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## CHAPTER 15

### Private International Law

#### A. COMMERCIAL LAW/UNCITRAL

##### 1. General

On October 16, 2013, John Arbogast, Counselor for Legal Affairs for the U.S. Mission to the UN, addressed the UN General Assembly's Sixth (Legal) Committee during its debate on the report of the UN Commission on International Trade Law ("UNCITRAL") on the work of its 46th session. See U.N. Doc. A/68/17. Mr. Arbogast's statement, excerpted below, is available at <http://usun.state.gov/briefing/statements/215561.htm>.

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The United States wishes to commend the UNCITRAL Secretariat for its continuing work in promoting the harmonization of international trade law. The Report of the 46th session of the Commission reveals significant accomplishments during the past year.

We welcome the adoption of numerous instruments during the Commission's 46th session. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the related revision of the UNCITRAL Arbitration Rules aim to make arbitrations involving a State, initiated under an investment treaty concluded after April 1, 2014, accessible to the public through publication of information regarding the commencement of the arbitration, key arbitration documents, open hearings, and participation by third parties. The UNCITRAL Guide on the Implementation of a Security Rights Registry provides commentary and recommendations on legal and practical issues that need to be addressed in a modern security rights registry. The guidance on procurement regulations to be promulgated in accordance with the UNCITRAL Model Law on Public Procurement and glossary of procurement-related terms used in that model law will provide assistance in the area of public procurement. Revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency are intended to address

uncertainty that has arisen in the application of that model law and to provide valuable guidance to domestic courts. Part four of the UNCITRAL Legislative Guide on Insolvency Law provides a useful discussion of issues related to the responsibilities of directors of corporations that are in the vicinity of insolvency.

The Report also details the ongoing and new work in the various UNCITRAL working groups. Working Group I will focus on the reduction of legal obstacles faced by micro, small and medium sized enterprises throughout their life cycle, particularly in developing countries. Working Group II is preparing a convention on the application of the new Rules on Transparency to investor-State arbitrations initiated under investment treaties. Working Group III will continue to draft generic procedural rules for online dispute resolution for the resolution of disputes arising from cross-border electronic commerce. Working Group IV will continue to consider the electronic transferability of rights. Working Group V is in the process of clarifying how it might proceed with enterprise group issues and other issues. Working Group VI will continue its work on a model law on secured transactions.

In light of the financial situation affecting UNCITRAL and its member states, the United States provided a paper, A/CN.9/789, encouraging members to consider many aspects of the operation of UNCITRAL. The United States is pleased that the Commission did begin the process of considering whether changes are needed to the processes by which UNCITRAL operates. In particular, the United States is pleased that the Commission discussed criteria to be addressed when considering projects to be undertaken by UNCITRAL and that the Commission acknowledged various tools through which it can introduce flexibility, and perhaps greater efficiency, in its working methods, such as through the use of experts or special rapporteurs. Moreover, the United States is pleased that the Commission realized the benefits of substantive cooperation with other organizations such as the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law, and looks forward to the Secretariat's forthcoming report on possible joint projects with these organizations. We also look forward to continued discussion of reform measures that could help maximize UNCITRAL's ability to accomplish more using its limited resources and ensure a focus on the highest-priority projects.

The Report highlights the important role of UNCITRAL in furthering the broader rule of law agenda of the UN. We continue to believe that, through the practical mechanism of international instruments designed to harmonize international trade law, UNCITRAL contributes in a very concrete manner to promotion of the rule of law internationally. We think that UNCITRAL deserves recognition for this contribution.

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## **2. Rules on Transparency in Treaty-based Investor-State Arbitration**

As mentioned in Mr. Arbogast's statement above, UNCITRAL finished negotiations on a set of Rules on Transparency in Treaty-based Investor-State Arbitration in 2013. Those Rules are available at [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html). The Rules are designed to promote transparency in investor-state arbitrations occurring under bilateral investment treaties ("BITs) and other treaties. The United States actively

participated in formulating the Rules and, as stated above, welcomed their adoption by UNCITRAL.

## **B. JUDGMENTS**

### **1. Resumption of the Judgments Project**

Over a decade ago, the Member States of the Hague Conference on Private International Law initiated “The Judgments Project,” which originally contemplated harmonization of the rules of jurisdiction of courts and the recognition and enforcement of their judgments across borders. The most notable result of their efforts was a more limited agreement, the Convention on Choice of Court Agreements (“COCA”), which was concluded in 2005. In 2011, the Council on General Affairs and Policy of the Hague Conference convened an “Experts’ Group” to explore the possibility of resuming the Judgments Project. The Experts’ Group agreed that there was some prospect of success for an instrument on the recognition and enforcement of judgments, but there was no consensus regarding further work on an instrument on jurisdictional bases. In 2012, the Council considered the findings of the Experts’ Group and divided the project into two parts: (1) a Working Group tasked with preparing proposals for consideration by a Special Commission in relation to provisions that might be included in a possible future instrument relating to recognition and enforcement of judgments; (2) further study by the Experts’ Group regarding the feasibility of making provisions in relation to matters of jurisdiction, including parallel proceedings, in the same or another future instrument. Initial meetings of the Working Group and the Experts’ Group took place in The Hague in February 2013.

In August of 2013, after some disagreement among delegations as to how the work on the Judgments Project should proceed, the Permanent Bureau of the Hague Conference disseminated to Member States a “Process Paper on Continuation of the Judgments Project,” which proposed (in paragraph 20) the following plan for the timing and agenda of the two groups (the Working Group and the Experts’ Group):

- (i) the Working Group continue to further advance its work in response to its mandate and report to the Council in 2014;
- (ii) the Experts’ Group inform the Council in 2014 that while its study and discussion on the desirability and feasibility of work on international jurisdiction is suspended to allow all Members of the Groups to have a clearer idea as to the evolution of the work on recognition and enforcement, it intends to resume its work at some point in the future so as to allow Members of the Experts’ Group to develop a more informed position on the policy issues at stake in relation to jurisdictional matters; and
- (iii) at the appropriate time, the Council consider the results of the work of the Working Group and the recommendations of the Experts’ Group in order to determine the scope and nature of the future instrument(s).

The Process Paper is available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

On December 6, 2013, John J. Kim, Assistant Legal Adviser for Private International Law at the U.S. Department of State, provided U.S. views regarding the proposed plan for the Working Group and the Experts' Group in proceeding with the Judgments Project. The letter from Mr. Kim to Christophe Bernasconi, Secretary General of the Hague Conference on Private International Law, is also available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). In response to the Process Paper, Mr. Kim's letter states:

The United States very much appreciates the Permanent Bureau's work in preparing the Process Paper. The Process Paper usefully summarizes the debate among delegations as to how the Judgments Project should proceed—in particular, whether the Conference should focus first on the recognition and enforcement of judgments alone, or whether work should proceed on a dual track including negotiations on direct jurisdiction. ...

As you know, the U.S. delegation has expressed its views on the Judgments Project at prior meetings of the Council on General Affairs and Policy. We believe that we must first see if an agreement can be reached on the fundamental objective of the Judgments Project (the recognition and enforcement of judgments) before the Council decides whether it makes sense to pursue work on direct jurisdiction. Further, we believe that the Permanent Bureau and the Member States should focus their limited resources in an area where the prospects for success are more promising.

Accordingly, the United States can accept the recommendations made by the Permanent Bureau in paragraph 20 of the Process Paper, subject to certain clarifications. First, we agree that the Working Group should resume its work in response to its mandate and report to the Council on General Affairs and Policy in April 2014.

Second, we agree that the Experts' Group should refrain from the study and discussion of the desirability and feasibility of work on international jurisdiction until all Members of the Hague Conference have a clearer idea as to the evolution of the work on recognition and enforcement. The Experts' Group should not meet again until there is a consensus by the Members of the Hague Conference that it is appropriate for the Experts' Group to meet.

Third, we appreciate the Permanent Bureau's recommendation that "at the appropriate time" the Council can consider the results of the work of the Working Group and the recommendations of the Experts' Group in order to determine the scope and nature of the future instruments. We wish to make clear, however, that the Council should consider the work product of the Working Group and the Experts' Group at such times as the relevant group presents its findings to the Council. The presentations of these two groups, which have very different mandates, need not be, and should not be, made in tandem. ...

## 2. Hague Convention on Choice of Court Agreements

The United States signed the Hague Convention on Choice of Court Agreements (“COCA”) in 2009. *Digest 2009* at 536. On January 19, 2013, shortly before the end of his tenure as Legal Adviser, Harold Hongju Koh signed a memorandum regarding U.S. implementation of COCA, which is available at [www.state.gov/s/l/releases/2013/index.htm](http://www.state.gov/s/l/releases/2013/index.htm). Also available along with the memorandum are the attachments mentioned therein. The memorandum appears below.

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On January 19, 2009, Legal Adviser John Bellinger signed the Hague Convention on Choice of Courts Agreement (COCA) (Attachment 1) on behalf of the United States. In the last four years, the U.S. Department of State’s Office of the Legal Adviser (particularly the Office of Private International Law (L/PIL)) has expended great effort seeking to identify a mechanism for implementing this Convention (at such time as the United States becomes a party to it) in a way that would accommodate the interests of all concerned participants at both the federal and state levels. Our goal has been to develop an agreed-upon package of legislation that would implement the Convention effectively in the United States. During that time, two principal options have emerged for COCA implementation:

### I. The “Cooperative Federalism” Approach:

Over the past four years, the Legal Adviser and other representatives of the Office of the Legal Adviser have participated in numerous meetings and have engaged in extended discussions among concerned stakeholders regarding an implementation scheme for the Convention. At those meetings, many participants have expressed strongly held and divergent views on issues relating to domestic implementation of the COCA, including with regard to the scope of federal court jurisdiction and the law applicable in federal court. The compromise proposal set forth in our April 16, 2012, State Department White Paper (Attachment 2) was intended to bridge the differences among the many views expressed. We continue to believe that the White Paper’s approach represents a principled position and the one most likely to attract broad support from different stakeholders. The Department of Justice has advised that the White Paper approach would raise no constitutional concerns were it adopted as the method of COCA implementation.

The State Department’s White Paper proposal presents a compromise with regard to a bundle of issues. It strikes what we believe is a fair balance between federal and state interests, taking into account all of the relevant circumstances. The White Paper is premised on a cooperative federalism approach involving parallel federal and state legislation, with states having the ability to elect to opt out of the federal statute and instead be governed by state law, applicable in state court, based on the uniform act developed by the Uniform Law Commission (ULC). It makes no change in existing rules regarding federal diversity jurisdiction or removal to federal court. It gives states autonomy in determining the length of the relevant statute of limitations and it allows states to elect whether to accept “no-connection” cases that involve no contacts with the forum. Nor does our proposed approach impair the authority of the states to establish common law jurisprudence with respect to substantive law relating to contracts or the

recognition and enforcement of judgments. Whether or not a court is applying the federal implementing law or a state's enactment of the uniform act, it is understood that certain principles of state law that are not addressed in the Convention will apply.

The White Paper approach was supported, as a necessary compromise, by the New York State Bar Association International Section, the New York City Bar Committee on International Commercial Disputes, and the prevailing majority of polled members of the Section of International Law of the American Bar Association. The Committee on Federal-State Jurisdiction of the Judicial Conference of the United States did not take a position on the White Paper proposals. The Maritime Law Association objected to the proposals, stating that it believes that cooperative federalism is an inappropriate method for implementation of a convention. The Uniform Law Commission and the Conference of Chief Justices indicated that they cannot support the White Paper approach as a workable compromise, specifically because of the provision on applicable law in federal court. In the attached correspondence with ULC President Michael Houghton (Attachment 3), I explained why the State Department believes the White Paper approach is fair and workable, should all stakeholders endorse it. A key factor underlies the White Paper proposals: under cooperative federalism, by design the federal and state implementing statutes are to be substantively the same – in fact, identical insofar as possible – and, in the event of any substantive discrepancy, the federal statute will preempt.

