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CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. General

On October 13, 2014, Carol Hamilton, Senior Adviser 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 47th session. Ms. Hamilton's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/233407.htm*.

* * * *

Mr. Chairman, the United States welcomes the Report of the 47th session of UNCITRAL and commends the efforts of UNCITRAL's member states, observers, and Secretariat in continuing to promote the harmonization of international commercial law.

Most notably, UNCITRAL's work in this past year included the development of a Convention on Transparency in Treaty-Based Investor-State Arbitration, to be known as the Mauritius Convention on Transparency. This effort built upon the previous development of a set of procedural rules designed to make arbitrations under investment treaties 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 new Convention will be a convenient tool for applying these transparency measures to arbitrations occurring under the thousands of existing investment treaties, without having to amend each treaty separately. We thus encourage all states to consider becoming parties to the Convention. We also wish to highlight the efficiency with which UNCITRAL completed this instrument, which was completed in approximately 12 days of negotiations—a pace that we hope can be replicated for other instruments in the future

Also of note, UNCITRAL commenced its efforts to develop legal instruments that will help states encourage the growth of micro, small, and medium enterprises. These efforts, underway in Working Group I, are starting with the topics of simplified incorporation and business registration. In Working Group II, which completed the Convention on Transparency, efforts are now underway to update the Notes on Organizing Arbitral Proceedings. That Working Group will also consider a U.S. proposal, submitted in A/CN.9/822, to develop a new treaty on the enforcement of mediated settlement agreements, with the aim of promoting the use of mediation to settle commercial disputes in the same way that the New York Convention promoted the use of international arbitration. Working Group III will continue to draft generic procedural rules for online dispute resolution in electronic commerce. Working Group IV will continue to draft an instrument that will facilitate the use of electronic transferable records. Working Group V will continue to work on enterprise group insolvency issues and will begin work on the recognition and enforcement of insolvency-related judgments. Working Group VI will continue its work on a model law on secured transactions.

The United States is pleased that the Commission continued its consideration of whether changes are needed to the processes by which UNCITRAL develops its work program. The Report highlights several aspects of this issue that merit further discussion: how to avoid the creation of permanent or semi-permanent working groups that continue to propose extensions of their own mandates; whether UNCITRAL should reduce the number of its working groups to five, rather than six; how to balance legislative activity with other uses of resources; and how best to pursue partnerships with other organizations. We would like to encourage states to continue considering these issues over the coming year, as well as at the next Commission session.

The upcoming year promises to be a productive one for UNCITRAL, with several of the working groups hopefully poised to complete their current work and submit projects for review by the Commission. The United States looks forward to continued collaboration with not only other member states but also all of the non-governmental organizations and other observers that provide so much valuable input into UNCITRAL's work by contributing their expertise regarding the practice of international commercial law.

* * * *

2. Transparency in Treaty-based Investor-State Arbitration

As mentioned in Ms. Hamilton's statement, above, UNCITRAL finished negotiating a new treaty on Transparency in Treaty-Based Investor-State Arbitration. The treaty will open for signature in March 2015. The text of the treaty is included in the July 2014 report on UNCITRAL's 47th session. U.N. Doc. A/69/17.

3. Proposed Convention on Enforcing Results of Conciliation

At the UNCITRAL session in July 2014, the United States submitted a proposal that UNCITRAL consider as a future project the development of a convention on the enforcement of settlement agreements resulting from international commercial

conciliation, a counterpart to the New York Convention on enforcement of arbitral awards. U.N. Doc. A/CN.9/822. The U.S. proposal is excerpted below.

* * * *

Background: The United Nations General Assembly has recognized that the use of conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States."[2] Because promoting the use of conciliation may help achieve these benefits, UNCITRAL has previously developed two important instruments aimed at increasing its usage: the Conciliation Rules (1980) and the Model Law on International Commercial Conciliation (2002). (In this paper, as in the Model Law, the term "conciliation" is used to refer to "a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute."[3] Thus, this paper does not intend to differentiate conciliation from mediation.)

When UNCITRAL completed this earlier work, it was already recognized that "[c]onciliation is being increasingly used in dispute settlement practice in various parts of the world," and that it is "becoming a dispute resolution option preferred and promoted by courts and government agencies," in part because of its high success rate.[4] Since then, conciliation's acceptance and use have continued to grow. For example, in 2008, the European Union issued a directive on mediation, requiring that its member states implement a set of rules designed to encourage the use of mediation in cross-border disputes within the EU.[5] Increased use of conciliation can be expected as parties continue to seek options that reduce costs and provide faster resolutions.

