to the recognition of that judgment in the United States and, as we discuss below, there was little chance of that contingency*, there would be no need for further proceedings in the district court." Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 685-86 (7th Cir. 1987) (citation omitted) (emphasis added). This observation is attributable to the unique setting of the *Ingersoll* case, in which the defendant explicitly requested the enforcement of the Belgian judgment in the United States. Under the ordinary setting of international parallel litigation, where the litigants will not specifically seek the recognition of the foreign judgment, the federal court most likely would not consider the recognizability of the foreign judgment.

261 Under *Erie v. Tompkins*, 304 U.S. 64 (1938), the recognition and enforcement of the foreign judgment is a matter of state law, though many states enacted the Uniform Money-Judgment Recognition Act, 13 U.L.A. 261 (1986). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 481-482 (1987); DAVID EPSTEIN & JEFFEREY L. SNYDER, INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE AND STRATEGY §§ 11.01-11.10 (2d ed. 1994).

262 In *Turner*, the court pointed out that "once a judgment on the merit is reached in one of the cases, . . . failure to defer to the judgment would have serious implications for the concerns of international comity. For example, the prospect of 'dueling courts,' conflicting judgment, and attempts to enforce conflicting judgments raise major concerns of international comity." Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512, 1521 (11th Cir. 1994).

issue only after the foreign court has rendered its judgment on the merits, it would not be difficult to determine whether such judgment is recognizable.

More importantly, federal courts have been reluctant to address the issue of whether a litigant has a legitimate motivation in instituting a parallel litigation. As noted earlier, in regulating parallel litigation, a court should balance the degree of undesirable effects against the legitimacy of motivations.[263] Accordingly, if a federal court wishes to justify its disposition of a parallel litigation, it is imperative to clearly address the issue of legitimacy of the motivation, which is the rationale behind deregulation, and balance it against the negative effects, which is the rationale behind regulation.

There is one way in which the U.S. federal courts may address the issue of legitimacy of the motivation: follow the jurisdictional approach of the Japanese courts. As articulated in *Gilbert,* the *forum non conveniens* analysis includes an examination of "all other practical problems that make trials of a case easy, expeditious and inexpensive."[264] Given the practical similarity between the structure for interest balancing under the U.S. *forum non conveniens* analysis and that under the Japanese jurisdictional approach, U.S. federal courts may safely consult the Japanese case law. Japanese courts consider both the legitimate motivations of the litigants, as well as the negative effects of parallel litigation, including the possibility of contradicting judgments.[265]

2. *Restrictive Use of Antisuit Injunctions*

The protectionist approach of liberally granting antisuit injunctions, such as that manifested in *Seattle Totems* or *Cargill*,[266] is still prevalent among the U.S. federal courts.[267] In fact, the Sixth Circuit observed that, as

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263 *See supra* parts I & II.

264 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

265 *See supra* part IV.A.2.

266 *See supra* part III.C.4.

267 For instance, about seven months after the *Laker* decision, the District Court for the Southern District of New York still maintained a liberal approach similar to *Seattle Totems* and *Cargill*, despite its reference to the *Laker* decision. American Home Assurance Co. v. Insurance Corp. of Ireland, 603 F. Supp. 636, 642-43 (S.D.N.Y. 1984). In his decisions rendered in 1993, Judge Posner of the Seventh Circuit repeatedly expressed his strong inclination to the liberal approach. Phillips Medical Systems Int'l B.V. v. Bruetman, 8 F.3d 600 (7th Cir. 1993); Allendale Mutual Ins. Co. v. Bull Data Systems, Inc., 10 F.3d 425 (7th Cir. 1993). As late as June 1994, the District Court for the Northern District of California cited *Seattle Totems* as decisive authority. Robinson v. Jardine Ins. Brokers Int'l Ltd., 856 F. Supp. 554, 560 (N.D. Cal. 1994).

of February 1992, this protectionist approach was still good law in the Fifth and the Ninth Circuits, where a duplication of the parties and issues alone would generally be sufficient to justify the issuance of an antisuit injunction.[268]

In the increasingly interdependent world of a global economy, such an interference with foreign courts shall constitute a violation of foreign judicial sovereignty. The principle underlying the concept of sovereignty is that each country should be able to enjoy its judicial sovereignty within its territory, and, in turn, every country should be obliged to respect others' judicial sovereignty.[269] Antisuit injunction orders, though addressed to the parties and not to the foreign court itself, threaten the foreign judicial sovereignty.[270] When an antisuit injunction is issued, the foreign court is deprived of the opportunity to exercise its jurisdiction.[271] Moreover, it is conceivable that both the domestic court and the foreign court could issue antisuit injunctions against each other. In such a case, neither court will be able to proceed any further.[272] The more liberally a court issues antisuit injunctions, the more likely it is that a deadlock might result.