On July 18, 2012, the Uniform Law Commission formally approved the Uniform Choice of Court Agreements Convention Implementation Act (Uniform Act) (Attachment 4). We had advised the ULC that, in light of the unresolved issues regarding implementation of the Convention, the State Department was not in a position to endorse that action. We have further cautioned the ULC that, because the draft federal legislation is still evolving – and would likely undergo further change if and when it is taken up by Congress – if states proceed with enactment of the Uniform Act in its current form, there is a serious risk that non-conforming federal and state texts could impair the effective implementation of the Convention. The Uniform Act and the federal legislation that was drafted to accompany it (Attachment 5) are quite detailed and largely replicate all of the operational provisions in the Convention.

## II. The “Federal Arbitration Act” Approach:

With the continuing impasse over the acceptability of the White Paper proposals, progress on a cooperative federalism approach remains stalled. Those who objected to the White Paper compromise have not come forward with an alternative proposal, based on cooperative federalism, that would attract broader support from key stakeholders. Accordingly, I thought it necessary and important to present an alternative proposal before the end of my tenure as Legal Adviser.

At a public meeting on January 4, 2013, held under the auspices of the State Department's Advisory Committee on Private International Law (ACPIL), a different draft vehicle for COCA implementation was discussed. It is a shorter version of a federal statute (Attachment 6), patterned after the gap-filling approach of the legislation (chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208) (Attachment 7) that has proved successful in implementing the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). It does not seek to replicate the operative provisions of the Convention, generally leaving those to be directly enforceable in U.S. courts in self-executing fashion, and it does not contemplate parallel uniform state law.

At that meeting, a representative of the Conference of Chief Justices queried whether the new approach could achieve the necessary level of support from stakeholders. At the same time,

the “Federal Arbitration Act” approach was strongly endorsed by representatives of the New York State Bar Association International Section, the New York City Bar Committee on International Commercial Disputes, the Maritime Law Association, and a number of other practitioners and academics in attendance. The ULC said that it cannot support that approach, but offered no alternative to break the impasse surrounding the “cooperative federalism” approach. As of this date, my judgment is that the federal-only approach is the most promising available path that would achieve simplicity, uniformity, and predictability in the implementation of the Convention. While further vetting and polishing of the proposal is advisable in the next period, I have recommended to my successor as Legal Adviser and the next Secretary of State that, absent new proposals from key stakeholders regarding how the package of issues under the cooperative federalism approach might be restructured to gain wider support, the Department should focus its energies upon the federal-only approach in order to complete this important implementation effort.

Let me say in closing that achieving U.S. ratification of the COCA is an important experiment in how private law conventions may be implemented in our federal system. We continue to believe that creative solutions are appropriate and necessary in order to bridge the policy differences that exist among key stakeholders. We also believe that either the White Paper approach or a fully vetted version of the Federal Arbitration Act approach would represent a reasonable method of implementation that would allow the United States to meet its international obligations under the Convention at such time as it becomes a party. Because the former approach is currently at an impasse, the latter approach is currently the most promising way forward. I hope that the extensive groundwork that has been laid during my time as Legal Adviser will make it possible for all stakeholders to arrive at an agreed-upon approach that would allow the United States to proceed to prompt ratification and implementation of this most important convention.

Attachments:

- 1 – Convention on Choice of Court Agreements
- 2 – State Department White Paper, April 16, 2012
- 3 – Correspondence between the Legal Adviser and Michael Houghton, President of the Uniform Law Commission
- 4 – Uniform Choice of Court Agreements Convention Implementation Act, adopted July 18, 2012
- 5 – Draft federal implementing legislation, April 24, 2012
- 6 – Draft federal implementing legislation, December 11, 2012
- 7 – Chapter 2 of the Federal Arbitration Act

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## C. FAMILY LAW

### Hague Convention on the Civil Aspects of International Child Abduction

#### 1. *Chafin*

As discussed in *Digest 2012* at 459-67, the United States filed an *amicus* brief in 2012 in the U.S. Supreme Court in a case under the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”). *Chafin v. Chafin*, No. 11-1347. The case involves the question of whether the return of a child to his or her country of habitual residence, pursuant to a district court order under the Hague Convention, renders the case moot. The Supreme Court decided the case on February 19, 2013, unanimously reaching the conclusion recommended by the U.S. *amicus* brief that the appeal from the district court was not rendered moot. Excerpts follow (with footnotes omitted) from the majority opinion of the Court (there was one separate concurring opinion).

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This dispute is still very much alive. Mr. Chafin continues to contend that his daughter’s country of habitual residence is the United States, while Ms. Chafin maintains that E.C.’s home is in Scotland. Mr. Chafin also argues that even if E.C.’s habitual residence was Scotland, she should not have been returned because the Convention’s defenses to return apply. Mr. Chafin seeks custody of E.C., and wants to pursue that relief in the United States, while Ms. Chafin is pursuing that right for herself in Scotland. And Mr. Chafin wants the orders that he pay Ms. Chafin over \$94,000 vacated, while Ms. Chafin asserts the money is rightfully owed.

On many levels, the Chafins continue to vigorously contest the question of where their daughter will be raised. This is not a case where a decision would address “a hypothetical state of facts.” *Lewis, supra*, at 477, 110 S.Ct. 1249 (quoting *Rice, supra*, at 246, 92 S.Ct. 402; internal quotation marks omitted). And there is not the slightest doubt that there continues to exist between the parties “that concrete adverseness which sharpens the presentation of issues.” *Camreta v. Greene*, 563 U.S. —, —, 131 S.Ct. 2020, 2028, 179 L.Ed.2d 1118 (2011) (quoting *Lyons, supra*, at 101, 103 S.Ct. 1660; internal quotations marks omitted).

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At this point in the ongoing dispute, Mr. Chafin seeks reversal of the District Court determination that E.C.’s habitual residence was Scotland and, if that determination is reversed, an order that E.C. be returned to the United States (or “re-return,” as the parties have put it). In short, Mr. Chafin is asking for typical appellate relief: that the Court of Appeals reverse the District Court and that the District Court undo what it has done. See *Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.*, 249 U.S. 134, 145–146, 39 S.Ct. 237, 63 L.Ed. 517 (1919); *Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 219, 11 S.Ct. 523, 35 L.Ed. 151 (1891) (“Jurisdiction to correct what had been wrongfully done must remain with the court so long as

the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal”). The question is whether such relief would be effectual in this case.

Ms. Chafin argues that this case is moot because the District Court lacks the authority to issue a re-return order either under the Convention or pursuant to its inherent equitable powers. But that argument—which goes to the meaning of the Convention and the legal availability of a certain kind of relief—confuses mootness with the merits. In *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), this Court held that a claim for backpay saved the case from mootness, even though the defendants argued that the backpay claim had been brought in the wrong court and therefore could not result in relief. As the Court explained, “this argument ... confuses mootness with whether [the plaintiff] has established a right to recover ..., a question which it is inappropriate to treat at this stage of the litigation.” *Id.*, at 500, 89 S.Ct. 1944. Mr. Chafin’s claim for re-return—under the Convention itself or according to general equitable principles—cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction, see *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), and his prospects of success are therefore not pertinent to the mootness inquiry.

As to the effectiveness of any relief, Ms. Chafin asserts that even if the habitual residence ruling were reversed and the District Court were to issue a re-return order, that relief would be ineffectual because Scotland would simply ignore it. But even if Scotland were to ignore a U.S. re-return order, or decline to assist in enforcing it, this case would not be moot. The U.S. courts continue to have personal jurisdiction over Ms. Chafin, may command her to take action even outside the United States, and may back up any such command with sanctions. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289, 73 S.Ct. 252, 97 L.Ed. 319 (1952); cf. *Leman v. Krentler–Arnold Hinge Last Co.*, 284 U.S. 448, 451–452, 52 S.Ct. 238, 76 L.Ed. 389 (1932). No law of physics prevents E.C.’s return from Scotland, see *Fawcett v. McRoberts*, 326 F.3d 491, 496 (C.A.4 2003), abrogated on other grounds by *Abbott v. Abbott*, 560 U.S. —, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010), and Ms. Chafin might decide to comply with an order against her and return E.C. to the United States, see, e.g., *Larbie v. Larbie*, 690 F.3d 295, 303–304 (C.A.5 2012) (mother who had taken child to United Kingdom complied with Texas court sanctions order and order to return child to United States for trial), cert. pending, No. 12–304. After all, the consequence of compliance presumably would not be relinquishment of custody rights, but simply custody proceedings in a different forum.

Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured. For example, courts issue default judgments against defendants who failed to appear or participate in the proceedings and therefore seem less likely to comply. See Fed. Rule Civ. Proc. 55. Similarly, the fact that a defendant is insolvent does not moot a claim for damages. See 13C C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3533.3, p. 3 (3d ed.2008) (cases not moot “even though the defendant does not seem able to pay any portion of the damages claimed”). Courts also decide cases against foreign nations, whose choices to respect final rulings are not guaranteed. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (suit against Austria for return of paintings); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (suit against Argentina for repayment of bonds). And we have heard the Government’s appeal from the reversal of a conviction, even though the defendants had been deported, reducing the practical impact of any decision; we concluded that the case was not moot because the defendants might “re-enter this country on their own” and encounter the

consequences of our ruling. *United States v. Villamonte–Marquez*, 462 U.S. 579, 581, n. 2, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983).

So too here. A re-return order may not result in the return of E.C. to the United States, just as an order that an insolvent defendant pay \$100 million may not make the plaintiff rich. But it cannot be said that the parties here have no “concrete interest” in whether Mr. Chafin secures a re-return order. *Knox*, 567 U.S., at —, 132 S.Ct., at 2287 (internal quotation marks omitted). “[H]owever small” that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate, and is enough to save this case from mootness. *Ibid.* (internal quotation marks omitted).

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#### IV

Ms. Chafin is correct to emphasize that both the Hague Convention and [the International Child Abduction Remedies Act or] ICARA stress the importance of the prompt return of children wrongfully removed or retained. We are also sympathetic to the concern that shuttling children back and forth between parents and across international borders may be detrimental to those children. But courts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children—through the familiar judicial tools of expediting proceedings and granting stays where appropriate. There is no need to manipulate constitutional doctrine and hold these cases moot. Indeed, doing so may very well undermine the goals of the treaty and harm the children it is meant to protect.

If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal. See, e.g., *Garrison v. Hudson*, 468 U.S. 1301, 1302, 104 S.Ct. 3496, 82 L.Ed.2d 804 (1984) (Burger, C.J., in chambers) (“When ... the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted” (citation and internal quotation marks omitted)); *Nicolson v. Pappalardo*, Civ. No. 10–1125 (C.A.1, Feb. 19, 2010) (“Without necessarily finding a clear probability that appellant will prevail, we grant the stay because ... a risk exists that the case could effectively be mooted by the child’s departure”). In cases in which a stay would not be granted but for the prospect of mootness, a child would lose precious months when she could have been readjusting to life in her country of habitual residence, even though the appeal had little chance of success. Such routine stays due to mootness would be likely but would conflict with the Convention’s mandate of prompt return to a child’s country of habitual residence.

Routine stays could also increase the number of appeals. Currently, only about 15% of Hague Convention cases are appealed. Hague Conference on Private Int’l Law, N. Lowe, A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Pt. III–National Reports 207 (2011). If losing parents were effectively guaranteed a stay, it seems likely that more would appeal, a scenario that would undermine the goal of prompt return and the best interests of children who should in fact be returned. A mootness holding here might also encourage flight in future Hague Convention cases, as prevailing parents try to flee the jurisdiction to moot the case. See *Bekier*, 248 F.3d, at 1055 (mootness holding “to some degree conflicts with the purposes of the Convention: to prevent parents from fleeing jurisdictions to find a more favorable judicial forum”).

Courts should apply the four traditional stay factors in considering whether to stay a return order: “ (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’ ” *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)). In every case under the Hague Convention, the well-being of a child is at stake; application of the traditional stay factors ensures that each case will receive the individualized treatment necessary for appropriate consideration of the child’s best interests.

Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation. Many courts already do so. See Federal Judicial Center, J. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 116, n. 435 (2012) (listing courts that expedite appeals). Cases in American courts often take over two years from filing to resolution; for a six-year-old such as E. C., that is one-third of her lifetime. Expedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child.

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The Hague Convention mandates the prompt return of children to their countries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties’ respective claims.

The judgment of the United States Court of Appeals for the Eleventh Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

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## 2. **Lozano**

Another case relating to the Hague Convention, *Lozano v. Alvarez*, No. 12-820, discussed in *Digest 2012* at 467-74, is the subject of two U.S. *amicus* briefs filed in the U.S. Supreme Court in 2013. In its *amicus* brief in support of the petition for certiorari in the case, the United States asserted that Supreme Court review was warranted on the question of whether the one-year period for automatic return of a child in Article 12 of the Hague Convention is subject to equitable tolling. The U.S. brief on the petition for certiorari filed on May 24, 2013 is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

As the U.S. brief on certiorari advocated, the Supreme Court agreed to review the issue of equitable tolling. Excerpts (with footnotes omitted) follow from the U.S. *amicus* brief filed on October 29, 2013 arguing, as the United States had in the court of appeals, that the one-year period under Article 12 is not subject to equitable tolling. The October 29 *amicus* brief is also available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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A. Article 12 Provides For The Return Of A Child “Forthwith” Only If A Petition Is Filed Within One Year

A central purpose of the Hague Convention is to “secure the prompt return of children wrongfully removed to or retained in any Contracting State.” Art. 1; see Introductory Declarations. To accomplish that purpose, the Convention provides that children abducted in violation of a parent’s rights of custody should be promptly returned to their country of habitual residence. See Arts. 1, 12. Article 12 requires that a court order the return of a child “forthwith,” except in limited circumstances provided in other Articles (see note 2, *supra*), if a petition is filed within one year of the wrongful removal or retention of the child. The Convention also provides, however, that if more than one year has elapsed, the court may consider whether the child is “now settled” in her new environment. Art. 12. That one-year period is not subject to equitable tolling.

1. “The interpretation of a treaty, like the interpretation of a statute, begins with its text.” *Abbott v. Abbott*, 130 S. Ct. 1983, 1990 (2010) (citation omitted). The plain language of Article 12 indicates that the one-year period is not subject to extension. Article 12 provides that if a child has been wrongfully removed or retained in violation of a parent’s custody rights, and “a period of less than one year has elapsed from the date of the wrongful removal or retention” to “the date of the commencement of the proceedings” for return of the child, authorities in the State where the child is located “shall order the return of the child forthwith.” Convention Art. 12. When “the proceedings have been commenced after the expiration of the period of one year,” the court “shall also order the return of the child, unless it is demonstrated that the child is now settled in [her] new environment.” *Ibid.*

The one-year period thus runs “from the date of the wrongful removal or retention,” and Article 12 makes no provision for an extension of that period. Convention Art. 12. As the court of appeals observed, if the States Parties to the Convention had meant to vary the starting date of the one-year period based on the circumstances of a left-behind parent’s locating his or her child, they easily could have adopted a discovery rule-providing for a one-year period running from the date the petitioning parent learned or reasonably could have learned of the child’s whereabouts. Pet. App. 17a n.8.

The choice of language is significant because the Convention negotiators fully understood that wrongful removal of a child to a foreign country commonly results in difficulties, often due to concealment, in learning the child’s whereabouts. See Elisa Pérez-Vera, *Explanatory Report* in 3 Hague Conference on Private Int’l Law, 14th Sess., Oct. 6-25, 1980, *Actes et Documents de la Quatorzième Session: Child Abduction* 426, paras. 107-108, at 458-459 (Permanent Bureau trans., 1982) (*Actes et Documents*) (acknowledging “difficulties encountered in establishing the child’s whereabouts,” but stating that the “single time-limit of one year” was the optimal resolution of competing concerns); see also, e.g., *Replies of the Governments to the Questionnaire* in *Actes et Documents* 61, 88 (“There is a sixth problem which is becoming all too common - the taking and concealment of a child by a parent before or after a custody decree.”); *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 215, 231-232 (noting that in many cases, a child’s location is unknown at the time of abduction and that some abductors will conceal the child’s whereabouts). Given that understanding, one would expect Article 12’s text to provide for the running of the one-year period from the date the left-behind parent knew or should have known of the child’s whereabouts, or to address tolling in circumstances involving concealment, had the Convention’s drafters intended either result.

2. The Convention's drafting history demonstrates that the decision to calculate Article 12's one-year period from the time of a child's removal or retention, rather than from the discovery of the child's whereabouts, was a considered choice made during Convention negotiations. See *Air France v. Saks*, 470 U.S. 392, 396, 400 (1985) (noting that because multilateral treaties are negotiated by numerous delegates, "the history of the treaty, [and] the negotiations," may be especially important, and therefore "[i]n interpreting a treaty it is proper \*\*\* to refer to the records of its drafting and negotiation").

At the outset of the process of drafting the Convention, a preliminary report prepared for a Special Commission charged by the Hague Conference on Private International Law with studying the problem of international parental kidnapping emphasized that "[t]ime is an important factor in the adjustment of the child to his new situation" and that a "court may find it more difficult to send back a child who has been forced to adjust to his new situation." Adair Dyer, *Report on International Child Abduction by One Parent* in *Actes et Documents* 12, 23-24. Thus, the Special Commission initially suggested that if "an application has been made more than six months after the removal" and the child has been "habitually resident" in the new country for more than one year, a court in the new country should "assume jurisdiction to determine" the proper custody arrangement rather than simply return the child. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping* in *Actes et Documents* 162, 164.

Consistent with that view, the preliminary draft of the Convention provided that when a parent sought return within six months of the abduction, the court was required to "order the return of the child forthwith." *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera* in *Actes et Documents* 166, 168 (Art. 11). But when the child's location "was unknown," the six months would "run from the date of the discovery," although even then the "total period" could not exceed one year. *Ibid.*

During consideration of that draft, the delegations from the participating nations debated the workability of a two-tier system and the proper length of each time period. See, e.g., *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 216, 218, 242; *Proces-verbal No. 6* in *Actes et Documents* 283, 288; see also *Proces-verbal No 7* in *Actes et Documents* 290, 291-293. Several delegations expressed concern that abductors would conceal the whereabouts of their children. See, e.g., *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 216. Nevertheless, after a number of delegations expressed the view that determining the "date of 'discovery'" would be difficult, the delegations decided to adopt a single time period that did not vary based on discovery. See *Procès-verbal No 7* in *Actes et Documents* 291-293; *Explanatory Report* para. 108, at 458-459.

During discussion of the appropriate length of that single time period, the United States delegation urged that the period should be long enough to account for the difficulty of locating a child but should also take into account the possibility of the child's assimilation into a new environment after enough time had passed. *Procès-verbal No 7* in *Actes et Documents* 292. ... Under the resulting framework, as described by the United States delegation, the Convention provides for a one-year period in which "no assimilation of the child was presumed to have occurred" and "return could be refused only on the grounds set forth" expressly, e.g., severe risk to the child. *Id.* at 315; see note 2, *supra*. After one year, "assimilation in a new environment [becomes] an open question." *Procès-verbal No 10* in *Actes et Documents* 315.

The one-year period during which return is required, without further inquiry thus represented a compromise between the interest in securing the immediate return of a wrongfully

removed child and the interests that may arise when a child develops attachments to a new environment. From the outset, the delegations negotiating the Convention contemplated that after *some* fixed period of time, return would not be mandatory. See *Preliminary Draft Convention in Actes et Documents* 168 (Art. 11) (time period running from “date of the discovery” but “total period” could not exceed one year). The negotiators explicitly considered but ultimately rejected a two-tier framework in which the period for obligatory return would be extended if there were difficulty locating the child. See *Procès-verbal No 7 in Actes et Documents* 291-293. When the negotiators adopted the single time limit, they plainly understood that the time limit would apply regardless of difficulty in locating the child. See, *e.g.*, *id.* at 292-293, 295.

3. The post-ratification understanding of States Parties to the Convention reinforces the conclusion that the one-year period is not subject to equitable tolling. See *Abbott*, 130 S. Ct. at 1993 (“In interpreting any treaty, [t]he opinions of our sister signatories \*\*\* are entitled to considerable weight.”) (internal quotation marks omitted; brackets in original); 42 U.S.C. 11601(b)(3)(B) (“recogniz[ing]” “the need for uniform international interpretation of the Convention”).

To our knowledge, the courts of other States Parties that have considered invocation of equitable tolling to extend Article 12’s one-year period of automatic return have uniformly declined to adopt it. ...

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Article 12 thus reflects a compromise based on the judgment that once enough time elapses, the return of a child may not be appropriate. The Convention implements that judgment with a single one-year period during which the child must be returned “forthwith”; after that period, the court may consider whether the child is settled before ordering return. The text, drafting history, and decisions of other States Parties demonstrate that the one-year period may not be extended.

B. The Department Of State Interprets Article 12 Not To Permit Equitable Tolling, But To Allow A Court To Consider The Abducting Parent’s Concealment In Exercising Its Equitable Discretion To Order The Child’s Return

1. The Department of State—which negotiated the Convention and facilitates the return of children from and to other countries, and whose Office of Children’s Issues serves as the Central Authority for the United States - interprets Article 12 not to permit equitable tolling. But it interprets the Convention to confer on the court equitable discretion, in cases filed more than a year after wrongful removal or retention, to consider concealment and other equitable factors in determining whether the child should be returned.

The State Department’s interpretation is informed, in part, by its recognition that foreign courts hearing petitions seeking the return of a child to the United States should not be precluded from considering relevant factors, including the behavior of the abducting parent, in determining whether to order the return of the child. The State Department’s interpretation is “entitled to great weight.” *Abbott*, 130 S. Ct. at 1993 (citation omitted).

2. Although Article 12 is not subject to equitable tolling, the Convention “provides a mechanism other than equitable tolling to avoid rewarding a parent’s misconduct - \*\*\* discretion to order the return of a child, even when a defense is satisfied.” Pet. App. 27a; see *id.* at 19a (even when a child is settled, a court may order the child’s return).

Article 12 provides that “where the proceedings have been commenced after the

expiration of the period of one year,” the court “shall also order the return of the child, unless it is demonstrated that the child is now settled in [her] new environment.” Article 12 thus *requires* return of the child if less than one year has elapsed or if the child is not settled in her new environment.

But even when a year has passed and the child is now settled in her new environment, the Convention does not affirmatively *prohibit* return. ...

As multiple courts of appeals have concluded, a court thus retains equitable discretion to order the return of a child even though she is settled in her new environment. See *Yaman v. Yaman*, Nos. 13-1240, 13-1285, 2013 WL 4827587, at \*12-\*17 (1st Cir. Sept. 11, 2013) (recognizing discretionary authority to return “now settled” child); *Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001) (same); cf. *Asvesta v. Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009) (courts have discretion to order return notwithstanding establishment of any Convention exception to return); *Miller v. Miller*, 240 F.3d 392, 402 (4th Cir. 2001) (same); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (same); *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) (same).

The British House of Lords and courts of other States Parties have similarly held that they possess equitable discretion to order the return of a settled child, or that they should consider equitable factors, including concealment and the objectives of the Convention, in performing the “settled” analysis. ...

In conducting that equitable assessment, the court should take into account the Convention’s background presumption favoring return. Cf. *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497-499 (2001). The court could ultimately conclude that the abducting parent’s conduct in concealing the child’s whereabouts, and other equitable factors, justify returning the child to the country of her habitual residence. Deterring concealment and ensuring that abduction does not confer tactical advantages on the abducting parent are important animating principles of the Convention. See *Explanatory Report in Actes et Documents* paras. 15-16, at 429. The court may therefore consider the abducting parent’s misconduct (including whether the parent actively took steps to conceal the child), together with any other relevant circumstances such as the degree to which the child is settled, whether return would not be harmful or disruptive even if the child has become settled, the extent of the left-behind parent’s custody rights, and any other reasons for the lapse of time in filing the petition.

