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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Petition describes three separate substantial circuit splits. The Brief in Opposition concedes one "deep" and "longstanding" split, Opp'n 20; disputes another based on alleged factual differences that were not material to the circuits' decisions, Opp'n 36-38; and essentially ignores the third, Opp'n 8 n.10. In fact, all three of the Questions Presented identify direct and significant conflicts in the circuits, any one of which merits certiorari.

Of the three significant circuit splits presented in the Petition, two implicate the Eighth Circuit's decision in *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007). A petition for certiorari was filed in *Goss* on October 15, 2007, and the response date is extended to January 9, 2008. Because of the issues in common between the two petitions, the Court may wish to consider them at the same time. The Court should grant certiorari in this case, however, whatever its disposition of *Goss*.

I. A DIRECT AND SUBSTANTIAL CIRCUIT SPLIT EXISTS REGARDING FEDERAL COURTS' ANCILLARY JURISDICTION FOLLOWING SATISFACTION OF A JUDGMENT.

KBC contends that the Second and Eighth Circuits are not in conflict on the issue of a federal court's ancillary jurisdiction to enjoin foreign proceedings following satisfaction of a damages judgment. KBC is at pains to justify this position,

given that the two courts reached opposite conclusions on that precise issue. The Second Circuit, in addressing *Goss*, did not even seek to distinguish that case; it expressly disagreed with it. *See* Pet. App. 37a-40a.

While KBC now identifies purported factual differences between the two cases,[1] none of these was determinative of the Eighth Circuit's ruling that jurisdiction was lacking, *see Goss*, 491 F.3d at 365-68, and the Second Circuit never suggested that those factual differences mattered to its decision. On the contrary, the Eighth Circuit held that federal jurisdiction to enjoin a foreign lawsuit does not exist after payment of a money judgment, even when the foreign lawsuit allegedly seeks to undo the effect of the U.S. federal court's judgment, *id.* at 365-67; the Second Circuit held the opposite, Pet. App. 38a-40a.

KBC quotes part of a footnote in *Goss* (Opp'n 37), but neglects to quote the preceding sentence; its characterization of the footnote is thus highly misleading. The footnote reads in full:

> We recognize there are cases where the satisfaction of judgment is not, as here, solely the payment of a money judgment. Therefore, we reach no categorical conclusion regarding the propriety of the issuance of an antisuit

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[1] Notably, KBC took the opposite position before the Second Circuit. Prior to the Eighth Circuit's inconvenient reversal of the Iowa district court's ruling, KBC argued that the *Goss* case was "remarkably similar" and "almost identical" to this one. Appellee's Br. 55, 56. *See also id.* at 36.

> injunction in all cases involving the preservation of a judgment.

Goss, 491 F.3d at 368 n.9. Read in its entirety, the *Goss* footnote indisputably means, not that the decision is confined to its facts, but rather that there are some district court judgments that are *not* fully satisfied by the payment of damages.[2] The judgment in this case, as in *Goss*, was not one of those. It was fully satisfied by payment of the turnover award.

KBC further characterizes the circuit split (which it claims does not exist) as a "shallow" one, involving only two circuits. Opp'n 36. But the importance of this issue of federal subject matter jurisdiction cannot be denied, and KBC does not try. Issues significantly implicating the power of federal courts should be resolved at the earliest opportunity. With two circuits at a clear impasse, after lengthy and reasoned opinions, only this Court can clarify the scope of federal court authority to enjoin litigation after satisfaction of a judgment.

While the issue presented here warrants certiorari whatever the Court's ultimate view of the merits may be, in fact *Goss* was correct, and the Second Circuit's decision below was not. *See* Pet. 18-22. KBC's principal argument in response is that *Goss* relies on *Peacock v. Thomas*, 516 U.S. 349 (1996), which allegedly "stands only for the . . .

