No. 07-619

IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO),
Petitioner,
v.
KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE REPUBLIC OF INDONESIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Republic of Indonesia ("Republic") requests leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the U.S. Court of Appeals for the Second Circuit. Petitioner PT Pertamina (Persero) ("Pertamina") consents to the filing of this brief. Respondent Karaha Bodas Company, L.L.C. ("KBC") does not consent. Counsel of record for both Petitioner and Respondent received timely notice of the Republic's intent to file an *amicus* brief.[1]

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[1] The petition for a writ of certiorari lists the Ministry of Finance of the Republic of Indonesia ("Ministry") as a party to the proceeding in the Second Circuit. The Ministry was not a party in any manner to the proceedings concerning the anti-suit injunction at issue, neither in the District Court nor in the Second Circuit, and did not participate in those proceedings. During the execution proceedings before the Southern District of New York, the Ministry was a "non-party" with interest, as specifically recognized by the Second Circuit's decisions in the appeals of the underlying District Court judgments authorizing, respectively, attachment and then turnover. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 81 (2d Cir. 2003); *Karaha Bodas Co. v. Ministry of Finance of Indonesia*, Nos. 04-6551, 04-6672, 2006 WL 565694, at *2 (2d Cir. Mar. 9, 2006). The Ministry made a limited appearance in the District Court as a non-party with interest to raise the District Court's lack of jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, to execute against the Republic's

The Republic, as a sovereign state and a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *codified at* 9 U.S.C. §§ 201-208 (the "New York Convention" or the "Convention"), has a profound interest in this case. The Republic's interest is discussed in the *amicus* brief and need not be repeated here except in summary fashion.

First, the Republic has an interest in the sanctity of the Convention's terms. The Republic considers the Second Circuit's affirming the anti-suit injunction a violation of the New York Convention because the decision impermissibly expands the jurisdictional reach of the executing court, which merely has in rem jurisdiction over the assets located in its jurisdiction that are potentially executable. As a treaty party, the Republic must object to the violation of the Convention by the organ of another State Party to the Convention.

Second, the Republic has an interest in the comity issues implicated by the Second Circuit's decision. Those issues include respect for the Cayman Islands court's determination of its jurisdiction and competence to adjudicate Pertamina's action against KBC.

Third, the Republic has an interest because the Second Circuit's decision negatively affects the ability of its state-owned enterprises to litigate

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sovereign oil and gas revenues to satisfy KBC's judgment against Pertamina – which is a separate juridical entity from the Republic.

claims that, although related, are separate and independent from the underlying arbitration award, in a forum other than the enforcing court. Most fundamentally, those claims were not raised or adjudicated by the arbitral tribunal in the underlying award.

The *amicus* brief is desirable because this Court has "long recognized the demands of comity in suits involving foreign states . . . with a coordinate interest in the litigation," and has instructed the lower courts to "take care to demonstrate due respect . . . for any sovereign interest expressed by a foreign state." *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 546 (1987). Moreover, the Republic addresses the Second Circuit's decision from the perspective of a State Party to the New York Convention and a member, like the United States, of the international community of sovereign and independent nations.

This is the second time during the course of KBC's enforcement proceedings that a U.S. court has enjoined Pertamina from prosecuting an action against KBC in foreign courts. The first time, the U.S. Court of Appeals for the Fifth Circuit vacated the anti-suit injunction because it exceeded the enforcing court's powers under the Convention and violated international comity. The same outcome is warranted with respect to the Second Circuit's decision in this case.

Accordingly, the Republic of Indonesia respectfully moves this Court for leave to file the accompanying *amicus curiae* brief.

December 10, 2007

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INTEREST OF *AMICUS*[1]

Amicus curiae the Republic of Indonesia ("Republic") is a sovereign state and a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *codified at* 9 U.S.C. §§ 201-208 (the "New York Convention" or the "Convention"). It has a profound interest in this case for several reasons.

First, the Republic has an interest in the sanctity of the treaty's terms and their violation by the application of the extraordinary remedy that is a foreign anti-suit injunction. As organs of a State Party to the Convention, United States courts must comply with the Convention. The Republic considers that the Second Circuit's decision exceeds that court's power under the New York Convention because the decision impermissibly expands the jurisdictional reach of the executing court.