Furthermore, given that the child’s settlement can be outweighed by other equitable factors, Article 12 should be understood to afford the court discretion in appropriate cases to pretermite an extensive “settled” inquiry—which can involve a fact-intensive and time-consuming inquiry into the child’s living situation—if it is apparent to the court at the outset that equitable factors favoring return would clearly outweigh the outcome of any “settled” analysis. Cf. *Chisom v. Roemer*, 853 F.2d 1186, 1188 (5th Cir. 1988) (because alleged harm to party seeking a preliminary injunction was not irreparable and the public interest did not require an injunction, court “pretermite[d] a discussion” of the first two preliminary injunction factors).

Although Article 12 does not explicitly state that a court may forgo deciding whether a child is “now settled” (see Pet. Br. 41-42; Resp. Br. 55 n.20), that is simply the logical implication of the fact that even if a child is “now settled,” a court may still order the child’s return. Such discretion is reinforced by Article 18, which provides that “[t]he provisions of this chapter [enumerating exceptions] do not limit the power of a judicial or administrative authority to order the return of the child *at any time*.” Convention Art. 18 (emphasis added). A court could conclude in a particular case, for example, that fact-intensive discovery and hearings delving into

the child's life would serve little purpose where the abducting parent's conduct was egregious, and - based perhaps on scarcely more than a year having passed, or on a child's young age or her continued strong ties to the habitual residence - that whether the child was now settled would be, at most, a close question that could not outweigh other factors. See *Chafin*, 133 S. Ct. at 1027 (“[C]ourts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation.”); *id.* at 1028 (litigation “uncertainty adds to the challenges confronting both parents and child”); cf. Convention Art. 1 (one object of the Convention is “[t]o secure the prompt return of children”).

C. Petitioner Identifies No Authority For Extending Article 12's One-Year Period During Which A Child Must Be Returned “Forthwith”

1. Petitioner's arguments in support of equitable tolling appear to rest on the premise that Article 12 is a statute of limitations (Br. 23-29), and that it may therefore be tolled under general principles of domestic law of the United States. There is no indication that the Convention negotiators intended the one-year period they adopted to be applied against the backdrop of one State's domestic tolling principles—or the disparate domestic tolling principles of each State. But in any event, Article 12's one-year period is not a statute of limitations; it is a period that triggers a substantive defense. Accordingly, even if ordinary presumptions for interpreting domestic law were applicable to the Convention, see *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (describing “rebuttable presumption” that equitable tolling applies for “federal statute[s] of limitations”), there is no basis for presuming that the one-year period contained in Article 12 is subject to equitable tolling. See *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27 (1989) (60-day notice period was not subject to equitable tolling because it was a condition precedent, not a limitations period, and tolling would be inconsistent with the purpose of the notice period).

A statute of limitations establishes a period in which a claim must be brought if it is to be adjudicated at all. The limitations period reflects a judgment about the point at which concerns about repose, stale claims, lost evidence, and the parties' need for certainty outweigh the plaintiff's interest in bringing a claim. See *Young v. United States*, 535 U.S. 43, 47 (2002). The doctrine of equitable tolling applies when circumstances render the balancing of interests embodied in the limitations period inequitable - *i.e.*, when extraordinary circumstances prevent the plaintiff, despite due diligence, from bringing his claim during the limitations period. See *Lawrence v. Florida*, 549 U.S. 327, 330-332, 336 (2007). When applied, tolling permits the court to treat the claim as though it were timely filed. *Ibid.*

Article 12's one-year period is not a statute of limitations. It does not fix a time limit in which a parent may petition for the return of a child. Instead, the one-year period establishes the permissible substantive scope of a court's inquiry in adjudicating the petition. The consequence of failing to file suit within a year is that the court is no longer automatically required to “order the return of the child forthwith” if it finds that the child was wrongfully removed (and no other exception to return applies). After one year, the court may also consider the child's ties to her new environment in deciding whether to order return. The expiration of the one-year period does not extinguish the left-behind parent's ability to seek return, and it does not eliminate the court's authority to order return. To the contrary, the court must still order return if the child is not settled (and no other exception to return applies), and it may order return even if the child is settled.

Petitioner, in essence, asks the Court to restrike the balance of considerations the negotiators of the Convention struck in drafting Article 12. But recognizing equitable tolling of Article 12's one-year period would disrupt the framework adopted in the Convention. Under petitioner's view, in cases where (1) the left-behind parent has been pursuing his rights diligently, and (2) some extraordinary circumstance stood in the way of his filing a timely petition, the petition would be treated as having been filed within one year. See Pet. Br. 45-46, 53 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The court would then be *required* to order return "forthwith," Convention Art. 12, and would be foreclosed from considering whether the child had become settled in her new environment—no matter how long the child had lived there, how strong her attachments had become, or how few attachments she had left in her country of habitual residence. But affording the court discretion to consider the child's settlement in cases in which she has been in the new country for a year—regardless of the reason for that prolonged residence—is the very purpose of the Convention's provision of a one-year cutoff for the child's mandatory return. *Explanatory Report in Actes et Documents* para. 107, at 458.

Petitioner observes (Br. 6, 27-28, 38) that the United States delegation used the term "statute of limitations" when suggesting changes to the preliminary draft of the Convention. The delegation was commenting on a different version of Article 12, and one that explicitly provided for extension of the filing period when the whereabouts of the child were unknown. See *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera in Actes et Documents* 168 (Art. 11). In any event, one delegation's passing use of the term "statute of limitations" during a negotiation session does not transform an explicit and firm time period in a multinational Convention into a flexible period presumed subject to equitable tolling based on background principles applied by the courts of one nation (the United States).

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3. Petitioner further contends (Br. 34-36, 53) that equitable tolling should be applied as a policy matter, so that parents will not have an incentive to conceal an abducted child for a year to avoid Article 12's period of automatic return. That argument is both legally and factually incorrect.

Even in a case involving a statute of limitations in an Act of Congress (which Article 12 is not), the question whether equitable tolling is available is a question of statutory interpretation. There is only a "rebuttable presumption" that tolling applies, which can be overcome by a showing that Congress intended to the contrary. See *Holland*, 130 S. Ct. at 2560-2561; *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137-138 (2008); *United States v. Brockamp*, 519 U.S. 347, 350-354 (1997); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Here, the negotiators of the Convention took account of the concealment concern petitioner identifies, but they also understood the potential harm of an automatic-return requirement for children who may have formed significant attachments in a new environment. The Convention reflects a judgment that the proper balance of those interests is to enable the court to consider the child's attachments in cases where it has been more than a year since the wrongful removal or retention. Petitioner's policy arguments are therefore already accounted for in the balance struck in the Convention. Any presumption in favor of equitable tolling is overcome by the negotiators' rejection of a discovery rule and adoption of the one-year period instead.

Furthermore, petitioner is wrong to assume that abducting parents can always rely on the prediction that by concealing the child, they can defeat a petition for the child's return. Concealment may undermine a child's ability to form stable attachments in a new environment. Concealment may also call into doubt other evidence and defenses that the abducting parent can be expected to present, such as the child's objection to return, a defense found in Article 13. See *Wasniewski v. Grzelak-Johannsen*, No. 06-cv-2548, 2007 WL 2344760, at \*5 (N.D. Ohio Aug. 15, 2007) (refusing to give weight to child's opinion when his "generalized statements" suggested that "his mother's influence \*\*\* biased [the child's] opinion of Poland, particularly given [her] efforts to isolate [the child] from his father and his earlier childhood"); *Gonzalez v. Nazor Lurashi*, No. 04-cv-1276, 2004 WL 1202729, at \*5 (D.P.R. May 20, 2004) (refusing to treat child's opinion as conclusive because the "child has not seen [his mother] nor his sister in over 16 months even though they occasionally communicate by telephone, e-mail and letters. Thus, we understand the child has been heavily influenced by [his father's] wish for the child to remain in Puerto Rico").

More fundamentally, as discussed in Part B, *supra*, even if an abducting parent can establish that a child is now settled, a court retains equitable discretion to order the child's return and may take the abducting parent's conduct into account in deciding whether to order return despite the passage of one year since the wrongful removal. Abducting parents therefore cannot rely on the prediction that by concealing the child, they can defeat a petition for the child's return. The inequity of rewarding an abducting parent's misconduct is appropriately addressed at that later stage, but it does not warrant an extension of the one-year period of automatic return adopted in the Convention so as to bar any consideration at all of whether the child has become settled in her new environment.

4. Finally, although petitioner agrees (Br. 40) that a court has discretion to order a child's return even if the child is now settled in a new environment, petitioner contends (Br. 45) that the Court should nevertheless recognize equitable tolling because, according to petitioner, few courts have exercised that discretion to order a child's return after the one-year period has expired. That concern is unfounded.

As petitioner has described, a number of United States courts have addressed concealment by tolling Article 12's one-year period of mandatory return, as petitioner urges this Court to do. Pet. Br. 45, Pet. 13-19 (cataloguing cases). Had those courts instead correctly recognized that Article 12's one-year period is not a statute of limitations subject to equitable tolling, it is entirely speculative for petitioner to assume that those courts would have concluded the children involved were settled and that the full range of equitable factors would not have warranted their return in any event.

The one-year period of mandatory return was a compromise adopted to balance the interests of returning a child forthwith and the prospect that as time progresses, a child may form attachments to a new environment. Petitioner has identified no authority for extending that period through a principle of equitable tolling, and doing so would be inconsistent with the framework agreed to in the Convention.

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## D. SECURITIES LAW

In 2013, the International Institute for the Unification of Private Law (“UNIDROIT”) completed negotiations on a set of Principles on the Operation of Close-Out Netting Provisions. The Principles are available at [www.unidroit.org/instruments/capital-markets/netting](http://www.unidroit.org/instruments/capital-markets/netting). Close-out netting is one of the main tools used by financial institutions and others to manage counterparty risk. Ensuring that netting provisions in contracts are enforceable is also important for managing systemic risk. The Principles are designed to encourage countries to provide in their domestic law at least some minimum level of enforceability for netting provisions. The United States government was involved in the negotiations and strongly supports the Principles.

## E. INTERNATIONAL CIVIL LITIGATION

### 1. Arbitration

In 2013, the United States filed two briefs as *amicus curiae* in the Supreme Court of the United States in a case challenging an award issued in an arbitration conducted under a bilateral investment treaty. *BG Group PLC v. Argentina*, No. 12-138. Both briefs are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The arbitration was brought by a United Kingdom company, BG Group, after its investment in a gas distribution enterprise in Argentina was adversely affected by state action taken to address Argentina’s economic crisis beginning in 2001. The United Kingdom and Argentina had entered into a bilateral investment treaty (“BIT”) in 1990 which provided for arbitration if the dispute was first submitted to a court in the state where the investment was made and eighteen months had passed without resolution. BG Group did not resort to the courts in Argentina, but proceeded directly to arbitration, which resulted in an award of more than \$185 million for BG Group.

Argentina filed suit in U.S. district court in 2008 seeking to vacate the arbitral award, while BG Group sought confirmation of the award. The district court denied Argentina’s motion to vacate and confirmed the award. Argentina appealed. The U.S. Court of Appeals for the District of Columbia reversed and vacated the award, holding that the court had the authority to decide questions of “arbitrability” under the facts of the case and that BG Group had failed to comply with a precondition to arbitration. BG Group petitioned for the U.S. Supreme Court to review the case

In May 2013, the United States filed a brief in opposition to the petition for certiorari in the case. The United States opposed Supreme Court consideration of the case because there was no circuit split on the issue and the U.S. government did not foresee that the decision of the court of appeals would have far-reaching implications, due to the uniqueness of the litigation requirement in the UK-Argentina BIT.