One obstacle to greater use of conciliation, however, is that settlement agreements reached through conciliation may be more difficult to enforce than arbitral awards, if a party that agrees to a settlement later fails to comply. In general, settlement agreements reached through conciliation are already enforceable as contracts between the parties.[6] However, enforcement under contract law may be burdensome and time-consuming. Thus, if even a successful conciliation simply results in a second contract that is as difficult to enforce as the underlying contract that gave rise to the dispute, engaging in conciliation to address a contractual dispute may be less attractive. Moreover, unlike arbitration, which generally provides a definitive resolution to a dispute, conciliation does not guarantee that the parties will reach an agreement,

[2] A/Res/57/18 (2003).
[3] Model Law on International Commercial Conciliation, art. 1.3.
[4] Guide to Enactment of the Model Law on International Commercial Conciliation ("Guide to Enactment"), para. 8.
[5] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3.
[6] Guide to Enactment, supra note 4, at para. 89.

and even a party that agrees to a resolution may later fail to comply. Thus, in deciding whether to invest their time and resources in the process of conciliation, parties may want greater certainty that, if they do reach a settlement, enforcement will be effective and not costly. "Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award."[7] Thus, the Commission has supported "the general policy that easy and fast enforcement of settlement agreements should be promoted."[8] Bolstering enforceability across borders also helps promote finality in settlement of cross-border disputes, as it reduces the possibility of parties pursuing duplicative litigation in other jurisdictions. For these reasons, initial consultations with the private sector have indicated strong support for further efforts by UNCITRAL to facilitate the enforceability of conciliated settlement agreements.

Proposed Convention: To further these goals, the United States proposes that Working Group II develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration. Just as the New York Convention has been successful in part due to its relative brevity and simplicity, an analogous convention on conciliation should also avoid unnecessary complexity.

With respect to the scope of a convention, the United States proposes that the Working Group address the following issues, among others:

• Providing that the convention applies to "international" settlement agreements, such as when the parties have their principal places of business in different states;

• Ensuring that the convention applies to settlement agreements resolving "commercial" disputes, not other types of disputes (such as employment law or family law matters);

• Excluding agreements involving consumers from the scope of the convention;

• Providing certainty regarding the form of covered settlement agreements, for example, agreements in writing, signed by the parties and the conciliator; and

• Providing flexibility for each party to the convention to declare to what extent the convention would apply to settlement agreements involving a government.

The convention could then provide that settlement agreements falling within its scope are binding and enforceable (similar to Article III of the New York Convention), subject to certain limited exceptions (similar to Article V of the New York Convention).

Such an approach would build on existing law. To encourage use of conciliation, many legislative frameworks and sets of rules make some conciliated settlement agreements easier to enforce by treating them in the same manner as arbitral awards. For example, the UNCITRAL Model Law on International Commercial Arbitration (adopted in many jurisdictions around the world) provides in Article 30 that if parties settle a dispute during arbitral proceedings, the tribunal can make an award on agreed terms, with the same status and effect as any other award on the merits of a case. The result relies on a legal fiction: although the parties resolve the dispute themselves, rather than waiting for a neutral third-party decision maker to impose a resolution, the settlement is still categorized as an award. This fiction gives the parties the same benefits in terms of finality and ease of enforcement that a normal award would have provided.

[7] *Id*. para. 87.
[8] *Id*. para. 88.

Other jurisdictions have gone further by treating conciliated settlement agreements equivalently to arbitral awards even if arbitral proceedings have not yet commenced. These jurisdictions thus provide parties with an incentive to settle disputes at earlier stages. For example, UNCITRAL has noted that India and Bermuda provide for settlement agreements reached through conciliation to be treated as arbitral awards.[9] A number of U.S. states, including California and Texas, have statutes on international commercial conciliation that provide for settlement agreements to have the same legal effect as arbitral awards.[10] Various sets of arbitration rules around the world take a similar approach. The Korean Commercial Arbitration Board's Domestic Arbitration Rules provide that, if conciliation succeeds in settling a dispute before arbitration commences, "the conciliator shall be deemed to be the arbitrator appointed under the agreement of the parties, and the result of the conciliation shall … have the same effect" as an award on agreed terms.[11] The Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce similarly provide that the parties can appoint the mediator as an arbitrator for the purpose of confirming a settlement agreement as an arbitral award.[12]

A convention for conciliation modelled on the New York Convention would draw upon the approach taken by these jurisdictions, but would address the enforceability of settlement agreements directly, rather than relying on the legal fiction of deeming them to be arbitral awards. This approach would also eliminate the need to initiate an arbitration process (with the attendant time and costs) simply to incorporate a settlement agreement into an award.