Based on the foregoing considerations, especially in due consideration for international comity, courts should decide carefully whether they should permit proceedings in their jurisdiction to continue, and restrict the issuance of antisuit injunctions as much as possible.

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268 Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1353 (6th Cir. 1992).

269 For example, in *Malaysia Airline*, the Supreme Court of Japan held that "the judicial jurisdiction of one country is a part of its sovereignty and the scope of the judicial sovereignty shall be the same as that of the sovereignty, and the Japanese judicial jurisdiction in principle shall not extend to a foreign corporation . . . ." Judgment of Oct. 16, 1981 (Malaysia Airline System Berhad v. Gotō), Saikōsai [Supreme Court], 35 Minshū 1224, 1226.

270 China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987) ("The fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity, because such an order effectively restricts the jurisdiction of the court of a foreign sovereign.") (citation omitted).

271 *Gau Shan*, 956 F.2d at 1355 ("[A]ntisuit injunctions are even more destructive of international comity than, for example, refusals to enforce foreign judgment. At least in the latter context foreign courts are given the opportunity to exercise their jurisdiction. Antisuit injunctions, on the other hand, deny foreign courts the right to exercise their proper jurisdiction.").

272 *Id.* at 1354-55 ("In a case in which parties to an international transaction file separate suits in different forums, the availability of antisuit injunctions present the possibility that no relief will be granted. If both the foreign court and the United States court issue injunctions preventing their respective nationals from prosecuting a suit in the foreign forum, both actions will be paralyzed and neither party will be able to obtain any relief.").

C. *Suggestions Concerning Japanese Practices*

1. *Recognizability Doctrine Versus Jurisdictional Approach*

Although early case law and scholars' traditional views in Japan tended to avoid restricting international parallel litigation, in recent cases the Japanese courts have acknowledged the necessity of regulating international parallel litigation. There are two possible frameworks under which the Japanese courts can regulate international parallel litigation: the recognizability doctrine and the jurisdictional approach. The jurisdictional approach, which balances various interests within the arena of jurisdiction, would be the more appropriate framework of the two.

As noted earlier, the regulation of parallel litigation depends upon the balancing of the extent of its undesirable effects against the degree of legitimacy of the motivation.[273] The justifications for restricting parallel litigation include (1) protection of the litigants against duplicative costs and other burdens, (2) judicial economy (that is, the prevention of waste of judicial resources), and (3) avoidance of contradicting judgments.[274] On the other hand, litigants' motivations may be deemed legitimate where (1) in the repetitive type of suit, the plaintiff intends to execute a judgment in multiple jurisdictions or, (2) in the reactive type of suit, the first forum is inadequate or disadvantageous for the defendant, and the defendant wishes to litigate the case in a more favorable forum.[275]

Generally, the recognizability doctrine is effective in avoiding contradicting judgments.[276] However, once it is determined that a foreign parallel litigation will result in a recognizable judgment, this doctrine automatically favors the proceeding which was filed first. In other words, where a foreign litigation has been filed prior to the Japanese parallel litigation, the Japanese court would be obliged to dismiss its action, as long as the court finds that the judgment to be rendered in the foreign forum will be recognizable in Japan. Here, it is obvious that the recognizability doctrine would necessarily fail to consider the degree of undesirable effects, other than those of contradicting judgments and the degree of legitimacy in

273 *See supra* part I.

274 *See supra* part I.

275 *See supra* part II.