After the Supreme Court granted certiorari, the United States filed a second brief with the Court in support of remanding the case to the appeals court for a proper

application of international law principles uniquely relevant in the investment arbitration setting, rather than applying domestic commercial arbitration case law. In particular, the U.S. brief argues that, in the investor-state arbitration context, courts should review independently arbitral rulings on objections to jurisdiction based on a lack of consent to arbitrate. Excerpts follow from the U.S. *amicus* brief filed in September 2013 (with footnotes and citations to the record omitted).\*

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This case presents the question whether, in an action to set aside an investor-state arbitral award subject to the New York Convention, the court should review *de novo* the arbitral tribunal's ruling on an investor's compliance with a requirement of prior litigation in the host State's courts in a bilateral investment treaty, or instead should review the ruling under the same deferential standard that applies to the tribunal's ruling on the merits. The Convention does not establish a standard of review governing vacatur proceedings, but contemplates that the reviewing court will generally apply the set-aside law of the country in which (or under the law of which) the award was made—in this case, the FAA. New York Convention art. V(1)(e); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19-21 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998). Argentina contends that the arbitral tribunal exceeded its powers, 9 U.S.C. 10(a)(4), by proceeding to adjudicate the merits of the parties' investment dispute even though Argentina had agreed to arbitrate only after the investor had first submitted the dispute to Argentina's courts and allowed 18 months for its resolution. The parties disagree over whether the courts should review the arbitral tribunal's resolution of that question independently or deferentially.

In the context of private commercial arbitration agreements, this Court has held that while parties are presumed to have expected arbitrators to have primary authority to decide “‘procedural’ questions” concerning the requirements for submitting claims to arbitration, subject to deferential review, “question[s] of arbitrability” are presumptively for the courts to review independently. *Howsam*, 537 U.S. at 83-84. In the distinct context of investor-state arbitral proceedings conducted pursuant to investment treaties, courts should not apply that interpretive framework wholesale, but instead should review *de novo* arbitral rulings on consent-based objections to arbitration, and review deferentially rulings on other objections.

I. IN THE CONTEXT OF PRIVATE COMMERCIAL ARBITRATION, WHETHER THE ARBITRAL TRIBUNAL HAS PRIMARY POWER TO RESOLVE OBJECTIONS TO ARBITRATION TURNS ON THE PARTIES' AGREEMENT, INTERPRETED ACCORDING TO PRESUMPTIONS REFLECTING THEIR LIKELY EXPECTATIONS

A. Because “arbitration is a matter of consent, not coercion,” *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010), the jurisdiction of an arbitral tribunal to resolve a dispute depends on whether the parties have agreed to arbitrate the matter. See *First Options*, 514 U.S. at 943; *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). This Court has referred to questions concerning whether an arbitrator is empowered to decide a particular dispute as questions of “arbitrability.” *First Options*, 514 U.S. at 942.

When a party objects to the propriety of submitting a particular dispute to arbitration, the

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\* Editor's Note: On March 5, 2014, the Supreme Court decided the case.

question arises whether a court or arbitrators should rule upon that objection. If the arbitrators have “primary power” to rule on the objection, the “court reviews their arbitrability decision deferentially.” *First Options*, 514 U.S. at 942 (emphasis omitted). If the court has primary power, “the court makes up its mind about arbitrability independently,” either by engaging in de novo review of the arbitrators’ decision on arbitrability or, if the parties are litigating in advance whether arbitration is required, by conclusively resolving the issue for itself. *Ibid.* Whether the court or the arbitrator “has the primary power to decide arbitrability,” *id.* at 943 (internal quotation marks omitted), turns on whether the parties have agreed “to arbitrate ‘gateway’ questions of ‘arbitrability,’ ” *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010).

B. In the context of private commercial arbitration, this Court has held that in “deciding whether the parties agreed to arbitrate a certain matter (including arbitrability),” courts “should apply ordinary state-law principles that govern the formation of contracts.” *First Options*, 514 U.S. at 944. To guide that determination, however, the Court employs a set of “interpretive” presumptions based on the nature of the question at issue and the Court’s understanding of what the parties would likely have agreed upon had they considered the matter expressly. *Rent-A-Center*, 130 S. Ct. at 2777 n.1.

Generally, in the private commercial context, the Court presumes that the parties did not agree to arbitrate “question[s] of arbitrability,” a category that includes “whether the parties are bound by a given arbitration clause” and whether a particular dispute falls within the scope of an arbitration clause. *Howsam*, 537 U.S. at 83-84; *First Options*, 514 U.S. at 945. Accordingly, unless the arbitration agreement contains “clea[r] and unmistakabl[e] evidence” that the parties agreed to arbitrate those questions, the court will decide the issue independently. *Id.* at 944 (internal quotation marks omitted). Conversely, when the objection to arbitration is one that the parties likely would have expected the arbitrator to decide, such as “ ‘procedural’ questions that grow out of the dispute and bear on its final disposition”—including “allegation[s] of waiver, delay, or a like defense to arbitrability”—the Court presumes that the parties intended to assign the arbitrator primary responsibility for deciding the issue. *Howsam*, 537 U.S. at 84 (citation omitted), 86.

II. WHEN AN INVESTOR-STATE ARBITRAL AWARD IS SUBJECT TO SET-ASIDE PROCEEDINGS, THE COURT SHOULD INDEPENDENTLY REVIEW ARBITRAL RULINGS ON OBJECTIONS BASED ON THE LACK OF A VALID ARBITRATION AGREEMENT, AND SHOULD PRESUMPTIVELY REVIEW OTHER RULINGS DEFERENTIALLY

This Court has not yet had occasion to consider whether its existing precedents, all of which concerned questions of arbitrability arising under private commercial agreements, should apply to objections to arbitration undertaken pursuant to investment treaties—here, an objection pertaining to an investor’s compliance with a litigation requirement in an investment treaty. Petitioner contends that this Court should apply *First Options* and *Howsam* to the investment-treaty context, and hold that under *Howsam*, responsibility to adjudicate objections to arbitration based on non-compliance with any procedural “precondition to arbitration” under the investment treaty “presumptively lies with the arbitrators.” In this case, petitioner asserts, compliance with the litigation requirement should be deemed to be such a precondition. Applying *First Options* and *Howsam* wholesale to investment treaties, however, would be inconsistent with principles of treaty interpretation and the treaties’ structure. Rather, the judicial standard of review should turn on the nature of the objection under the applicable treaty. Courts should review de novo arbitral

rulings concerning objections based on the asserted lack of a valid agreement to arbitrate, even if the absence of an agreement is caused by a failure to comply with a requirement that resembles what might be viewed as a “procedural” matter or a mere “precondition” to arbitration in a private commercial dispute. Rulings on other objections should be reviewed deferentially, unless the treaty provides that the arbitral tribunal’s authority to rule on such matters is more limited.

A. The Standard Of Review Of Arbitral Rulings On Threshold Objections To Arbitration Under Investment Treaties Is Not Governed By The Presumptions Set Forth In *First Options And Howsam*

1. As in the private context, arbitration between a State and a foreign investor under an investment treaty is fundamentally a matter of consent. Christopher F. Dugan et al., *Investor-State Arbitration* 219 (2008) (Dugan). The arbitral tribunal’s authority therefore arises from, and is limited by, the consent of the parties. Christoph Schreuer, *Consent to Arbitration, in The Oxford Handbook of International Investment Law* 830, 831 (Peter Muchlinski et al. eds., 2008) (Schreuer); Vandeveld 433; Jeswald W. Salacuse, *The Law of Investment Treaties* 385 (2010) (Salacuse).

A crucial distinction between investor-state and private commercial arbitration, however, is that in the investor-state context, the relevant agreement concerning the arbitral tribunal’s authority is contained in the investment treaty itself and reflects the *treaty* parties’ agreement. An investment treaty typically sets forth a host State’s standing offer to arbitrate certain categories of disputes with a class of investors from the other contracting State, and the “offer includes the various terms and conditions contained in the \*\*\* investment treaty.” Salacuse 381. The actual “arbitration agreement” between the disputing parties comes into being only after an investor accepts the host State’s offer by initiating arbitration against the State in the manner provided in the treaty. See Dugan 222; Vandeveld 437. The treaty itself therefore sets forth the prerequisites to consent and the parameters of the contemplated arbitration proceedings - the types of disputes covered, and the procedures governing arbitration. If a foreign investor properly initiates arbitration in accordance with the treaty’s conditions, those terms become part of the arbitration agreement between the host State and the investor. Dugan 207. It is therefore the shared intent of the *treaty* parties, not the disputing parties, that determines the existence and substance of an agreement to arbitrate.

As a result, questions concerning the treaty parties’ agreement—and therefore the existence and substance of a contracting State’s agreement to arbitrate with an individual investor—are matters of treaty interpretation, and are not governed by any nation’s domestic contract law. See Gary B. Born, *International Arbitration: Law and Practice*, § 18:01[B], at 420 (2012). Under principles of interpretation that this Court has applied to treaties to which the United States is a party, a court begins “with the text of the treaty and the context in which the written words are used.” *Air France v. Saks*, 470 U.S. 392,397 (1985). Because a treaty is negotiated between two sovereign States, the court must “give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.” *Id.* at 399; see *Zichemnan v. Korean Air Lines Co.*, 516 U.S. 217, 223 (1996). Although this case involves a treaty between two foreign Nations, those basic principles of treaty interpretation are generally adhered to among Nations. See Vienna Convention art. 31.1 (“[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”).

2. In an investment treaty, the States parties typically do not address the arbitration of any particular dispute. The host State’s standing offer to arbitrate under the treaty is made with

respect to a class of investors as a whole. See, e.g., Gus Van Harten, *Investment Treaty Arbitration and Public Law* 63 (2007). Multiple investors may accept a single state offer of arbitration, and a single treaty may therefore lead to multiple investor-state arbitrations. A treaty generally provides an investor with an option of several forums in which to pursue arbitration, and it generally leaves the seat of arbitration - and thus the national law that will govern any set-aside proceedings - for later determination by the parties to a particular dispute or by the arbitral tribunal. See David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* ¶ 17.27, at 596-597 (2d ed. 2010).

Investment treaties may permit investors to pursue arbitration under the ICSID Arbitration Rules, which do not permit judicial review of arbitral awards. Vandevelde 434-435. Alternatively, investors may choose to initiate arbitration under separate rules subject to the New York Convention, which provides for judicial review of arbitral awards in the form of set-aside proceedings governed by the law of the seat of arbitration and recognition proceedings under Article V of the Convention. While the States parties to an investment treaty generally contemplate that the arbitral tribunal will initially resolve objections to arbitration, subject to judicial review in cases subject to the Convention, they do not ordinarily agree, in the *First Options* sense, as to whether the arbitral tribunal or any reviewing court has authority definitively to resolve such disputes across the board. Nor do the treaty parties, at the time they enter into the treaty, ordinarily have specific expectations as to the availability or scope of judicial review of an arbitral tribunal's resolution of threshold objections in any particular dispute.

3. *First Options* and *Howsam* set forth default rules governing whether the court or the arbitral tribunal has authority to finally resolve particular objections to arbitration, based on the Court's understanding of what the parties to private commercial arbitration agreements would have agreed to had they considered the matter expressly. See pp. 12-14, *supra*. But, as noted above, States parties to an investment treaty do not ordinarily establish in the treaty itself the scope (or availability) of judicial review. Those matters are determined later, when the investor chooses to arbitrate under the ICSID Arbitration Rules (where available) or, in other arbitrations, when the investor and the host State select the \*19 place of arbitration. There is no reason to read into an investment treaty - especially one, as here, to which the United States is not a party - the specific interpretive presumptions set forth in *First Options* and *Howsam* concerning private commercial arbitration under United States law. Applying those presumptions wholesale to investment treaties, without taking into account distinct sovereign interests of the contracting States, would graft onto those treaties default provisions that would not necessarily reflect the parties' expectations. See *Zicherman*, 516 U.S. at 223.