The United States courts in this case have limited power under the Convention. As an enforcing court of secondary jurisdiction, the U.S. District Court for the Southern District of Texas is limited to conducting summary proceedings to recognize and enforce an international arbitration award, and may refuse to do so only if one of the limited grounds for refusal specified in the Convention applies. The U.S. District Court for the Southern District of New York

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity made any monetary contribution intended to fund the preparation or submission of this brief.

has even more limited power because it is the executing court with in rem jurisdiction over the assets sought to be attached. Nowhere does the Convention provide that a secondary-jurisdiction court may enjoin related proceedings, let alone an executing court, and certainly not an unrelated proceeding. Therefore, the District Court did not have the juridical competence to govern or regulate court proceedings in the Cayman Islands. Unless vacated, the Second Circuit's decision implicates the United States in a breach of its obligations owed to the Republic under the Convention and international law generally.

Second, the Republic has an interest in the international comity issues implicated by the anti-suit injunction. Those comity issues include not only respect for the obligations contained in the New York Convention by the Republic's treaty partners, but also respect for the Cayman Islands court's determination of its own jurisdiction and competence to adjudicate Pertamina's action against KBC, including KBC's defenses to that action. The Second Circuit's motivation in upholding the injunction, namely to "protect" KBC from the "legal hardships" of enforcing its judgment, *see* App. 27a, is unjustified and disguises a paternalistic attitude towards the Cayman Islands court that disregards comity.

Third, the Republic has an acute interest in this case because the anti-suit injunction prevents the Indonesian state-owned oil and gas company from resolving its separate and independent legal

claims against KBC in a legitimate, foreign forum, the Grand Court of the Cayman Islands.

As the owner of a number of state companies that do business abroad, the Republic of Indonesia is troubled that the Second Circuit's affirming the foreign anti-suit injunction negatively affects the ability of its state-owned enterprises engaged in global commerce to bring lawsuits against contract partners in their domicile, where they do business, or in whichever forum personal jurisdiction exists over the contract partner. This quite simply is not for the United States courts to dictate extraterritorially without a compelling interference with their own jurisdiction. In a time of increased global commerce and competition, the Second Circuit's decision fosters greater uncertainty for Indonesian companies that may choose to litigate claims that are separate and independent from the arbitration award in a forum other than the executing court.

SUMMARY OF THE ARGUMENT

The Second Circuit's decision affirming the anti-suit injunction violates the New York Convention. The Convention, a ratified treaty under the laws of the United States, provides very limited authority to secondary-jurisdiction courts – courts charged simply with recognizing and enforcing arbitral awards in summary proceedings according to the terms of the Convention.[2] The District Court

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[2] Professors W. Michael Reisman and Albert Jan van den Berg, the pre-eminent legal authorities on the New York Convention, both provided opinions during the enforcement proceedings on

here had even less power than the secondary-jurisdiction court because it exercised in rem jurisdiction over the assets sought to be attached in its jurisdiction pursuant to the judgment issued by the secondary-jurisdiction court, *i.e.*, the U.S. District Court for the Southern District of Texas. The District Court exceeded its authority by enjoining Pertamina from pursuing its action against KBC in the Cayman Islands. While U.S. courts may issue injunctions to protect their judgments, they may not do so in violation of the New York Convention.

The anti-suit injunction also violates principles of international comity. Comity among nations is vital to ensure international cooperation. The District Court's anti-suit injunction implicates a number of comity issues in addition to respect for reciprocal treaty rights, including: respect for the Cayman Islands court's ability to determine its own jurisdiction and competence to adjudicate Pertamina's claims and KBC's defenses; and inhibiting the Republic of Indonesia's state-owned enterprises engaged in global commerce from prosecuting actions in the legally-appropriate, foreign fora of their choice. For each of these issues, comity counsels against upholding the anti-suit injunction.

Because the anti-suit injunction is an unjustified, unnecessary, and improper restraint on the sovereign powers and prerogatives of the

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the jurisdictional scope of the primary- and secondary-jurisdiction courts. Those opinions are attached as Appendices A and B to this *Amicus* Brief.

Republic of Indonesia, and contrary to the provisions of the New York Convention, the Court must grant the petition for certiorari and vacate the injunction.

ARGUMENT

I. THE ANTI-SUIT INJUNCTION LEFT INTACT BY THE SECOND CIRCUIT IMPLICATES THE UNITED STATES IN A BREACH OF THE NEW YORK CONVENTION AS AGAINST THE REPUBLIC OF INDONESIA

A. The New York Convention Is The Law Of The United States

Ratified treaties of the United States are part of U.S. law, and U.S. courts must enforce such treaties according to their terms. U.S. Const. art. VI, cl. 2. Thus, treaties have the force and effect of congressional enactments. *See Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (Treaties "stand[] on the same footing of supremacy as do the provisions of the Constitution and laws of the United States . . . and [] will be applied and given authoritative effect by the courts.").