276 In fact, the avoidance of contradicting judgments seems to be the primary purpose in the recognizability doctrine. Ōbuchi, *supra* note 5, at 62 ("The German scholars usually emphasize decisional harmony . . . . On the other hand, the Anglo-American case law positions seem to consider the policies of prevention of vexation and litigation economy, but not the policy of decisional harmony.").

motivations behind the parallel litigation. Further, as the recognizability doctrine always gives preference to a preceding litigation, it may compel a race to the institution of lawsuits and may result in forum shopping.[277]

In contrast, under the jurisdictional approach, the need for an international parallel litigation itself is considered as one of the "extraordinary circumstances" that would modify the literal application of the *Malaysia Airline* standard. In its province of "extraordinary circumstances," the jurisdictional approach can facilitate the interest balancing of all of the legitimate motivations against the negative effects. In fact, in *Mazaki Bussan*,[278] the court balanced the negative effects against the legitimacy of motivation.[279]

In addition, this approach can accommodate the need to examine the recognizability of a foreign judgment. Where (1) the foreign parallel litigation was filed prior to the Japanese litigation, and (2) it is highly likely that Japanese courts will recognize the judgment to be rendered in the foreign forum, Japanese courts will tend to defer to the foreign parallel litigation. Note, however, that the recognizability of a foreign judgment is not necessarily a decisive factor under the jurisdictional approach.[280]

Furthermore, the recognizability doctrine inevitably accompanies difficulty in its actual application. If a Japanese court were to apply this doctrine, the court must decide the recognizability of a foreign judgment long before a foreign court actually renders the judgment. In a practical sense, the court will face material difficulty in determining the recognizability of a foreign judgment which has not been rendered yet.[281] For example, it will be difficult for the court to predict with certainty whether or not (1) the procedure leading to the judgment violates the Japanese public policy, (2) the contents of the judgment to be rendered violate the Japanese public policy, and (3) the reciprocity rule exists between the Japanese and

277 Yoshihisa Hayakawa, *Kokusaiteki Soshō kyōgō wo 'Tokudan no Jijō' no Hitotsu toshite Kokusaiteki Saiban Kankatsu wo Hitei shita Jirei*, [*A Case that Declined the International Jurisdiction, Having Considered an International Parallel Litigation as a Factor of "Extraordinary Circumstances"*] 1007 JURISTO 168, 169 (1992).

278 Judgment of Jan. 29, 1991 (Mazaki Bussan K.K. v. Nanka Seimen Co.), Tokyo District Ct., 1390 HANREI JIHŌ 98, *summary English translation in* 35 JAPANESE ANN. INT'L LAW 171 (1992).

279 *See supra* notes 204 & 206 and accompanying text.

280 Ōbuchi, *supra* note 5, at 90 ("Recognizability of the foreign judgment can be very important. The more probable it is that a foreign judgment will be recognized, the stronger is the requirement of decisional harmony, the less legitimate the interest of the plaintiff in initiating the second action . . . . However, this factor is not necessarily decisive.").

281 KAZUNORI ISHIGURO, 1 GENDAI KOKUSAI SHIHŌ [MODERN CONFLICT OF LAWS IN JAPAN] 632 (1986); Ōbuchi, *supra* note 5, at 99 ("Predicting recognizability of the expected foreign judgment *with certainty* is very difficult, or often almost impossible.").

the foreign jurisdiction. All three of these concerns are the very same factors noted as relevant in determining recognizability of the foreign judgment in Japan under article 200 of the Code of Civil Procedure.[282]

In addition to the difficulty of predicting the outcome of a foreign judgment, there is also the lack of any assurance that the court deciding the recognizability of a foreign judgment may come to the same conclusion as would the Japanese court, which will later decide whether to recognize the judgment rendered in a foreign court.[283] Suppose a Japanese court dismissed its action because (1) the foreign parallel litigation was filed first, and (2) the judgment to be rendered by the foreign court will be recognizable in Japan. Further suppose the foreign parallel litigation eventually reaches a judgment on the merits. When a litigant later seeks recognition of the said foreign judgment in Japan, its recognizability will in most cases be decided not by the court, which dismissed the Japanese parallel litigation, but by another court. Further complicating the matter, Japanese public policy or the reciprocity rule may have changed since the dismissal of the Japanese parallel litigation.[284] Given these possible factors, it is conceivable that the latter court may deny the recognizability of the said foreign judgment, notwithstanding the contrary decision rendered earlier by another Japanese court.