Any convention along these lines would, of course, need to include a limited set of exceptions similar, but not identical, to those provided in Article V of the New York Convention. For example, an analog to Article V(1)(d) (regarding the composition of the arbitral authority or the arbitral procedure) may not be necessary. By contrast, the Working Group could consider whether to allow a party to a settlement agreement to prevent enforcement if it can demonstrate that it was coerced into signing that settlement agreement. The Working Group could also consider several possible structural limitations on enforcement under the convention:

• Whether to provide that other courts could give effect to an originating jurisdiction's determination that a settlement agreement is not enforceable (similar to the New York Convention's treatment of set-aside proceedings);

• How to avoid duplicative litigation caused by simultaneous attempts to enforce a settlement under the convention as well as under contract (or other) law; and

• How to ensure respect for restrictions on enforcement chosen by the parties to a settlement (*e.g.*, settlements containing forum selection clauses or other limitations on remedies).

Moreover, settlement agreements can contain long-term obligations regarding the parties' conduct years into the future, and might address such issues more commonly than arbitral awards would. The Working Group should consider whether limits on enforcement under the convention would be appropriate in such cases. For example, enforcement under the convention could be made available only for a limited period of time, after which other mechanisms — such as domestic contract law — might be more appropriate (*e.g.*, to deal with issues such as changed circumstances). Other methods of limiting the convention's application to non-monetary

[9] *Id*. para. 91 (citing Bermuda, Arbitration Act 1986; and India, Arbitration and Conciliation Ordinance, 1996, arts. 73-74).

[10] *E.g.*, Cal. Civ. Pro. § 1297.401; Tex. Civ. Prac. & Rem. Code Ann. § 172.211.

[11] Korean Commercial Arbitration Board, Domestic Arbitration Rules 18.3 (2011).

[12] Arbitration Institute of the Stockholm Chamber of Commerce, Mediation Rules 14 (2014).

elements of settlements could also be considered. During the development of the Model Law on International Commercial Conciliation, it was noted that drafting uniform legislation regarding enforcement would be difficult because the methods for achieving expedited enforcement of settlement agreements varied greatly between legal systems and depended on domestic procedural law.[13] However, the Working Group could minimize these difficulties by addressing enforcement via a convention that, like the New York Convention, sets forth the result that states would need to provide through their domestic legal systems (in this case, enforcement of conciliated settlement agreements) without trying to harmonize the specific procedure for reaching that goal.[14]

Similarly, efforts to develop a convention should not seek to develop harmonized rules for the conciliation process itself, just as the New York Convention does not set forth mandatory rules for conducting arbitral proceedings. However, the Working Group could consider whether additional topics, such as the confidential nature of conciliation discussions, could be addressed through further projects after completion of an initial convention.

Next Steps: In view of the potential benefits of such a convention, as well as the background work already done by the Secretariat in the context of the development of the Model Law, the United States urges the Commission to assign this project the highest priority within the Working Group, including at its next session in September 2014. While other efforts under consideration by the Working Group (such as updating the Notes on Organizing Arbitral Proceedings) should continue, they should not delay work on this project.

* * * *

At its session in July 2014, the Commission decided that Working Group II should consider the U.S. proposal to develop a convention on conciliation at its February 2015 session and report to the Commission on the feasibility of work on the topic. On December 23, 2014, the United States submitted a paper to provide further explanation of its proposal and respond to questions raised at the July session. U.N. Doc. A/CN.9/WG.II/WP.188. Excerpts follow (with footnotes omitted) from the December submission by the United States.

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* * * *

I. The Need for a New Convention

One question that has been raised in response to the proposal is whether commercial parties' willingness to enter into conciliation is affected by the legal regime that would apply to the enforcement of any resulting settlement. UNCITRAL's previous work on conciliation suggests that enforceability does matter…A recently-conducted international survey also supports the

[13] Guide to Enactment, *supra* note 4, at para. 88.

[14] Similarly, although this convention would provide for enforcement of settlement agreements, it would not address matters related to the attachment or execution of assets, just as the New York Convention did not do so.

view that a convention that facilitated enforcement would encourage conciliation. …Similarly, a survey of in-house counsel, senior corporate managers, and others by the International Mediation Institute found that over 93% of respondents would be more likely (either "much more likely" or "probably") to mediate a dispute with a party from another country if that country had ratified a convention on the enforcement of mediated settlement agreements. …Additionally, the U.S. Council for International Business— *i.e.*, the U.S. branch of the International Chamber of Commerce (ICC)—sought input on the subject from its membership, which expressed the view that a convention would be useful.

Thus, the United States believes that a convention as outlined in the proposal would encourage parties to consider investing resources in conciliation, by providing greater certainty that any resulting settlement could be relied on and easily enforced. (In particular, when a commercial dispute arises from a contractual relationship, conciliation may not be an attractive option if even a successful conciliation would result in a settlement that would merely have the same legal status as the original contract and would have to be the subject of litigation under contract law.)