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[2] It is on precisely this basis that the decisions cited by KBC (Opp'n 35) – *Dietzsch v. Huidekoper*, 103 U.S. 494 (1880), and *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) – are distinguishable: they involved ongoing orders that needed protection. *See* Pet. 20.

proposition that 'the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment.'" Opp'n 38 (quoting *Goss*, 491 F.3d at 365) (emphasis in original). The clear implication of *Peacock*'s statement, however, as *Goss* correctly recognized, is that jurisdiction exists until satisfaction of the judgment – *and not beyond.* While noting that courts have ancillary jurisdiction over proceedings "to assist in the protection and enforcement of federal judgments," 516 U.S. at 356, the Court in *Peacock* emphasized that its "recognition of these supplementary proceedings has not . . . extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment," *id.* at 357. The present anti-suit injunction lies beyond a mere attempt to execute upon a judgment, and therefore the district court lacked jurisdiction to issue it.

II. A DIRECT AND SUBSTANTIAL CIRCUIT SPLIT EXISTS REGARDING THE PROPRIETY OF FOREIGN ANTI-SUIT INJUNCTIONS BY SECONDARY JURISDICTION COURTS UNDER THE NEW YORK CONVENTION.

The Second Circuit, in direct contrast to the Fifth, erroneously treated the district courts' secondary confirmation and enforcement proceedings under the New York Convention as equivalent to a judgment on the merits by a United States court.

KBC's "response" to this, the second Question Presented in the Petition, is consigned to a footnote in its Counter-Statement of the Facts. Opp'n 8 n.10.

The footnote asserts that the Second and Fifth Circuits' decisions are "factually and legally distinct," because the Cayman Action, a lawsuit for damages and subsidiary injunctive relief, allegedly posed a greater threat to the district court's jurisdiction than the Indonesian annulment action that the Fifth Circuit refused to enjoin.

This proffered distinction in no way resolves the circuit conflict, because the Fifth Circuit's decision did not depend on the remedy sought in the foreign action. Indeed, the Fifth Circuit expressly considered that "Pertamina could have sought monetary relief in the Indonesian courts," but concluded that –

> as a court of secondary jurisdiction under the New York Convention, charged only with enforcing or refusing to enforce a foreign arbitral award, it is not the district court's burden or ours to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it.

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 369 (5th Cir. 2003).

The Fifth Circuit thus grounded its decision on the limited role of a court of secondary jurisdiction – "charged only with enforcing or refusing to enforce a foreign arbitral award" – not on the nature of the

remedy sought in the foreign proceeding. *Id.* Indeed, the Fifth Circuit reversed the anti-suit injunction based in part on the "general principle that a sovereign country has the competence to determine its own jurisdiction *and grant the kinds of relief it deems appropriate.*" *Id.* at 372-73 (emphasis added).

A direct circuit split exists, which this Court should resolve, regarding the authority of a court of secondary jurisdiction under the New York Convention to grant a foreign anti-suit injunction.

III. THE SECOND CIRCUIT'S DECISION CONTRIBUTES TO THE WIDELY ACKNOWLEDGED CIRCUIT SPLIT REGARDING THE STANDARD FOR ISSUING ANTI-SUIT INJUNCTIONS.

KBC concedes, as it must, that there is a "deep" and "longstanding" split among the circuits regarding the proper standard for issuing foreign anti-suit injunctions. Opp'n 20, 21. It does not and cannot deny that this Court's review would resolve that conflict and clarify the law throughout the federal courts on an issue fundamental to international comity.

KBC attempts to downplay this clear-cut basis for granting certiorari by arguing that the Second Circuit granted an anti-suit injunction based on "the most restrictive standard," Opp'n 22, and therefore Pertamina could not hope for a more favorable result in this Court. KBC mischaracterizes the circuit split and the Second Circuit's place within it. In any event, the issue is far from academic in this case: in

resolving the differences among the circuits, this Court can and should reverse the Second Circuit's decision below.

The Opposition insists that each circuit falls into one of two neatly divided "binary" camps. Opp'n 21-27. In its zeal to establish that there are two, and only two, standards in use, KBC seeks to impose a uniformity upon the courts' approaches that the case law does not bear out. It thereby ignores the significant – and potentially outcome-determinative – differences even among those circuits whose approach has been called "restrictive." *See* Pet. 32-34.