B. Under An Investment Treaty, Courts Presumptively Should Independently Review Objections Based On The Absence Of An Agreement To Arbitrate And Differentially Review Other Objections

In investor-state arbitrations governed by the New York Convention, the appropriate scope of judicial review of arbitral rulings on objections to arbitration depends on whether the objection concerns the host State's consent to enter into an arbitration agreement with the investor. When treaty parties agree that particular treaty requirements are conditions on their consent, they necessarily agree that if an investor fails to comply with those conditions, no agreement to arbitrate with that investor is formed. Because the absence of a valid arbitration agreement prevents the arbitral tribunal from obtaining authority to rule on *any* dispute between the parties, it is appropriate for a reviewing court to independently evaluate objections based on

noncompliance with conditions on consent. Once an arbitration agreement is formed, however, it is as a general matter most consistent with the basic purpose of investment treaties for courts to review deferentially the tribunal's resolution of other objections to arbitration,\*20 including non-consent-based objections to the tribunal's "jurisdiction" (see n.3, *supra*).

*1. Investment treaties set forth a State's standing offer to arbitrate in multiple forums, subject to any conditions on its consent to arbitrate that limit the arbitral tribunal's final authority to adjudicate an individual dispute*

Because an investment treaty is structured as a standing offer to arbitrate, States parties may condition their consent to enter into an arbitration agreement with any individual investor on that investor's compliance with particular treaty requirements. ...

If a condition on the State's consent to arbitrate with an investor is not satisfied, no arbitration agreement will be formed when the investor attempts to initiate arbitration. See *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award ¶ 16 (June 2, 2000), 40 I.L.M. 56, 63 (2001) (NAFTA). Because an arbitrator's authority to resolve any dispute between the parties must arise from the existence of an arbitration agreement between them, see p. 15, *supra*, in the absence of the host State's consent and of any resulting agreement, the arbitrator will lack any authority to consider any dispute between the parties. See *Waste Mgmt.* ¶¶ 16-17, 40 I.L.M. at 63 ("the entire effectiveness of this institution depends" on "fulfillment of the prerequisites established as conditions precedent to submission of a claim to arbitration," because those conditions pertain to "consent to arbitration"); 1 Born 893; cf. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543,547 (1964) (a party cannot be compelled to arbitrate if it never entered into an agreement to do so).

States expect an arbitral tribunal—and if necessary, a reviewing court—to enforce conditions on a State's consent to form an investor-state agreement. In entering into an investment treaty, a State acts in its sovereign capacity to establish a legal regime under which the State will consent to an adjudication of disputes against it by private parties. When present, conditions on the formation of an arbitration agreement—like limitations on a waiver of sovereign immunity to a suit in court—can serve important sovereign functions by limiting the terms under which the sovereign State may be subject to such proceedings against it. Dugan 219. And once an arbitration agreement is formed by an investor's valid initiation of arbitration under the treaty, the consequences for a State can be significant: investor-state disputes may often implicate the State's national economic and regulatory policies and entail large financial stakes. Salacuse 355. Conditions on consent therefore can protect States' sovereign interests in a variety of ways, by establishing mandatory steps an investor must take to invoke arbitration. For instance, a treaty that makes waiving pursuit of alternative remedies a condition on consent (see p. 20, *supra*) protects the State from parallel proceedings and double recoveries.

*2. When States parties make a treaty requirement a condition on consent, it is appropriate for a reviewing court to engage in de novo review of compliance with that condition*

By providing in a treaty that a particular requirement is a condition on a State's consent to enter into an arbitration agreement with an individual investor, the treaty parties contemplate that the arbitral tribunal and courts engaging in judicial review under the Convention will enforce the condition as written. If the condition is unfulfilled, no agreement to arbitrate is formed, and the arbitrator never gains any authority to rule on any dispute between the parties—including on whether an arbitration agreement exists. See *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274,288 (3d Cir. 2003). To defer to an arbitral tribunal's ruling where the host State denies that it entered into an arbitration agreement with the particular investor would

thus be to assume the very arbitral authority that the State denies ever arose.

As a result, it is generally recognized that “where a party denies ever having concluded an agreement to arbitrate, there is no basis for concluding, without independent judicial assessment, that a party has agreed to submit any issues, including jurisdictional issues, to the tribunal.” 2 Born 2792; *John Wiley*, 376 U.S. at 547; *China Minmetals*, 334 F.3d at 288; *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov’t of Pakistan*, [2010] UKSC 46 ¶ 30, [2011] 1 A.C. 763 (“The tribunal’s own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all.”). When the existence of the agreement is disputed, therefore, the “possibility of de novo judicial review of any jurisdictional award in an annulment action is logically necessary.” 2 Born 2792; Restatement (Third) of the U.S. Law of International Commercial Arbitration § 4-12, cmt. d (Tentative Draft no. 2, 2012) (“[a] court reviews de novo an arbitral tribunal’s determination of whether an arbitration agreement exists”).

Accordingly, although different States’ national laws concerning judicial review of arbitral rulings on objections to arbitration may vary, courts in several States that commonly serve as seats for investor-state arbitration generally review de novo whether an arbitration agreement exists. See, e.g., *Republic of Ecuador/Chevron Corp.*, Rechtbank’s-Gravenhage [District Court of the Hague], 2 mei 2012, 38694/HA ZA 11-402 en 408948/HA ZA 11-2813, ¶ 4.11 (Neth.) (translated by Harm Lassche, May 4, 2012) (objection that no arbitration agreement was formed pursuant to BIT was subject to de novo review, but other objections to arbitration were primarily for arbitrators to decide); *Dallah*, [2010] UKSC 46 ¶ 104 (English courts are “entitled (and indeed bound) to revisit the question of the tribunal’s decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement”); George A. Bermann, *The ‘Gateway’ Problem in International Commercial Arbitration*, 37 Yale J. Int’l L. 1, 18-19 (2012) (describing French practice); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 Am. Rev. Int’l Arb. 133, 134-136 (1997) (Swiss practice). Similarly, the New York Convention provides that a court considering a pre-arbitration challenge to arbitration where “the parties have made an agreement” to arbitrate “shall \*\*\* refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” New York Convention art. II(3). The clear implication is that the court may independently determine that no valid agreement exists, even though the arbitral tribunal has not considered the issue, and may then decline to refer the dispute to arbitration. See 1 Born 977.

Thus, it is appropriate for courts in the United States, on review under the Convention and the FAA, to review de novo the arbitral tribunal’s resolution of objections based on an investor’s non-compliance with a condition on the State’s consent to enter into an arbitration agreement. Indeed, this rule is also consistent with *First Options* itself, which establishes even in the context of private commercial arbitration that the existence of an agreement to arbitrate is presumptively for the Court to decide independently. 514 U.S. at 944-945.

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### C. When A Party Seeks To Set Aside An Arbitral Award Based On An Objection To Arbitration, The Court Should Apply Principles Of Treaty Interpretation To Determine The Appropriate Standard Of Review

1. When a State challenges an arbitral award on the ground that the arbitrator should have concluded that arbitration was not authorized, the court must ascertain the nature of the State's objection in order to determine the proper standard of review. When a State argues to a reviewing court that there is no arbitration agreement between the State and the investor, the court should engage in independent review of that objection. Sometimes the State and the investor may dispute the antecedent question whether the treaty requirement on which the State relies is in fact a condition on the State's consent. Because resolving that dispute is integral to determining whether an arbitration agreement was formed, the court should independently evaluate whether the requirement is a condition on consent, applying principles of treaty interpretation. See, e.g., Dugan 224-225; pp. 16-17, *supra*.

In considering whether a treaty provision is a condition on the State's consent to enter into an arbitration agreement, the court should be cognizant of the fact that investment treaties are structured to provide a State's standing offer to arbitrate, and so the treaty itself should provide any limitations on the State's consent to form an arbitration agreement. See pp. 20-21, *supra*; *Waste Mgmt.* ¶¶ 13-14, 40 I.L.M. 62-63 (emphasizing NAFTA's use of the phrase "conditions precedent to submission" of a claim to arbitration, and the requirement that arbitration may be instituted "[o]nly if" the conditions are fulfilled). Absent a sufficient indication in the treaty's text and, if necessary, other appropriate evidence of the parties' intent, that a particular requirement is a condition precedent to the formation of an investor-state arbitration agreement, noncompliance with that requirement does not prevent the formation of an agreement. See *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award on Jurisdiction, ¶ 44 (Oct. 11, 2002), 42 I.L.M. 85, 94 (2003). Courts should not assume that all threshold requirements stated in the treaty presumptively implicate a State's consent, or that the treaty parties intended any particular requirement to be a limitation on consent. Rather, courts should analyze the treaty's text and materials relevant to treaty interpretation to determine whether the States parties intended the requirement to operate as a limitation on consent. See *Saks*, 470 U.S. at 396.

At the same time, courts should be cognizant of the fact that different treaty parties, as sovereigns, may choose to make different requirements conditions on consent—including those that might resemble ones in private commercial agreements that are characterized as "procedural" and presumptively for arbitrators to decide. *Howsam*, 537 U.S. at 84; see pp. 12-14, *supra*; Schreuer 843-849. Courts should therefore conclude that a treaty requirement is a condition on consent if the text and other relevant evidence sufficiently so indicate, rather than presuming that certain types of treaty pre-conditions—such as time limits, notice requirements, or waiver of any right to pursue other remedies—are *not* conditions on a State's consent based on the assertedly "procedural" nature of the requirement. Cf. *Howsam*, 537 U.S. at 83; *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26-28 (1989) (requirement of pre-enforcement-suit notice to federal agency is a mandatory prerequisite to suit, requiring dismissal if not complied with, that serves important regulatory purposes). Such an approach would risk subjecting a sovereign State to an adjudication to which it never consented and to the liability that might ensue.

2. When a reviewing court concludes that a treaty requirement is a condition on the State's consent to arbitrate, the court, like the arbitral tribunal, must enforce that condition

according to its terms to avoid forcing a nonconsenting State to submit to arbitration. If the arbitrator concluded that the investor complied with the condition on consent, the court should independently review that ruling. If the issue implicates factual questions, the court, in exercising its independent judgment, should consider affording respectful consideration to the findings made by an arbitral tribunal in resolving any factual disputes. Cf. *Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 477 (6th Cir. 2006) (reviewing court’s independent consideration may be “informed by the arbitrator’s resolution of the arbitrability question”).

3. If the court concludes that the requirement on which the State relies is not a condition to its consent, then any noncompliance with that condition did not prevent the formation of an agreement between the disputing parties. Because the arbitrator’s ruling on the objection was made pursuant to an arbitration agreement, the court presumptively should review the arbitrator’s ruling on the objection deferentially.

### III. THE COURT SHOULD REMAND THIS CASE FOR FURTHER PROCEEDINGS

A. In this case, the court of appeals did not employ the correct analytical framework in considering whether the United Kingdom and Argentina contemplated that an investor could be excused from complying with the Treaty’s litigation requirement. The court framed the operative question as whether there was “clear and unmistakable evidence” that the “contracting parties intended the arbitrator to decide” objections based on the litigation requirement. Pet. App. 15a-16a (citing *First Options*, 514 U.S. at 944). The court’s holding that de novo review was appropriate was based on its conclusion that because the treaty contemplated litigation in local courts, the treaty parties would have intended a court in the seat of arbitration to independently review compliance with the litigation requirement. *Ibid.* For the reasons stated above, however, the court should have examined as a matter of treaty interpretation whether the litigation requirement was a condition on Argentina’s consent to enter into an arbitration agreement, and it should have applied de novo review only if it concluded that the requirement was indeed such a condition. Although the substance of the particular requirement—here, that the investor first seek to resolve the dispute in the host State’s courts—may inform that determination, it is not the ultimate focus of the inquiry in its own right.

B. The Court should remand this case to the court of appeals so that it can construe the Treaty in accordance with the proper interpretive framework. That course is warranted because the parties to this point appear to have assumed that the contract-law framework set forth in *First Options* and *Howsam* should control the arbitrability analysis, and they have accordingly not presented arguments concerning the proper interpretation of the Treaty under governing international-law principles. See, e.g., *AT&T Techs. Inc.*, 475 U.S. at 651-652.