Some who have questioned why a convention is needed have noted that many sets of arbitration rules permit parties who settle during an arbitration to have the settlement turned into a "consent award" (or an "award on agreed terms"). The settlement is treated as if it were an award, even though the parties themselves (rather than an arbitral panel) determine the outcome. However, adapting this feature of international arbitration to the enforcement of conciliated settlements would be difficult. First of all, if a dispute is settled through conciliation and subsequently submitted to arbitration solely in order to obtain a consent award, questions persist as to whether such award would be enforceable under the New York Convention, as it might not arise from "differences between the parties." Furthermore, even if arbitrators could be persuaded to serve in an arbitration whose only function is to rubberstamp an agreement that has already been reached between the parties, parties should not have to initiate arbitration—with the attendant costs and delays—merely in order to bless a settlement. Many parties would likely not be willing to do so at the end of a successful conciliation, at a time when the parties presumably expect compliance and thus would see extra formalities as an unnecessary cost. (Even if they were willing to initiate arbitration merely to have the settlement blessed, it may not be appropriate in all situations, such as if court proceedings have already commenced.)

Moreover, the problems identified in the survey responses noted above persist even to the extent it is possible to convert conciliated settlements into consent awards. Assuming parties are able to enforce settlements under contract law or transform them into consent awards, enforcement of conciliated settlements is still seen as too difficult in the cross-border context. Solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.

II. Status of Settlements under a Convention

At the Commission session in July 2014, several questions about the operation and effect of a convention were raised with respect to the proposal, including whether a convention would merely convert conciliated settlements into arbitral awards, and "whether the new regime of enforcement envisaged would be optional in nature."

The proposal does not envision that a convention would transform conciliated settlements into arbitral awards. Rather, although the convention would give conciliated settlements an enforcement regime similar to that provided under the New York Convention, conciliated settlements would remain a separate legal concept, entirely distinct from (though coequal to) arbitral awards. The basis for a conciliated settlement would still be the voluntary agreement by the parties, rather than a decision of an arbitral panel. The settlement would simply be more easily enforceable internationally than it would be if it remained merely a contractual agreement. Given that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration (in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them).

At the same time, because the conciliated settlement has its basis in the parties' voluntary agreement, any enforcement regime should respect the contours of that agreement, including any limitations that the parties establish. For example, if the parties include a forum selection clause specifying that enforcement could only occur in a particular jurisdiction, the convention should not override that clause. Similarly, if the parties include in the settlement other limitations on remedies, such as requiring any disputes to be brought back to the conciliator before enforcement is sought, enforcement under the convention should only be available to the degree specified. By extension, parties could opt out of the convention's framework entirely by specifying in the settlement that enforcement under the convention is unavailable. By including limitations of this nature, the convention would respect the voluntary nature of conciliated settlements and would not diminish the ability of the conciliation process to bring disputing parties to mutually-agreeable resolutions.

III. Complex Settlements and Other Possible Exceptions

Another question raised in response to the proposal is whether complex conciliated settlements (*e.g.*, those containing complicated non-monetary elements, such as long-term obligations) would be suitable for enforcement under the convention. However, in general, arbitral awards also have the potential to include similarly complex elements, depending on the issues the arbitrators are asked to resolve. Thus, courts enforcing arbitral awards under the New York Convention could already be confronted by a need to enforce such complex elements and order various forms of non-monetary relief. A new convention providing a similar enforcement mechanism for conciliated settlements thus should not present courts with a qualitatively different set of problems. At the same time, conciliated settlements may include complex obligations more frequently than arbitral awards do; the proposed convention could thus require courts to enforce such complex obligations more often. Providing for the possibility of limiting the convention's application when a conciliated settlement includes non-monetary obligations may therefore be prudent. The simplest approach may be to permit states to make a reservation limiting the extent to which the convention applies to non-monetary elements of conciliated settlements. Under this approach, the default rule would be full coverage of both monetary and non-monetary elements of conciliated settlements, but if a state believes that its courts would struggle to enforce certain types of non-monetary elements of settlements, it could limit its obligations in those respects.

A related question is which other exceptions should apply to a state's obligation to enforce conciliated settlement agreements. Some of the exceptions in Article V of the New York Convention would likely need to be retained, while others could be modified or replaced by other exceptions more appropriate for the context of conciliation, as discussed below.

IV. Technical Feasibility

An additional question that has been raised about the proposal is whether the New York Convention is the appropriate model on which to base a new convention. Using the New York Convention as the model for work on enforcement of conciliated settlements—a model that sets forth a broad obligation to recognize and enforce, and provides a set of exceptions to that obligation—would have the benefit of simplicity, focusing on the result (*i.e.*, recognition and enforcement) rather than dictating particular procedures to reach that goal. Thus, a new convention would not need to be long and complex.