Indeed, *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004), the very case on which KBC relies for its contention that there are only two standards, directly undercuts that contention. *See* Opp'n 24-25. The First Circuit in *Quaak* expressly distanced itself from "the conservative approach," and, in particular, from decisions of the Third and Sixth Circuits, which it found treated preservation of jurisdiction and protection of important national policies "as exclusive," and thereby "evince[d] a certain woodenness." 361 F.3d at 18. The First Circuit thus recognized the very division within the restrictive circuits that KBC now denies, between those circuits that examine equitable considerations in considering anti-suit injunctions, and those circuits that treat interference with jurisdiction or important public policies "as exclusive." *Id.*

The question, in any event, is not whether the First Circuit – or any other circuit – has observed differences between the Second Circuit's approach and that of other circuits, or has characterized those differences as part of a two-way, three-way, or other-way split. The question is whether those differences exist. They do. The Second Circuit relied on equitable factors in issuing the anti-suit injunction, Pet. App. 33a-34a; the Third, Eighth, and Sixth Circuits have not considered such factors, *see, e.g.*, *Goss*, 491 F.3d at 361 n.4; *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127-29 (3d Cir. 2002); *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160-61 (3d Cir. 2001); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992). Indeed, the Sixth Circuit has stated that interference with jurisdiction or an important policy of the forum are the "only" two factors that may be considered. *Gau Shan*, 956 F.2d at 1355.

Had the Second Circuit adopted that approach, eschewing equitable factors, it could not have relied on "vexatiousness" as a basis for affirming the anti-suit injunction in this case. *See* Pet. App. 33a-34a. The Second Circuit's reliance on equitable factors thus separates it from the more restrictive standard applicable in the Third, Sixth, and Eighth Circuits. On this basis alone, the circuit split is implicated by this case.

Regardless where on the spectrum of restrictiveness the Second Circuit's *China Trade* test may fall, KBC fails to respond to the ways in which the Second Circuit's application of that test conflicts with other circuits' application of the threat-to-

jurisdiction and public policy factors. *See* Pet. 36-38. If certiorari is granted, this Court, in articulating a standard for foreign anti-suit injunctions that resolves the deep split among the circuits, necessarily will address the meaning of these fundamental factors and their application to this case. Review of this Question Presented therefore may – indeed, should – lead to reversal of the anti-suit injunction.

Finally, KBC does not dispute that the Court should resolve the conflict among the circuits with regard to anti-suit injunctions; it merely argues (incorrectly, as discussed above) that this case is not the appropriate vehicle. Accordingly, it suggests that this "longstanding," "deep" circuit split should be left unresolved for another day. KBC puts forth no good reason why this Court should not address this issue, to put an end to the unpredictability in this area of the law and the resulting severe negative consequences for international commerce and comity.

IV. RESPONDENT'S "POLICY" ARGUMENTS ARE NOT WELL TAKEN AND IN ANY EVENT HAVE NO BEARING ON WHETHER THE PETITION SHOULD BE GRANTED.

KBC asserts that "any grant of certiorari by this Court" would undermine "important public policy considerations." Opp'n 28. Such considerations, even if they existed (they do not) are not among the factors pertinent to the decision whether to grant a petition. *See* Sup. Ct. R. 10.

The "policy" concerns KBC highlights are among the same considerations debated in this litigation as potential equitable grounds allegedly relevant to the issuance of an anti-suit injunction. As discussed in Part III, *supra*, the circuits are divided regarding the propriety of considering just such equitable factors; accordingly, it would be most incongruous to deny Pertamina's petition on that basis.

In any event, even were they relevant to the petition, the considerations KBC identifies would not weigh against certiorari. KBC first articulates a federal policy in favor of finality of litigation. Although KBC invoked finality as a reason for the Second Circuit to affirm the anti-suit injunction, the Second Circuit did not rule on that basis. Finality is not an end in itself – there is a "strong presumption in favor of deciding cases on the merits" in federal courts. *Malot v. Dorado Beach Cottages Assocs.*, 478 F.3d 40, 43 (1st Cir. 2007). Indeed, if finality were sufficient reason to deny a petition for certiorari, no petition ever would be granted.