It is true that a clear set of standards for interest balancing under the jurisdictional approach is yet to be established. Litigants cannot be sure whether their particular setting constitutes "extraordinary circumstances." Nevertheless, this defect in the jurisdictional approach is less significant than the inherent defects in the recognizability doctrine. Moreover, since the majority of the recent lower court cases have adopted the jurisdictional approach, the case law will gradually establish a set of standards for interest balancing in the international parallel litigation situation.

2. *Introduction of Statutory Stays*

When a Japanese court decides to defer to a foreign parallel litigation, the only currently available disposition is the unconditional dismissal of its action. Otherwise, the Japanese court is obliged to proceed with its

282 *See supra* note 212.

283 Dōgauchi, *supra* note 181, at 91 (admitting that the decision regarding the likelihood of recognition of the future foreign judgment may differ among judges.)

284 *See* Ōbuchi, *supra* note 5, at 91 (emphasizing the difficulty of predicting whether or not the future judgment will be consistent with public policy).

litigation. In other words, Japanese courts cannot just stop and see what will happen in the foreign parallel litigation. Under such a system, Japanese courts will sometimes face the tough decision of whether or not they should defer their proceedings to foreign courts, despite the difficulty of precisely predicting the outcome of the foreign litigation.[285] As an unconditional dismissal will drastically harm the plaintiff, Japanese courts will tend to retain jurisdiction and proceed with litigation before them, unless they are convinced that interest balancing definitely favors the foreign parallel litigation.[286] Thus, even in cases where a Japanese court believes that interest balancing favors the foreign parallel litigation, unless it is convinced beyond any doubt, the court will retain jurisdiction and proceed to a judgment.

If a stay or a conditional dismissal were available, in cases where a Japanese court believes that interest balancing favors the foreign parallel litigation, the court will be able to stop its proceeding and monitor how the foreign parallel litigation is proceeding.[287] In other words, stays and conditional dismissals would allow a temporary, not final, deference to the foreign court. These devices will give Japanese courts some latitude in their decision-making with regard to international parallel litigation.[288]

In addition, an introduction of stays will reduce the number of antisuit injunctions against the Japanese litigation issued by foreign courts. In the absence of a statutory provision authorizing a stay or a conditional dismissal, a Japanese court will defer to a foreign court only when interest balancing clearly favors the foreign forum. In contrast, if a stay or a conditional dismissal were available, a Japanese court can defer a "gray" case, which otherwise would not have been deferred. Accordingly, the foreign court would be encouraged to let the Japanese court decide on the adequacy of the Japanese litigation, rather than to unilaterally issue an antisuit injunction.

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285 For example, there may be a case in which, after a Japanese court dismisses a litigation before it, a foreign court also dismisses its litigation on the grounds of lack of jurisdiction or *forum non conveniens*. Kobayashi, *supra* note 189, at 40.

286 Ōbuchi, *supra* note 5, at 98 ("Dismissal is drastic and a high degree of need is required. Thus, it can be used when recognizability of the foreign judgment is almost certain, or when there is a high probability of recognizability and some special factors such as inconvenience in the domestic forum exist.").

287 *Id.* ("The remedy of stay is less drastic and less rigorous conditions are required . . . . Thus, when there is some probability of recognition and there are no such special factors as inconvenience in the forum, etc., there is need of staying to await the foreign judgment . . . .").

288 Dōgauchi, *supra* note 181, at 86 (lack of a stay option "makes it difficult for a Japanese court to deal with cases in a flexible manner.").

In Japan, the use of stays or conditional dismissals will require new legislation, since Japanese courts have been traditionally reluctant to exercise nonstatutory power. Statutory stays will be more appropriate than conditional dismissals, since Japanese courts are familiar with a stay of their proceedings, though in a different context,[289] while conditional dismissals are completely unknown in Japan. According to the Supreme Court's statistics, forty-eight out of eight High Courts and fifty District Courts were in favor of an introduction of statutory stays in international parallel litigation, while only one court was against the introduction of this concept.[290] These statistics indicate that a vast majority of the Japanese judges want the authority to grant a statutory stay in international parallel litigation.