Only a few articles would be needed to set forth the central content of a convention. The main obligation, to recognize and enforce conciliated settlements, could be based on Article III of the New York Convention. This article could also require that Parties to the convention not impose substantially more onerous conditions on the recognition and enforcement of international conciliated settlements than are imposed on either domestic conciliated settlements or on arbitral awards. Next, a set of definitions would be needed. A definition of "conciliation" could be based on Article 1.3 of the Model Law. Similarly, a definition of "international" could be based on Article 1.4(a) of the Model Law, which addresses parties that have their places of business in different states. The definition of "commercial" in the Model Law may not be as well suited for a convention, as it only provides a non-exhaustive list of examples. Instead, this definition could be drawn from other instruments, such as the draft Hague Principles of Choice of Law in International Commercial Contracts, which in Article 1 state that they apply to contracts "where each party is acting in the exercise of its trade or profession" but not to consumer or employment disputes. Similarly, a definition would be needed for a conciliated settlement agreement, specifying that the agreement should be in writing, that it should be signed by the parties to an international commercial dispute, and that the parties should have used conciliation.

The other key provisions of a convention, in addition to the definitions and the obligation to recognize and enforce conciliated settlements, would be the exceptions to that obligation. Some of these issues could be addressed as exceptions similar to those in Article V of the New York Convention, while for other issues a reservation mechanism might be more appropriate. Generally-available exceptions might include the following:

• Conciliated settlements invoked against parties that were, under the law applicable to them, under some incapacity or that were coerced into signing the conciliated settlements;

• Conciliated settlements that are not valid under the law to which the parties have subjected them or, failing any indication thereon, under the law of the country in which they were made;

• Conciliated settlements the subject matter of which is not capable of settlement through conciliation under the law of the country where recognition and enforcement is sought;

• Conciliated settlements that would be contrary to public policy to recognize or enforce; and

• Conciliated settlements whose own terms would preclude enforcement as requested.

Other issues may be more properly addressed by permitting Parties to the convention to take a reservation limiting the convention's application when needed in order to allow implementation in a particular legal system:

• Applying the convention to conciliated settlements to which a government is a party only to the extent specified in the declaration;

• Providing that a party to a conciliated settlement shall not be eligible to seek recognition and enforcement under the convention if that party has its place of business in a state that is not a Party to the convention;

• Applying the convention to non-monetary elements of conciliated settlements only to the extent specified in the reservation; or

• Applying the convention only to conciliated settlements in which the parties to the conciliated settlement have explicitly agreed that the convention would apply.

Beyond provisions such as these, not many additional substantive rules would be needed in a new convention. Analogues to Articles IV (procedures for enforcement) and VI (suspension of proceedings) of the New York Convention could be included, as could a provision limiting application of the convention to conciliated settlements signed after the convention's entry into force. Otherwise, only a standard set of final provisions would be needed.

Thus, the United States continues to believe that developing a new convention along the lines set out in the earlier proposal would be not only a useful project, but a feasible one that the Working Group could accomplish in a relatively short period of time. We look forward to discussing these issues with other delegations.

* * * *

B. FAMILY LAW

1. Hague Convention on the Civil Aspects of International Child Abduction

a. Lozano

As discussed in *Digest 2013* at 435-42, the United States filed *amicus* briefs in 2013 in the U.S. Supreme Court in *Lozano v. Alvarez*, No. 12-820, on whether the one-year period for automatic return of a child in Article 12 of the Hague Convention is subject to extension based on principles of "equitable tolling" applied to U.S. statutes of limitations. On March 5, 2014, the Supreme Court decided the case, agreeing with the U.S. arguments in its briefs that the one-year period is not subject to such extension. Excerpts follow from the Supreme Court's opinion (with footnotes omitted).

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* * * *

We conclude that the parties to the Hague Convention did not intend equitable tolling to apply to the 1-year period in Article 12. Unlike federal statutes of limitations, the Convention was not adopted against a shared background of equitable tolling. Even if the Convention were subject to a presumption that statutes of limitations may be tolled, the 1-year period in Article 12 is not a statute of limitations. And absent a presumption in favor of equitable tolling, nothing in the Convention warrants tolling the 1-year period.

A

First, there is no general presumption that equitable tolling applies to treaties. Congress is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law. *Rotella v. Wood*, 528 U. S. 549, 560 (2000) ("[F]ederal statutes of limitations are generally subject to equitable principles of tolling"). It does not follow, however, that we can export such background principles of United States law to contexts outside their jurisprudential home.

It is particularly inappropriate to deploy this background principle of American law automatically when interpreting a treaty. "A treaty is in its nature a contract between . . . nations, not a legislative act." *Foster v. Neilson*, 2 Pet. 253, 314 (1829) (Marshall, C. J., for the Court); see also 2 Debates on the Federal Constitution 506 (J. Elliot 2d ed. 1863) (James Wilson) ("[I]n their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make . . ."). That distinction has been reflected in the way we interpret treaties. It is our "responsibility to read the treaty in a manner 'consistent with the *shared* expectations of the contracting parties.'" *Olympic Airways v. Husain*, 540 U. S. 644, 650 (2004) (quoting *Air France v. Saks*, 470 U. S. 392, 399 (1985); emphasis added). Even if a background principle is relevant to the interpretation of federal statutes, it has no proper role in the interpretation of treaties unless that principle is shared by the parties to "an agreement among sovereign powers," *Zicherman v. Korean Air Lines Co.*, 516 U. S. 217, 226 (1996).