KBC next asserts that Pertamina's fraud claims in the Cayman Action are arbitrable; it thus concludes that this Petition contravenes a federal policy favoring enforcement of arbitration clauses. This issue was not decided below; no court has addressed whether the claims are arbitrable. In any event, the anti-suit injunction KBC now defends prevents Pertamina from seeking arbitration. *See* Pet. App. 43a (enjoining Pertamina "from making a claim or commencing an action in any court *or tribunal*" (emphasis added)). Accordingly, if KBC were correct that the claims are arbitrable, any

policy favoring arbitration clauses would support Pertamina.

KBC's third proposed policy consideration – that federal courts favor the swift resolution of arbitration – also favors Pertamina. As this Court has observed, the success of international 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). The issuance of anti-suit injunctions by U.S. courts signals profound disrespect for the court systems of the other Convention signatories. *See* Brief of Republic of Indonesia as Amicus Curiae in Supp. of Pet. 16-18. The inevitable result is injunctions of federal actions by foreign courts, *see, e.g.*, *Dependable Hwy. Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067-69 (9th Cir. 2007) (federal action enjoined by English court), which hinder the efficient resolution of arbitrations.

KBC further asks the Court not to grant the petition in light of federal policies against forum shopping or vexatious conduct. If anyone is guilty of forum shopping it is KBC: it initiated proceedings in this case in four countries; Pertamina's Cayman Action is filed in the country where KBC is incorporated; and KBC ran to its preferred New York forum to block that lawsuit.

Nor is the Cayman Action "vexatious." Pertamina filed that lawsuit in KBC's home forum, after KBC had thwarted on procedural grounds Pertamina's attempts to prosecute its fraud allegations in then-

ongoing enforcement actions in Singapore and Hong Kong. *See* Pet. 8-9.[3] Pertamina believes it was defrauded of hundreds of millions of dollars. It understandably desires to redress that injury, and it should not be criticized for its persistence in seeking vindication through the courts.

Finally, KBC recites a litany of alleged litigation abuses by Pertamina. Never mind that it is KBC that stands accused of a nine-figure fraud and seeks to enjoin litigation of that claim; its strategy is to fling allegations, no matter how irrelevant and unseemly they may be in the context of a petition for certiorari. It should suffice in response to say that Pertamina disagrees with KBC's characterizations of its conduct, and that the Second Circuit did not predicate its decision on these allegations.[4]

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[3] Pertamina pursued its fraud claims after it first reviewed, in August 2005, the documents on which they are predicated. *See* Pet. 8. KBC claims that this statement is "demonstrably false" because Pertamina admits that the documents had been sent to it in 2002, *see* Opp'n 5-6 n.5, but Pertamina has submitted evidence showing that it did not review those documents until its new counsel uncovered them in 2005. *See* Pet. 8; *see also, e.g.*, C.A. App. A-1845. KBC may disbelieve that evidence, but the anti-suit injunction has prevented the parties from litigating those facts in the Cayman Islands court.

[4] KBC's principal allegation, *see* Opp'n 13-14, focuses on a letter Pertamina's counsel wrote to the district court, in response to a specific question. Pertamina's August 28, 2006 letter stated that Pertamina would "not object before this Court to the payment of the judgment." The Second Circuit found that this letter was technically accurate, Pet. App. 12a, and did not base its affirmance of the anti-suit injunction in any way on the letter. While the district court evidently believed that Pertamina's letter should have disclosed an intention to file the Cayman Action, the record does not show whether Pertamina in

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DECEMBER 2007

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fact had such an intention on August 28, over two weeks before it filed the Cayman Action on September 15. *See* Appellant's Br. 56-58. It was this point that counsel for Pertamina addressed at oral argument before the Second Circuit, in the exchange from which KBC quotes only a small excerpt (Opp'n 14-15 n.20). *See* Opp'n App. 99a-106a.