On remand, the court of appeals should determine, applying principles of treaty interpretation, whether the litigation requirement is a condition to Argentina’s consent to arbitrate, and it should then apply the appropriate standard of review to the arbitral panel’s ruling on Argentina’s objection to arbitration. See pp. 28-31, *supra*. The United States takes no position on whether this litigation requirement is a condition on consent. Although litigation requirements like that at issue here appear to be uncommon in investment-treaty practice, those tribunals that have interpreted treaties containing similar litigation provisions have divided on the nature of such provisions. Compare, e.g., *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 571-591 (Aug. 4, 2011) (Argentina-Italy BIT) (litigation requirement concerned whether claim was properly presented to tribunal, and noncompliance was excused on the facts presented), with, e.g., *Daimler Fin. Servs. AG v. Argentina*, ICSID Case No. ARB/05/1, Award, ¶ 194 (Aug. 22, 2012) (Argentina-Germany BIT) (litigation requirement

“cannot be bypassed”). Ultimately, resolution of the question will depend on the text and structure of the treaty and evidence as to the treaty parties’ intent. The court of appeals should address the matter on remand after the parties have had an opportunity to brief it.

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## 2. Jurisdiction Over Foreign Entities in U.S. Courts

On July 5, 2013, the United States submitted a brief as *amicus curiae* in support of petitioner, DaimlerChrysler, in a case on appeal from the U.S. Court of Appeals for the Ninth Circuit, *DaimlerChrysler AG v. Bauman*, No. 11-965. The question presented on appeal was whether the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution permits a court to exercise general personal jurisdiction over an out-of-state corporation based on its subsidiary’s contacts with a U.S. state, in a case not arising out of, or related to, either corporations’ contacts with the U.S. state. Plaintiffs in the district court brought suit against German company DaimlerChrysler, alleging that DaimlerChrysler’s Argentinian subsidiary had collaborated with state forces during Argentina’s “Dirty War” in the 1970s and 1980s. The district court dismissed for lack of personal jurisdiction. The court of appeals initially affirmed, but reversed on rehearing. The appeals court reasoned primarily that another of DaimlerChrysler’s subsidiaries, Mercedes-Benz United States, LLC (“MBUSA”), performed services for DaimlerChrysler in California that were sufficiently important to the parent company and that there was an element of control by the parent so as to allow for attribution of activities to the parent for jurisdictional purposes.

Excerpts below from the U.S. *amicus* brief (with most footnotes omitted) argue that the court of appeals erred, noting that it did not take into account the Supreme Court’s decision in *Goodyear*, discussed in *Digest 2011* at 458-62, which was decided after the *DaimlerChrysler* appeal was decided.\*\*

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### INTEREST OF THE UNITED STATES

This case concerns a federal court’s exercise of personal jurisdiction over a foreign parent corporation based on its subsidiary’s contacts with the State in which the federal court sits, in a case not arising out of, or related to, either entity’s contacts with the State. This Court has referred to such a claim of adjudicatory authority as “general” personal jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). In some instances, the interests of the United States are served by permitting suits against foreign entities to go forward in domestic courts. But expansive assertions of general jurisdiction over foreign corporations may operate to the detriment of the United States’ diplomatic relations and its foreign trade and

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\*\* Editor’s Note: On January 14, 2014, the Supreme Court issued its decision in the case, *Daimler AG v. Bauman*, 134 S.Ct. 746. The Court held that due process did not permit exercise of general jurisdiction over the corporation in California. The Supreme Court’s decision will be discussed in *Digest 2014*.

economic interests. See U.S. Br. at 1-2, 28-34, *Goodyear, supra* (No. 10-76) (U.S. *Goodyear* Br.). Those concerns would only be magnified under the court of appeals' framework, which fails even to give foreign defendants fair warning of what conduct would subject them to suit in domestic courts, and thus leaves them unable "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

From an economic perspective, the inability to predict the jurisdictional consequences of commercial or investment activity may be a disincentive to that activity. Likewise, an enterprise may be reluctant to invest or do business in a forum, if the price of admission is consenting to answer in that forum for all of its conduct worldwide. The uncertain threat of litigation in United States courts, especially for conduct with no significant connection to the United States, could therefore discourage foreign commercial enterprises from establishing channels for the distribution of their goods and services in the United States, or otherwise making investments in the United States. Such activities are likely to be undertaken through domestic subsidiaries and thus are likely to implicate the decision below.

From a diplomatic perspective, foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments. See Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161-162. The conclusion of such international compacts is an important foreign policy objective because such agreements serve the United States' interest in providing its residents a fair, sufficiently predictable, and stable system for the resolution of disputes that cross national boundaries.

The United States has a further interest in preserving the federal government's legislative and regulatory flexibility to foster those trade, investment, and diplomatic interests, while assuring a domestic forum to adjudicate appropriate cases. This case does not directly implicate that interest. It does not, for example, involve an Act of Congress addressing the relationship between a parent corporation and its subsidiary, or reflecting Congress's judgment concerning relevant contacts with a forum for jurisdictional purposes. And it presents a question under the Due Process Clause of the Fourteenth Amendment, while exercises of the federal judicial power are, as a constitutional matter, constrained instead by the Due Process Clause of the Fifth Amendment.<sup>1</sup> Nonetheless, because the political Branches are well positioned to determine when the exercise of personal jurisdiction will, on balance, further the United States' interests, the United States has an interest in ensuring proper regard for their judgments in this field.

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<sup>1</sup> "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *J McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion). For example, the United States' special competence in matters of interstate commerce and foreign affairs, in contrast to the limited and mutually exclusive sovereignty of the several States (see *ibid.*), would permit the exercise of federal judicial power in ways that have no analogue at the state level. This Court has consistently reserved the question whether its Fourteenth Amendment personal jurisdiction precedents would apply in a case governed by the Fifth Amendment, and it should do so here. See, e.g., *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987).

## ARGUMENT

The court of appeals applied a rule for attributing a subsidiary's forum contacts to its foreign parent that is inconsistent with due process, and indeed is not grounded in any applicable law shaping petitioner's expectations about the jurisdictional consequences of its corporate affiliations. Even apart from its flawed approach to attribution of contacts, the court below embraced the startling conclusion that the relatively small fraction of a German manufacturer's production sold in California by a corporate affiliate permits that State's courts to bind the German corporation to judgment on potentially any claim, arising anytime, anywhere in the world. *Goodyear* puts that result in doubt by holding that a forum court may properly exercise general jurisdiction only over corporations that are "essentially at home in the forum." 131 S. Ct. at 2851.

### A. The Ninth Circuit's Decision Did Not Take Account Of *Goodyear*

The court of appeals' approach would hold a foreign parent corporation subject to general jurisdiction in a forum whenever the parent has an element of control over its subsidiary that makes substantial sales in the forum State of products manufactured and sold abroad by the foreign parent. The lower court endorsed that approach without the benefit of this Court's decision in *Goodyear*, which was announced a month after the panel's decision. The result below is difficult to square with *Goodyear's* reaffirmation of the principle that a State may bind a corporation to judgment on any claim arising anywhere in the world only when the corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State," 131 S.Ct. at 2851.

1. Because the foreign corporate defendants in *Goodyear* had only "attenuated connections to the [forum] State" that "[f]e]ll far short" of the standard for exercising general jurisdiction, 131 S. Ct. at 2857, this Court did not have occasion there to explain what kinds of contacts would establish that a defendant is "essentially at home" in a particular forum. ... Whatever precise rule emerges from *Goodyear*, we understand the Court's test to be appropriately demanding, given that an exercise of general jurisdiction subjects a defendant to suit for any claim arising anytime, anywhere in the world.

The Ninth Circuit's approach is very different. As the court of appeals acknowledged, its "agency" test "has its origins in case law from the Second Circuit," Pet. App. 32a. In particular, *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 423 (9th Cir. 1977), adopted the test in *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967), cert. denied, 390 U.S. 966 (1968). *Gelfand* in turn drew its standard from New York cases, most prominently *Frummer v. Hilton Hotels International, Inc.*, 227 N.E.2d 851, 852-854 (N.Y.), cert. denied, 389 U.S. 923 (1967). *Frummer* applied a principle of "[t]raditional" New York personal jurisdiction law, viz., that New York courts have general jurisdiction over a foreign corporation "engaged in such a continuous and systematic course of 'doing business' [in New York] as to warrant a finding of its 'presence' in this jurisdiction." *Id.* at 853 (citation omitted). That principle traces back decades before *International Shoe*, to cases such as *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917) (Cardozo, J.), which held that a Pennsylvania coal company's maintenance of a "branch office in New York" for salesmen, "contain[ing] eleven desks, and other suitable equipment," subjected it to general jurisdiction in New York. *Id.* at 916-917. At bottom, therefore, the Ninth Circuit's test articulates what it meant a century ago for an out-of-state corporation to be "doing business" in New York, and then extends that test through a nontraditional concept of "agency" to attribute a subsidiary's "doing business" to its foreign parent.

Substantial reason exists to doubt the continuing vitality of the Ninth Circuit's concept of general jurisdiction. The analysis below is unmoored from this Court's "continuous and systematic" test for general jurisdiction, obligingly quoting it once (Pet. App. 20a) but never mentioning it again. More broadly speaking, a foreign corporation that merely does business in the forum State would not necessarily be "essentially at home" there. The "doing business" approach to general jurisdiction has been a source of contention in diplomatic contexts, see U.S. *Goodyear* Br. at 33 n.14, and has been subject to extensive scholarly criticism, see, e.g., *Essentially at Home*, 63 S.C. L. Rev. at 545-548; *General Jurisdiction*, 66 Tex. L. Rev. at 758-759, 781.

2. The particular result below, moreover, is in tension with this Court's decisions. A court may not assert general jurisdiction over a foreign parent based simply on (1) a conclusion (or concession) that its subsidiary is subject to the court's general jurisdiction, and (2) a determination to attribute some or all of the subsidiary's contacts to its parent. See *Keeton*, 465 U.S. at 781 n.13 ("Each defendant's contacts with the forum State must be assessed individually."). Rather, the court must directly apply *Goodyear's* test to the foreign parent's direct contacts (if any) and any contacts fairly attributed to it. Moreover, this Court's decisions suggest that if contacts are attributed from a subsidiary to its parent, their significance may well shrink by their placement in context with the foreign parent's independent contacts with other jurisdictions throughout the world. Cf. *Goodyear*, 131 S. Ct. at 2853-2854 (identifying as "paradigm" certain forums with which a defendant is likely to have relatively substantial contacts, implying that relatively insubstantial contacts are less likely to support the exercise of general jurisdiction); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-448 (1952) (finding modest corporate contacts with Ohio sufficient to establish general jurisdiction, given that the company had ceased its Philippine mining operations, but implying that if such operations were ongoing, the result might have been different).

Here, MBUSA's contacts with California, even if properly attributed to petitioner, would be modest relative to petitioner's contacts with the forum in which petitioner is most obviously "at home" and subject to general jurisdiction—Germany. Cf. European Community Council Reg. 1215/2012 Art. 4.1 ("[P]ersons domiciled in a [European Union] Member State shall, whatever their nationality, be sued in the courts of that Member State."); Zivilprozessordnung [ZPO] [Code of Civil Procedure] Dec. 5, 2005, Bundesgesetzblatt [BGBl] 3202, as amended, § 17, ¶ 1, sentences 1-2 ("The general venue of \*\*\* corporate bodies \*\*\* is defined by their registered seat. Unless anything to the contrary is stipulated elsewhere, a legal person's registered seat shall be deemed to be the place at which it has its administrative centre."). Petitioner's headquarters are in Germany, where it manufactures and sells Mercedes-Benz vehicles, and where it presumably orchestrates its corporate operations. J.A. 60a-62a. By contrast, only 2.4% of petitioner's production is ultimately sold in California by MBUSA, Pet. App. 7a, and none is sold by petitioner, whose direct contacts with California appear minimal or nonexistent, see *id.* at 95a.