Lozano has not identified a background principle of equitable tolling that is shared by the signatories to the Hague Convention. To the contrary, Lozano concedes that in the context of the Convention, "foreign courts have failed to adopt equitable tolling . . . because they lac[k] the presumption that we [have]." Tr. of Oral Arg. 19–20. While no signatory state's court of last resort has resolved the question, intermediate courts of appeals in several states have rejected equitable tolling. See *Cannon v. Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W. L. R. 32, ¶51 (Eng.), (rejecting the "tolling rule" as "too crude an approach" for the Convention); *Kubera v. Kubera*, 3 B. C. L. R. (5th) 121, ¶64, 317 D. L. R. (4th) 307, ¶64 (2010) (Can.) (equitable tolling "has not been adopted in other jurisdictions, including Canada"); see also *HJ v. Secretary for Justice*, [2006] NZFLR 1005, ¶53 (CA), appeal dism'd on other grounds, [2007] 2 NZLR 289; A. C. v. P. C., [2005] HKEC 839, 2005 WL 836263, ¶55, (Hong Kong Ct. 1st Instance). The American presumption that federal statutes of limitations can be equitably tolled therefore does not apply to this multilateral treaty. Cf. *Eastern Airlines, Inc. v. Floyd*, 499 U. S. 530, 544–545, and n. 10 (1991) (declining to adopt liability for psychic injury under the Warsaw Convention because "the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the Convention" (footnote omitted)).

It does not matter to this conclusion that Congress enacted a statute to implement the Hague Convention. See ICARA, 42 U. S. C. §§11601–11610. ICARA does not address the availability of equitable tolling. Nor does it purport to alter the Convention. See §11601(b)(2) ("The provisions of [ICARA] are in addition to and not in lieu of the provisions of the Convention"). In fact, Congress explicitly recognized "the need for uniform international interpretation of the Convention." §11601(b)(3)(B). Congress' mere enactment of implementing legislation did not somehow import background principles of American law into the treaty interpretation process, thereby altering our understanding of the treaty itself.

B

Even if the presumption in favor of equitable tolling had force outside of domestic law, we have only applied that presumption to statutes of limitations. See *Hallstrom v. Tillamook County*, 493 U. S. 20, 27 (1989) (no equitable tolling of a 60-day presuit notice requirement that does not operate as a statute of limitations). The 1-year period in Article 12 is not a statute of limitations.

As a general matter, "[s]tatutes of limitations establish the period of time within which a claimant must bring an action." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U. S. ___, ___ (2013) (slip op., at 4). They characteristically embody a "policy of repose, designed to protect defendants." *Burnett v. New York Central R. Co.*, 380 U. S. 424, 428 (1965). And they foster the "elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, *supra*, at 555.

In *Young*, 535 U. S. 43, we evaluated whether those characteristics of statutes of limitations were present in the "three-year lookback period" for tax liabilities in bankruptcy proceedings. The Bankruptcy Code favors tax claims less than three years old in two respects: Such claims cannot be discharged, and they have priority over certain others in bankruptcy proceedings. See 11 U. S. C. §§507(a)(8)(A)(i), 523(a)(1)(A). If the Internal Revenue Service "sleeps on its rights" by failing to prosecute those claims within three years, however, then those mechanisms for enforcing claims against bankrupt taxpayers are eliminated. *Young*, 535 U. S., at 47. We concluded that the lookback period "serves the same 'basic policies [furthered by] all limitations provisions,'" *ibid*. (quoting *Rotella*, 528 U. S., at 555), *i.e.*, certainty and repose. We accordingly held that it was a limitations period presumptively subject to equitable tolling. 535 U. S., at 47.

Unlike the 3-year lookback period in *Young*, expiration of the 1-year period in Article 12 does not eliminate the remedy the Convention affords the left-behind parent—namely, the return of the child. Before one year has elapsed, Article 12 provides that the court "shall order the return of the child forthwith." Treaty Doc., at 9. But even after that period has expired, the court "shall also order the return of the child, unless it is demonstrated that the child is now settled." *Ibid*. The continued availability of the return remedy after one year preserves the possibility of relief for the left-behind parent and prevents repose for the abducting parent. Rather than establishing any certainty about the respective rights of the parties, the expiration of the 1-year period opens the door to consideration of a third party's interests, *i.e.*, the child's interest in settlement. Because that is not the sort of interest addressed by a statute of limitations, we decline to treat the 1-year period as a statute of limitations.