The New York Convention is a ratified treaty that was implemented by Congress in Chapter 2 of the Federal Arbitration Act. *See* 9 U.S.C. §§ 201–208. The Convention is therefore the law of the United States and has the same force of law as a federal statute. *Id.* at § 201 ("The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United

States courts in accordance with this chapter."). "Chapter 2 of the [FAA] mandates the enforcement of the New York Convention in United States courts . . . 'according to its terms over all prior inconsistent rules of law.'" *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte*, 141 F.3d 1434, 1440 (11th Cir. 1998) (quoting *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985)).

B. A Court Called Upon To Enter A Judgment Under The Convention Has "Very Limited" Jurisdiction

The New York Convention provides for two distinct tiers of jurisdiction for the review of arbitral awards, and grants each tier "separate and limited roles." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 373 (5th Cir. 2003) ("*Fifth Circuit Decision*"). The first tier is "primary jurisdiction." A court of primary jurisdiction is defined by the New York Convention as "a competent authority of the country in which, or under the law of which, [an] award was made" and in which that award may be "set aside or suspended." N.Y. Conv., art. V(1)(e).

The second tier of jurisdiction is "secondary or enforcement jurisdiction," in which courts are charged with reviewing the enforceability of a foreign arbitral award. Courts of secondary jurisdiction are those courts in all countries, other than the country of primary jurisdiction, where enforcement of the award is sought.

As the Second Circuit has previously noted, courts of secondary jurisdiction exercise a "very limited" jurisdiction, as they are bound to conduct summary proceedings and recognize the award unless one of the limited grounds for non-recognition and non-enforcement contained in Article V of the Convention is found. *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19, 23 (2d Cir. 1997). As the pre-eminent jurist of the Convention, Albert Jan van den Berg, explains, the enforcing court's limited review does not concern the merits of the dispute, and is based on the principle of non-interference with the arbitration:

> It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. . . . Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration.

Albert Jan van den Berg, *The New York Arbitration Convention of 1958* 269 (1981).

C. The District Court Overstepped Its Limited Role Under The Convention By Issuing The Permanent Anti-suit Injunction

The Convention serves the important purpose of promoting international commercial arbitration by creating a system that requires the State Parties to recognize and enforce foreign arbitral awards. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974) ("The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 577 (7th Cir. 2007) ("Since its implementation, many decisions have noted that the Convention demonstrates a shared understanding of the necessity for uniform rules to facilitate efficient international arbitration."). Importantly, "[t]he utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985); *see also Vimar*

Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.").

Here, the District Court and the Second Circuit did not let go of matters they normally would think of as their own. The District Court was acting in a *very* limited role. The court of secondary jurisdiction was, in fact, the U.S. District Court for the Southern District of Texas. That court recognized the underlying arbitral award, reduced the award to a judgment, and ordered enforcement under the New York Convention. The District Court in New York had a much more limited role: it presided over an in rem proceeding adjudicating property rights in Indonesian oil and gas revenues located in that jurisdiction, for the purpose of ordering attachment and execution on the judgment in accordance with New York procedure.

The District Court was charged simply with identifying funds belonging to Pertamina in New York and ordering their turnover pursuant to the judgment obtained from the U.S. District Court for the Southern District of Texas. The District Court carried out this very limited role, which was made difficult and complicated by KBC's overly broad attachment strategy that tied up close to a billion dollars in revenues belonging to the Republic and not to the judgment debtor, Pertamina. In due course,

(1) the District Court identified Pertamina's funds; (2) the District Court ordered their turnover and execution; and (3) KBC dissipated those funds. Once these steps were done, the District Court's work adjudicating execution on the judgment under the Convention was complete.

But the District Court went further – further than the New York Convention and U.S. law allows – when it issued the permanent anti-suit injunction against Pertamina, barring Pertamina from pursuing its action in the Cayman Islands (or any other jurisdiction).[3] By overstepping its limited jurisdictional authority under the Convention – to adjudicate execution on assets following the judgment of the secondary jurisdiction – the District Court impinged on the jurisdiction of the Cayman Islands court to decide Pertamina's claims – claims that are separate from the issues and claims decided by the enforcing courts. In doing so, the District Court "assert[ed] [] authority not contemplated by the New York Convention." *Fifth Circuit Decision*, 335 F.3d at 373. Thus, the anti-suit injunction "threatens to upset the Convention's assignment of limited, distinct roles to national courts in the confirmation and enforcement process." *Id.* at 373 n.62.