This Court has eschewed "simply mechanical or quantitative" jurisdictional tests. *International Shoe*, 326 U.S. at 319. But *Goodyear's* "at home" inquiry weighs against recognizing general jurisdiction where, as here, the defendant's forum contacts are dwarfed (in both qualitative and quantitative senses) by its contacts with a forum in which it is paradigmatically "at home." See Pet. Br. 31 n.5; *J. McIntyre*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting) (recognizing that an English corporate defendant whose product was distributed through a third party and caused an injury in New Jersey "surely [wa]s not subject to general

(all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation [was] hardly ‘at home’ in New Jersey”) (quoting *Goodyear*, 131 S. Ct. at 2851). Likewise, the sheer consequences of the court of appeals’ expansive notions of general jurisdiction are a further reason to doubt the compatibility of the judgment below with *Goodyear*. The decision below ultimately rests on the sales and marketing contacts associated with a relatively small portion of production to assert general jurisdiction over petitioner potentially concerning claims arising anytime, anywhere in the world—the vast majority of which would (like respondents’ claims here) have no relation to California. There seems little to recommend that result, in either theory or practice.

**B. The Ninth Circuit’s Framework For Attributing Contacts Of A Corporate Subsidiary To Its Parent Offends Due Process**

For the reasons above, the Ninth Circuit’s result is in considerable tension with *Goodyear*, even assuming that MBUSA’s contacts with California were properly attributed to petitioner. But the record was developed and the case was decided below without the benefit of *Goodyear*, and petitioner sought this Court’s review on the specific question (see Pet. i) of the Ninth Circuit’s approach to attribution of a subsidiary’s forum contacts to its foreign parent. Answering that question, the Court should reject the Ninth Circuit’s approach to attribution.

The Due Process Clause itself does not intrinsically forbid or permit the attribution of a subsidiary’s contacts to its parent. Rather, due process analysis should look to the general framework of state law (and when appropriate, federal law) to define the circumstances in which forum contacts may be attributed to a foreign defendant, within outer constitutional limits that ensure fairness and sufficient predictability. In our legal system, the pervasive principle of separate corporate personality is grounded in positive law; it forms the backdrop for the operation of other legal norms; and it molds the expectations of the corporations themselves and those with whom they interact. Within that legal framework, the paradigmatic (if not inevitably exclusive) state law bases on which one entity is held responsible for the acts of another are the traditional understandings on which substantive alter ego liability is imposed on a parent corporation, and on which a principal is held vicariously liable for its agent’s actions. The Ninth Circuit’s approach, however, ignores that framework and is inconsistent with the Due Process Clause’s demand that jurisdictional rules be fair and sufficiently predictable in operation.

1. *The Due Process Clause does not itself prescribe rules for attribution of contacts to a juridical person*

\* \* \* \*

2. *Considerations of fairness, notice, and consent support looking to state law (or when appropriate, federal law) to decide questions of attribution*

Corporations are creatures of positive law and, within broad constitutional limits, the benefits and obligations of corporate existence are matters of legislative judgment. Corporate “personality is a fiction, although a fiction intended to be acted upon as though it were a fact.” *International Shoe*, 326 U.S. at 316 (citation omitted). Because state law (or when appropriate, federal law) defines the legal characteristics of juridical persons in general, that law ordinarily should form the foundation for determining when one juridical person’s contacts will be attributed to another. When one corporation (the parent) creates or acquires a controlling ownership interest in another corporation (its subsidiary), the parent is on notice of, and can

properly be treated as subjecting itself to, the law governing the existence of the subsidiary and the parent-subsidiary relationship.

In particular, by creating or acquiring a subsidiary, the parent accedes to the rights of ownership in the subsidiary. See generally Model Business Corporation Act §§ 7.01-.48. But it also becomes liable for the subsidiary's debts if the articles of incorporation provide for shareholder liability (see, e.g., *id.* § 2.02(b)(2)(v)) or if state veil-piercing law is applied to disregard the subsidiary (see generally 1 Philip I. Blumberg et al., *Blumberg on Corporate Groups* chs. 11-12 (2d ed. 2005) (*Blumberg*)). The parent-subsidiary relationship has substantial consequences under federal law too. Although this Court has interpreted federal law by default to respect state corporation law, Congress may provide otherwise, see *United States v. Bestfoods*, 524 U.S. 51, 61-64 (1998), and it has in numerous federal laws attached substantive or regulatory consequences to intercorporate relationships.

Moreover, reference to state and federal law in this context is consistent with this Court's practice of looking to and respecting legislative judgments about the corporate characteristics and intercorporate relationships that bear on the proper forum for a suit. See, e.g., *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (interpreting Congress's rule for determining corporate citizenship for purposes of diversity jurisdiction); *Scophony, supra* (applying venue and service provisions of federal antitrust laws to British corporation holding a controlling interest in an American firm); *Cannon*, 267 U.S. at 337 (concluding that service there was ineffective "in the absence of an applicable statute").

3. *The Due Process Clause limits the rules of attribution a State may adopt*

The Due Process Clause of the Fourteenth Amendment nonetheless limits the rules a State may adopt for attribution of contacts. The attribution inquiry, like any other aspect of the exercise of personal jurisdiction, must "not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). Those limits come in two forms.

First, a State may attribute the in-state contacts of one entity to a foreign defendant for jurisdictional purposes only on terms of which the defendant has fair notice, and which are reasonably susceptible of predictable ex ante application. See *Burger King*, 471 U.S. at 472 (explaining that due process requires defendants to be given "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign") (citation omitted, brackets in original); *WorldWide Volkswagen*, 444 U.S. at 297 (insisting on rules that afford "a degree of predictability \*\*\* that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."); cf. *Hertz*, 559 U.S. at 94 ("Simple jurisdictional rules \*\*\* promote greater predictability. Predictability is valuable to corporations making business and investment decisions.").

Second, however clearly announced, some rules of attribution are arbitrary or fundamentally unfair, and for that reason impermissible. "A defendant [may] not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted). Thus, for example, this Court has rejected the forum contacts of an insurer as a basis for exercising personal jurisdiction over the insured defendant. *Rush v. Savchuk*, 444 U.S. 320, 328-329 (1980). A court's determination about the permissibility of attribution under the Due Process Clause should, however, be informed by legislative judgments about the basis for attribution of contacts. See *Shaffer v. Heitner*, 433 U.S. 186, 213-214 (1977) (emphasizing "the failure of the [state] Legislature to assert [a] state interest" in exercising

jurisdiction over a state-chartered corporation's out-of-state fiduciaries in a derivative suit against the fiduciaries).

Within those broad limits, a State has latitude to provide for the exercise of personal jurisdiction over a foreign defendant on the basis of someone else's direct or physical contacts with the State. This Court has repeatedly endorsed the exercise of specific jurisdiction based on "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Such a forum contact may be made through use of agents, salesmen, distributors, or subsidiaries in the forum (at least when that activity is deliberate on the defendant's part). See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.) (suggesting that a foreign defendant's creation, control, or use of a distribution system that predictably delivers products into the forum State may establish minimum contacts); *Burger King*, 471 U.S. at 471-476 ("[W]e have consistently rejected the notion that an absence of physical contacts can [alone] defeat personal jurisdiction.").

4. *Traditional alter ego and agency principles from substantive law generally should govern the attribution of contacts from a corporate subsidiary to its parent*

Legislatures have seldom spoken directly to the rules governing attribution of forum contacts for jurisdictional purposes. In the absence of clear legislative direction, courts have developed a range of approaches for attributing a subsidiary's contacts to its parent. See generally 1 *Blumberg* Pt. III (comprehensively surveying these approaches). We do not think the Due Process Clause countenances the complex, malleable, and unpredictable approaches that some lower courts have devised to justify the attribution of a subsidiary's forum contacts to its foreign parent for purposes of exercising general jurisdiction over the parent.

Rather, formally distinct corporations should presumptively be regarded as separate for jurisdictional purposes. Commercial and investment activity in this country relies on a widely shared understanding, now firmly embodied in law, that parent and subsidiary corporations possess separate juridical personalities. See *Anderson*, 321 U.S. at 362 ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."). This Court has recognized that principle in general (see, e.g., *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628 n.19 (1983) (*Bancec*)), and it has particular support in the Court's personal jurisdiction cases. See, e.g., *Keeton*, 465 U.S. at 781 n.13 (emphasizing, in a case involving affiliated corporate defendants, that "[e]ach defendant's contacts with the forum State must be assessed individually").

But that baseline of separate corporate personality has always been qualified, most prominently in the field of substantive liability. Thus, for example, this Court has held in a number of cases applying federal law that "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, \*\*\* one may be liable for the actions of the other," and that the corporate form "will not be regarded when to do so would work fraud or injustice" or "where it is interposed to defeat legislative policies." *Bancec*, 462 U.S. at 629-630 (citations omitted); see note 8, *supra* (noting array of federal laws that disregard or give only qualified regard to separate corporate personality).

Such background principles of federal law (when applicable), and the corresponding principles of state substantive law that speak to the circumstances in which a parent corporation is responsible for the acts of its subsidiary, would generally be a sound basis for attributing the subsidiary's contacts to its parent for the purpose of exercising general jurisdiction. As we have

previously suggested (U.S. *Goodyear Br.* at 26 n.9), that approach in practice permits the attribution of a corporate subsidiary's contacts to its parent if state substantive law would treat the two corporations as one for all purposes (*i.e.*, treats them as alter egos), or if the subsidiary acted as a traditional agent to establish contacts on behalf of its parent as principal (to the extent of its agency and its contacts). See also *Pet. Br.* 21-22 (alter ego); *id.* at 27-29 (agency).

Those traditional alter ego and agency principles are very likely to comport with due process. They are deeply embedded in our legal structure, and their general contours are similar (though not identical) from State to State. They have proven to be predictable enough in application that there is no serious claim that they are arbitrary or unfair. And they are among the legal doctrines that commercial actors already account for because they govern matters of substantive liability in a wide range of contexts.

*5. The Ninth Circuit's approach to attribution of contacts fails to satisfy due process*

As articulated by the court of appeals, the contacts of a subsidiary may be attributed to its parent for jurisdictional purposes when (1) "the subsidiary \*\*\* performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services," and (2) there exists "an element of control" of the subsidiary by the parent. *Pet. App.* 21a-22a (citation and emphasis omitted). That approach is defective in two respects.

*First*, the Ninth Circuit's approach has no foundation in any state or federal law that governs the subsidiary-parent relationship more generally and that might reasonably have set petitioner's expectations about its responsibility for the California conduct of a New Jersey-based Delaware LLC (MBUSA) owned by petitioner's Michigan-based Delaware-chartered corporate holding company subsidiary (DCNAHC). Rather, that test ultimately traces to turn-of-the-century New York courts' practice of taking jurisdiction over any foreign corporation doing business in New York. ...

*Second*, the Ninth Circuit's approach is too malleable, ill-defined, and subjective to give a parent corporation fair and sufficiently predictable notice of when its subsidiary's forum contacts will be attributed to it. ...

The test the court of appeals ultimately applied forces a potential corporate-parent defendant to predict what activities a court might believe at some future time were "sufficiently important" to it, and whether a court would think that the parent would take over (or "substantially" take over) if it could not rely on its subsidiary to engage in those "important" activities. ...

Layered over that uncertain inquiry would be the question whether the parent corporation has "an element of control" over the subsidiary. Inasmuch as the court of appeals refused to "define the precise degree of control required to meet that test or establish any particular method for determining its existence," *Pet. App.* 22a n.12, potential defendants could not hope to reliably predict the jurisdictional consequences of their business arrangements with corporate affiliates. The pervasive indeterminacy of the Ninth Circuit's approach does not "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen*, 444 U.S. at 297, and it "offend[s] traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316, for that reason as well. It is therefore not a permissible basis on which to exercise general personal jurisdiction.

**Cross References**

*Hague Abduction Convention*, **Chapter 2.B.2.**

*Organization for Economic Cooperation and Development*, **Chapter 7.E.2.**