As observed earlier, the Japanese Ministry of Justice once proposed a statutory stay in deference to a foreign parallel litigation during the debate over the amendment of the Japanese civil procedures. Because of the substantial number of dissents, the Ministry of Justice withdrew the proposal.[291] The proposal has been tabled by the Ministry of Justice until it can satisfactorily answer the following questions: (1) whether the statutory stay in deference to a proceeding in a foreign court will jeopardize the rights of Japanese nationals; (2) whether it is appropriate to deal with international parallel litigation by domestic legislation, in the absence of any assurance that foreign countries will deal with this issue in a similar way; and (3) how to formulate a set of clear standards for granting a stay.[292]

However, these concerns are not significant enough to deter the introduction of statutory stays in deference to a foreign parallel litigation. None of the concerns which the dissents and the Ministry of Justice have voiced is decisive, and there is no material reason which excludes the introduction of statutory stays from the current civil procedure amendment project in Japan.

The first concern of the dissents and the Ministry of Justice is that, if a court stays its proceeding because of international parallel litigation, it

289 *See supra* notes 239 & 240.

290 Nine courts did not express their views. CIVIL AFFAIRS BUREAU OF THE SUPREME COURT, MINJI SOSHŌ TETSUZUKI NI KANSURU KAISEI YŌKŌ SHIAN NI TAISURU KAKU SAIBANSHO NO IKEN [OPINIONS OF EACH COURT ON THE TENTATIVE PROPOSAL FOR THE PROTOCOL OF THE AMENDMENT TO THE CIVIL PROCEDURE] 142 (1994).

291 *See supra* part IV.B.

292 THE SUPPLEMENTAL EXPLANATION, *supra* note 233, at 79. In the Supreme Court's statistics, the dissenting court also expressed similar concerns. THE CIVIL AFFAIRS BUREAU OF THE SUPREME COURT, *supra* note 290, at 143 ("The legislation requires careful considerations, as it concerns the right of access to the court, and there is a problem as to how requirements for a stay should be formulated. Where there is no assurance of reciprocity, it is inappropriate to introduce a statutory stay in our civil procedure by domestic legislation.").

will jeopardize the rights of Japanese nationals. This is only a speculation, however. As long as a court does not abuse its power to grant a stay, the Japanese national's right to a home forum will not be disturbed unduly. In the United States, for example, although federal courts often stay or conditionally dismiss litigations before them, it is rarely contended that the stay or the conditional dismissal hinders the rights of U.S. nationals.[293] This is because federal courts maintain a strong presumption for a U.S. national's right to litigate in American courts, notwithstanding the availability of a stay and a conditional dismissal.[294]

As is the case in the United States, there is no reason to believe that Japanese courts will not carefully exercise their power to grant a stay, and jeopardize the right of Japanese nationals. First, forty-eight out of fifty-eight courts expressed a positive view for the introduction of stays.[295] This implies that many Japanese judges are confident about their ability to squarely exercise their judicial authority. Second, Japanese courts have already dealt with the issue of whether or not to dismiss a litigation in deference to a foreign parallel litigation.[296] Here, the danger to the right of Japanese nationals is more imminent than it is in the case of a stay. This is because once the Japanese litigation is dismissed, litigants have no choice but to litigate the case abroad, while in the case of a stay the Japanese litigation may be revived and litigants can litigate the case in Japan again. Japanese judges have not abused their power to dismiss. In fact, there has not been any contention that the right of Japanese nationals has been hindered by a dismissal under the jurisdictional approach.

The dissents and the Ministry of Justice further question whether it is appropriate to deal with international parallel litigation by domestic legislation, where there is no rule of reciprocity. The dissents specifically contend that it is not appropriate for Japan to unilaterally enact the provision because the disposition of international parallel litigation should be regulated harmoniously among nations.[297]

Ideally, all nations should agree on the rules and procedures for disposing international parallel litigations. It should be noted, however, that realization of this ideal requires an international convention to this effect. To date, there has been no international convention which deals with the

293 *See supra* part III.C.1.
294 *See supra* part V.A.2.
295 *See supra* note 290 and accompanying text.
296 *See supra* part IV.A.
297 Yanagida et al., *supra* note 228, at 48.

uniform disposition of transnational parallel litigations. The Brussels Convention provides for a uniform treatment of parallel litigation within the European Union.[298] The Brussels Convention, however, was articulated based on the EEC Treaty, and it does not intend to expand its application beyond the boundary of the European Union.[299]