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[3] The Second Circuit later modified the anti-suit injunction to allow Pertamina to return to the District Court and seek permission, if it chooses, to challenge the award in Switzerland, the situs of primary jurisdiction. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 130 (2d Cir. 2007).

The Second Circuit paternalistically held that the District Court's judgment "is entitled to protection from Pertamina's attempts to vitiate it through the Cayman Islands action." *Karaha Bodas*, 500 F.3d at 124. Whether or not KBC is entitled to such protection, it cannot come from the executing court. That protection, if appropriate, must come from the Cayman Islands court, as a sovereign nation perfectly capable of adjudicating, or deciding not to adjudicate, Pertamina's claims and KBC's defenses. It is not the job of U.S. courts within whose jurisdiction assets are located, *i.e.*, courts with in rem jurisdiction that have even more limited roles than secondary-jurisdiction courts, to protect KBC from *all* claims relating to its investment. Indeed, not even the arbitration was so broad as to consider all claims between KBC and Pertamina.

Professor Michael Reisman addressed the alleged "protective" aspect of the injunction in his opinions to the courts below, explaining that the real issue was not protection of the enforcing court's jurisdiction but the allocation of jurisdiction under the Convention: "one must look at the treaty's allocation of jurisdiction before one moves to the powers of a particular court to protect its own jurisdiction, for in this category of cases, it is the treaty that determines whether the court has a jurisdiction in the matter." Reisman at 29a.

Nothing prevents KBC from asserting its defenses, if any, in the Cayman Islands. *See Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 366 (8th Cir. 2007)

(in vacating the trial court's anti-suit injunction, noting that while the resulting Japanese suit could "effectively nullify the remedy Goss legitimately procured in the United States courts," the foreign suit "[did] not threaten United States jurisdiction" or prevent Goss from seeking affirmative defenses under Japanese law); *see also Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1356 (6th Cir. 1992) ("The possibility that a holding of a Hong Kong court might permit Bankers Trust to gain control of Gau Shan is not a threat to the jurisdiction of the United States courts; rather, it is merely a threat to Gau Shan's interest in prosecuting its lawsuit.").

II. THE ANTI-SUIT INJUNCTION VIOLATES INTERNATIONAL COMITY AND IMPROPERLY INFRINGES THE REPUBLIC OF INDONESIA'S SOVEREIGNTY

A. Comity Demands That U.S. Courts Seriously Limit Anti-Suit Injunctions

Although U.S. courts have the power to enjoin foreign suits by persons subject to their jurisdiction:

> [t]he 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. Therefore, an anti-foreign-suit injunction should be used sparingly and should be granted only with care and great restraint.

China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987) (citations and internal quotations omitted).

"An anti-suit injunction, by its nature, will involve detailed analysis of international comity." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990 (9th Cir. 2006). Comity has long counseled courts to give effect, whenever possible, to the executive, legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation. *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Moreover, "[c]omity ordinarily requires that courts of a separate sovereign not interfere with concurrent proceedings based on the same transitory claim, at least until a judgment is reached in one action, allowing res judicata to be pled in defense." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 939 (D.C. Cir. 1984); *see also Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 877 (3d Cir. 1981) (holding that the fact that duplicative proceedings could be "harassing and vexatious" in nature was not sufficient to "justify the breach of comity among the courts of separate sovereigns"); Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 Geo. Wash. J. Int'l L. & Econ. 1, 32 (1997) ("In developing an international system for effective dispute resolution,

the *Laker* approach is probably the best a court system can adopt. . . . Injunctions and counter-injunctions cannot provide a meaningful foundation for an efficient and just international system to resolve disputes.").

Several appellate courts have agreed with the premise that "issuing an international antisuit injunction is a step that should be taken only with care and great restraint and with the recognition that international comity is a fundamental principle deserving of substantial deference." *Goss*, 491 F.3d at 360 (citing *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004) (internal quotation marks omitted); *see also Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004); *Gau Shan*, 956 F.2d at 1352 ("[I]njunctions 'restraining litigants from proceeding in courts of independent countries are rarely issued.'") (quoting *Laker Airways*, 731 F.2d at 927).