C

Without a presumption of equitable tolling, the Convention does not support extending the 1-year period during concealment. Article 12 explicitly provides that the 1-year period commences on "the date of the wrongful removal or retention," and makes no provision for an extension of that period. *Id*., at 9. Further, the practical effect of the tolling that Lozano requests would be to delay the commencement of the 1-year period until the left-behind parent discovers the child's location. Commencing the 1-year period upon discovery is the obvious alternative to the commencement date the drafters actually adopted because the subject of the Hague Convention, child abduction, is naturally associated with the sort of concealment that might justify equitable tolling under other circumstances. See 697 F. 3d, at 51, n. 8 ("It would have been a simple matter, if the state parties to the Convention wished to take account of the possibility that an abducting parent might make it difficult for the petitioning parent to discover

the child's whereabouts, to run the period 'from the date that the petitioning parent learned [or, could reasonably have learned] of the child's whereabouts'" (alterations in original)). Given that the drafters did not adopt that alternative, the natural implication is that they did not intend the 1-year period to commence on that later date. Cf. *Sebelius v. Auburn Regional Medical Center*, 568 U. S.___, ___ (2013) (slip op., at 10–11). We cannot revisit that choice.

Lozano contends that equitable tolling is nevertheless consistent with the purpose of the Hague Convention because it is necessary to deter child abductions. In his view, "absent equitable tolling, concealment 'probably will' result in non-return," which will in turn encourage abduction. Reply Brief 14–15; see also *Duarte*, 526 F. 3d, at 570.

We agree, of course, that the Convention reflects a design to discourage child abduction. But the Convention does not pursue that goal at any cost. The child's interest in choosing to remain, Art. 13, or in avoiding physical or psychological harm, Art. 13(b), may overcome the return remedy. The same is true of the child's interest in settlement. …We are unwilling to apply equitable tolling principles that would, in practice, rewrite the treaty. …

Nor is it true that an abducting parent who conceals a child's whereabouts will necessarily profit by running out the clock on the 1-year period. American courts have found as a factual matter that steps taken to promote concealment can also prevent the stable attachments that make a child "settled." See, *e.g.*, *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363–1364 (MD Fla. 2002) (children not settled when they "lived in seven different locations" in 18 months); *Wigley v. Hares*, 82 So. 3d 932, 942 (Fla. App. 2011) ("The mother purposely kept him out of all community activities, sports, and even church to avoid detection by the father"); *In re Coffield*, 96 Ohio App. 3d 52, 58, 644 N. E. 2d 662, 666 (1994) (child not settled when the abducting parent "was attempting to hide [child's] identity" by withholding child from school and other organized activities). Other signatories to the Hague Convention have likewise recognized that concealment may be taken into account in the factual determination whether the child is settled. See, *e.g.*, *Cannon*, [2005] 1 W. L. R., ¶¶52–61. See also *Kubera*, 3 B. C. L. R. (5th), ¶47, 317 D. L. R. (4th), ¶47; A. C. v. P. C., [2005] HKEC 839, ¶39, 2005 WL 836263, ¶39. Equitable tolling is therefore neither required by the Convention nor the only available means to advance its objectives.

D

Finally, Lozano contends that the Hague Convention leaves room for United States courts to apply their own "common law doctrine of equitable tolling" to the 1-year period in Article 12 without regard to whether the drafters of the Convention intended equitable tolling to apply. Brief for Petitioner 25. Specifically, Lozano contends that the Convention recognizes additional sources of law that permit signatory states to return abducted children even when return is not available or required pursuant to the Convention. Article 34 of the Convention provides that "for the purpos[e] of obtaining the return of a child," the Convention "shall not restrict the application of an international instrument in force between the State of origin and the State addressed" or the application of "other law of the State addressed." Treaty Doc., at 13; see also Art. 18, *id.*, at 11 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time"). In Lozano's view, equitable tolling principles constitute "other law" that should apply here.

That contention mistakes the nature of equitable tolling as this Court has applied it. We do not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose. See *supra*, at 7–8. To the contrary, we may apply equitable tolling to the Hague Convention only if we determine that

the treaty drafters so intended. See *Choctaw Nation*, 179 U. S., at 535. For the foregoing reasons, we conclude that they did not.