The Brussels Convention is limited in other ways. It is apparent that the Brussels Convention adopts the "first to file" doctrine,[300] which, in effect, prohibits parallel litigation within the European Union. Underlying the prohibition against parallel litigation within the European Union are two unique factors: (1) the European Union consists of relatively homogeneous countries[301] and (2) the Brussels Convention itself simplified formalities governing the recognition and enforcement of foreign judgments among European Union countries.[302] Thus, similar to the situation in Japan where

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298 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, *reprinted in* EPSTEIN & SNYDER, *supra* note 261, at A191-204 [hereinafter Brussels Convention]. The Convention in pertinent part provides that:

Art. 21 [Pendency of concurrent suits in different States]

Where suits having the same object and the same basis between the same parties are brought before courts of different Contracting States, the court in which the later suit is brought shall *ex officio* yield jurisdiction in favor of the court where the action was first brought.

Art. 22 [Interrelationship between suits in different States]

Where related suits brought before courts of different Contracting States are still pending before the courts having original jurisdiction, the court in which the later suit was brought may stay the proceedings.

The court in which the later suit was brought may also, at the request of one of the parties, declare that it lacks jurisdiction if the law permits a joinder of related suits and the court in which the suit was first brought has jurisdiction over both suits.

Suits are related, within the meaning of this article, if the relationship between them is so close that there is reason to try and to decide them at the same time in order to avoid results that could be in conflict if the decisions were reached separately.

Art. 23 [Exclusive jurisdiction of several courts]

Where suits are within the exclusive jurisdiction of several courts, the court in which the later suit was brought shall yield jurisdiction in favor of the court in which suit was first brought.

299 TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], art. 220 ("Member State shall so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

. . .

- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.").

300 Brussels Convention, *supra* note 298, art. 21.

301 Although there would still be material differences among member states with regard to the procedural laws, the substantive laws, and the judicial systems, especially between the common law countries including the United Kingdom and the civil law countries including Germany, I assume that the European Union is also working to achieve more uniformity in this respect, including the establishment of the European Court of Justice, a judicial authority superior to national judiciaries.

302 Brussels Convention, *supra* note 298, art. 26 ("A judgment given in one Contracting State shall be recognized in the Other Contracting States, without requiring special proceedings for this purpose.") & art. 34 ("The court to which the request [for enforcement of a foreign judgment] is addressed shall rule

a domestic parallel litigation is prohibited, litigants in the European Union have little legitimacy in instituting a parallel litigation.[303]

In a sense, the European Union aims at a unified political and economical entity akin to the United States. Thus, the Brussels Convention resembles the Conflict of Jurisdiction Model Act, which is now being proposed to achieve a uniform treatment among states in the United States.[304] For that same reason, the Brussels Convention is unlike the Hague Service Convention[305] or the Hague Evidence Convention,[306] both of which purport a worldwide harmonization of certain aspects of civil procedures.

Similar to the underlying circumstances of the Brussels Convention, harmonizing the international parallel litigation practice worldwide requires the harmonization of the various nations' legal systems at the same time. Both the substantive and procedural laws, as well as the judicial systems, should be dramatically simplified to enable a sure and simple set of procedures for recognition and enforcement of a foreign judgment. No doubt this kind of project requires tremendous effort and time, and is unlikely to be achieved in the near future. In fact, as of yet, there is no project which is aimed at worldwide harmonization of the parallel litigation practice.

Meanwhile, with rapidly expanding international business transactions, Japanese courts are confronted with an increasing number of international parallel litigation cases. If the Japanese courts wait for an international convention for worldwide harmonization, they will continue to suffer from the lack of power to stay international parallel litigation cases pending before them. The continuing pressure toward the resolution of the increasingly difficult international cases compels the postponement of the idealistic approach of worldwide harmonization. In fact, this pressure mandates a compromised solution to deal with the reality of the transnational world. The Japanese legislature should make a unilateral decision to authorize its courts with power to stay parallel litigation cases.

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without delay and without giving the judgment debtor an opportunity to enter his plea at this stage of the proceedings.").

303 *Compare with supra* part V.A.1.

304 *See* Spencer Waller, *Forum Selection: Model Act Provides a Solution*, NAT'L L.J., Jan. 29, 1990, at 17, col. 1. *See also* Teitz, *supra* note 30.