B. The Anti-Suit Injunction Implicates Several Public International Issues

First, the enjoined action in the Cayman Islands is not a purely private dispute. Pertamina is a state-owned oil and gas company, and the Republic of Indonesia has an interest in its state-owned entities' ability to litigate claims arising from their international commercial relations. Indonesian combined imports and exports in oil and liquefied natural gas have increased annually and amounted

to $46,817,000,000 in 2007.[4] Pertamina is the second-largest oil and gas producer in the Republic of Indonesia, and has plans to expand its production in the future.[5] The company also maintains joint ventures with international oil companies such as Exxon/Mobil, Statoil, Shell, and Petronas, and has further plans to work with China's Sinopec, Venezuela's Petroleos de Venezuela S.A., Iran's National Iranian Oil Refinery and Distribution Company, and certain Japanese investors.[6] Given the international scope of the Republic of Indonesia's economic expansion strategies, it is necessary that there is predictability as to its state-owned companies' ability to bring suit in a foreign forum.

Second, while couched as an act necessary to protect the judgment of a U.S. court, the anti-suit injunction, in reality, prohibits the Cayman Islands court from adjudicating claims involving the alleged conduct of its own corporation – one that chose to domicile itself there – and, therefore, interferes with the sovereign acts of that nation. *See China Trade*, 837 F.2d at 36. The injunction effectively removes

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[4] *See* The World Bank, Indonesia Data & Statistics, International Trade, http://siteresources.worldbank.org/INTINDONESIA/Resources/226271115552951715 1/Trade.xls (last visited Dec. 6, 2007).

[5] *See* American Indonesian Chamber of Commerce, Business Advantage: Indonesia 13, *available at* http://www.cmmc.com.au/8_13_IND07_Mining_and_Energy.pdf (2007).

[6] *See* Energy Info. Admin., Dep't of Energy, Indonesia Country Analysis Brief 2-3, *available at* http://www.eia.doe.gov/emeu/cabs/Indonesia/pdf.pdf (2007).

the case from the competent hands of the Cayman Islands court, preventing it from determining its own jurisdiction and granting the appropriate relief.

Third, the anti-suit injunction negatively affects international commerce, which is dependent on "the ability of merchants to predict the likely consequences of their conduct in overseas markets." *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992). This predictability is harnessed, *inter alia*, by the cooperation and reciprocity between sovereigns, embodied by the New York Convention. Improper anti-suit injunctions like the one issued by the District Court, through which the courts of a jurisdiction enforcing a judgment of a secondary jurisdiction annex the judicial power of another sovereign nations' courts, make cooperation and reciprocity between courts less likely. *Id.*

Finally, the anti-suit injunction sets a dangerous precedent by allowing a court exercising in rem jurisdiction following a secondary-jurisdiction court's authorizing enforcement of its judgment to impose penalties on a party when it assumes or believes that a party is attempting to challenge the award in another country. There is no basis for such an expansive extraterritorial exercise of jurisdiction by an executing court. These comity departures, taken together, evince a lack of mutual respect for the judicial proceedings of other sovereign nations and are an affront to the sovereignty of other nations. *See Gau Shan*, 956 F.2d at 1354 ("The days of American hegemony over international economic

affairs have long since passed. The United States cannot today impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could.").

C. International Comity Requires That The Anti-Suit Injunction Be Vacated

Given the New York Convention's carefully crafted tiers of primary and secondary jurisdiction, the anti-suit injunction issued by the executing court preventing Pertamina from exercising its right under Cayman Islands law to pursue its action is a grave breach of the respect and deference that co-equal sovereigns owe each other, and a direct breach of the New York Convention. An executing court has no power under the Convention to assess the underlying award. The executing court is not the secondary-jurisdiction court that recognizes and authorizes enforcement of the award, and it is not otherwise entitled to such a prerogative.

The Cayman Islands has both the right and the obligation under international law to provide a judicial forum for the resolution of claims related to a corporation organized under its laws. Pertamina has the right to invoke and rely on the Cayman Islands' procedures to prosecute an action against KBC on alleged claims not considered by the courts below or in the arbitration. Further, the United States has an obligation to respect the right and obligation of the Cayman Islands courts to hear and decide the issues of Cayman Islands law, not only as

a matter of comity, but also because the international treaty on which the jurisdiction of U.S. courts in this case depends requires that result. *See Gau Shan*, 956 F.2d at 1355 ("Antisuit injunctions . . . deny foreign courts the right to exercise their proper jurisdiction. Such action conveys the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility."). The courts of this country must respect the decisions of, and the ongoing process in, the Cayman Islands court. They must leave the Cayman Islands court "free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). To hold otherwise is to violate the New York Convention and to restrict without justification the proper exercise of a sovereign nation's jurisdiction.

CONCLUSION

For the foregoing reasons, the Republic of Indonesia urges this Court to grant the petition for certiorari and ultimately to reverse the Second Circuit's decision and vacate the anti-suit injunction enjoining Pertamina from pursuing its action in the Cayman Islands.

December 10, 2007

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