305 The Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361-73, 658 U.N.T.S. 163.

306 The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555.

Finally, the Ministry of Justice is concerned with the problems of formulating a set of clear standards for granting a stay. Admittedly, it is difficult to formulate detailed provisions in statutory terms. However, the statute could state: "The court may, at the request of one of the parties, order a stay of the proceedings, if (1) a parallel litigation is pending abroad, (2) there is a possibility that a foreign judgment may be recognized in Japan, and (3) there are certain circumstances under which the deferral to the foreign court is adequate."[307]

Such a general and vague formulation might make the Japanese judges feel uncomfortable. It should be noted here, however, that under the jurisdictional approach, Japanese courts are required to interpret and apply a standard formulated as "extraordinary circumstances under which the conference of jurisdiction will violate the idea of facilitating equity among parties, and fair and speedy litigation."[308] This considerably general and vague formulation notwithstanding, the majority of the recent Japanese courts have relied upon the jurisdictional approach. In fact, courts have been gradually establishing a more detailed guideline as to how a court should apply the "extraordinary circumstances" standard in light of particular facts in the suit pending.

When a statutory stay is introduced, but the standard for granting a stay is as general as "extraordinary circumstances," the case law can similarly establish a more detailed set of guidelines for the application of statutory provisions, since the courts will treat a dismissal under the jurisdictional approach and a statutory stay as the companion devices for a deferral. In the United States, for example, federal courts tend to treat the motion to stay as superfluous to the motion to dismiss.[309]

VI. CONCLUSION

As compared and contrasted here, the similarities and differences between the U.S. and Japanese parallel litigation practices are a reflection of the underlying social and legal traditions. In both jurisdictions, where the relevant laws and judicial systems are divergent, the litigants' motivations for parallel litigation tend to be more legitimate.[310] The courts are more likely to allow a parallel litigation where there are more legitimate

307 Kobayashi, *supra* note 189, at 41.
308 *See supra* part IV.A.
309 *See supra* part III.C.3.
310 *See supra* parts V.A.1. & 2.

motivations for parallel litigation.[311] At the same time, however, the possibility of negative effects compels the courts to restrict the parallel litigation practice.[312]

The Japanese domestic parallel litigation practice illustrates that, when the level of homogeneity of the underlying social and legal foundation reaches a certain level, the litigants' legitimacy for parallel litigation will categorically be considered minimal. In this situation, the concern for possible negative effects mandates the courts to uniformly prohibit parallel litigation.[313] In contrast, where certain diversities exist, the courts have to balance the legitimacy of motivations against the degree of negative effects to determine whether or not to permit a parallel litigation.[314] To this end, both the U.S. federal and Japanese judiciaries have endeavored to develop an appropriate framework for the interest-balancing approach to international parallel litigation. In the United States, the main framework is the *forum non conveniens* analysis,[315] and in Japan it is the "extraordinary circumstances" analysis.[316]

This comparative analysis between the U.S. and Japanese parallel litigation practices indicates that an analysis based on the comparison between legitimate motivation and negative effects[317] may be applied universally. If this proves to be correct, the goals toward a transnational harmonization of the international parallel litigation practices may be achieved by refining the existing practice from the viewpoint of the "legitimate motivation versus negative effect" analysis.

Once the harmonization is achieved to the extent that courts in different countries apply the same standards and devices, the courts would be able to cooperate internationally in identifying the most proper forum for a dispute resolution. For example, a court may: (1) dismiss a litigation in deference to a foreign litigation, (2) stay a litigation and monitor how a foreign court will proceed, or (3) decline to defer to a foreign litigation. In each case, the court is expressing its view as to which forum is more proper for litigating the dispute. If the standards and devices are harmonized, the

311 *See supra* part I.

312 *See supra* part I.

313 *See supra* part IV.A.1. The observation about the Brussels Convention confirms this proposition. *See supra* notes 298-306 and accompanying text.

314 *See supra* part I.

315 *See supra* part III.C.1.

316 *See supra* part IV.A.2.

317 *See supra* part I.

foreign court will easily understand the message from another court, and will be obliged to pay due respect to that other court's view.

By exchanging their respective views, the courts will move from merely questioning whether their forum is adequate to the more interesting question of which is the appropriate forum. Ultimately, the courts of one nation will find themselves in *de facto* cooperation with foreign courts in search of the most appropriate forum.