* * * *

b. Lopez Sanchez

In 2014, the Court of Appeals for the Fifth Circuit considered the question of what impact a grant of asylum to the children has on a petition for their return brought pursuant to the Hague Convention and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"). *Angelica Lopez Sanchez v. R.G.L. et al.*, 761 F.3d 495 (5th Cir. 2014). The three minor children had been brought into the United States by their aunt and uncle and were subsequently placed in foster care after expressing fear of returning to Mexico because of their mother's boyfriend, with whom they and their mother had lived, because they claimed he was involved in drug gang activity and abusive behavior. The children appealed from the district court's order that they be returned to their mother in Mexico. During the pendency of the appeal, U.S. Citizenship and Immigration Services ("USCIS") granted the children asylum pursuant to 8 U.S.C. § 1158. The Court of Appeals held that the children had standing to appeal the district court's order that they be returned to Mexico and remanded the case for further consideration. Excerpted below (with footnotes omitted) is the portion of the opinion of the Court of Appeals relating to the relevance of the asylum proceedings to consideration of a Hague Convention petition.[*] The Court also held that the district court had jurisdiction although the mother had not served the children's actual custodian; that joinder of the United States was required; and that the children were entitled to appointment of a guardian ad litem.

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* * * *

III. Effect of asylum grant on the district court's order

The final issue we address is whether the children's asylum grant should be considered by the district court. The children first argue that an asylum grant directly conflicts with the district court order, and the more recent asylum grant should take precedence over Convention relief under the last-in-time rule. *See Ntakirutimana v. Reno*, 184 F.3d 419, 426–27 (5th Cir.1999).

[*] Editor's Note: Excerpts herein come from the Court's August 1, 2014 opinion. The Court initially issued its decision vacating and remanding to the district court on February 21, 2014. *Sanchez v. R.G.L.*, 743 F.3d 945 (5th Cir. 2014) (withdrawn on rehearing). The Court issued a second opinion on June 5, 2014, in response to the children's first petition for rehearing, in which it ordered the Government's joinder on remand. *Sanchez v. R.G.L.*, 2014 WL 2532434 (5th Cir. 2014) (withdrawn on rehearing). The final opinion restates the conclusions that the district court had jurisdiction, that the Government should be joined, and corrects the erroneous conclusion that joinder would moot the jurisdictional challenge raised by the children. On remand, the district court dismissed the case after considering all submissions of the parties.

This argument focuses on the effect of the asylum grant vis-a-vis the district court order and views Sanchez's attempt to secure the return of her children under ICARA as an impermissible collateral attack on the grant of asylum. Alternatively, the children argue that we should remand to the district court for reconsideration of whether the Article 13(b) or 20 exception applies in light of the recent grant of asylum, which is new evidence not considered by the district court.

Sanchez responds that, if Convention relief is found to be in conflict with the asylum grant, the return order should take precedence over the asylum grant because the Convention proceedings were more thorough. She also disputes the argument that it is necessary for the district court to consider the asylum grant because evidence related to that grant was already considered by the district court. In its amicus brief, the Government advances the position that a grant of asylum is not dispositive of but is relevant to whether either the Article 13(b) or 20 exception applies.

The children were granted asylum pursuant to the Immigration and Nationality Act ("INA"), as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), 8 U.S.C. §§ 1158, 1229a, 1232. To qualify for asylum, an applicant must either have suffered past persecution or have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A), *incorporated by* 8 U.S.C. § 1158(b)(1)(B)(i). The children's grant of asylum was discretionary, 8 U.S.C. § 1158(b)(1)(A), and provides that "the Attorney General shall not remove or return the alien to the alien's country of nationality...." 8 U.S.C. § 1158(c)(1)(A).

We disagree with the children's argument that the asylum grant must be revoked before they can be returned to Mexico pursuant to the Hague Convention. The language of the INA indicates that the discretionary grant of asylum is binding on the Attorney General or Secretary of Homeland Security. *See id.* No authority has been offered to support the argument that the discretionary grant of asylum confers a right to remain in the country despite judicial orders under this Convention. The asylum grant does not supercede the enforceability of a district court's order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland Security under the INA. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993).

The children's asylum grant, though, is relevant to whether the Hague Convention exceptions to return should apply. We agree with the Government that there is a significant overlap between the asylum inquiry and Article 13(b) of the Hague Convention. Both focus on the level of harm to which the children would be exposed if returned to their home country. An asylee has been found to face persecution upon return to his or her country of nationality. 8 U.S.C. § 1101(a)(42)(A). Persecution has been defined as an "extreme concept" and turns on whether suffering or harm is likely to be inflicted on the asylum applicant. *Eduard v. Ashcroft*, 379 F.3d 182, 187 & n. 4 (5th Cir.2004). Similarly, Article 13(b) of the Hague Convention requires a respondent to show that "there is a grave risk that his or her return would expose the child to physical or psychological harm." Hague Convention, art. 13(b). The level of harm necessary to trigger the Article 13(b) exception must be "a great deal more than minimal." *Walsh*, 221 F.3d at 218.

Despite similarities, the asylum finding that the children have a well-founded fear of persecution does not substitute for or control a finding under Article 13(b) of the Convention about whether return "would expose the child to physical or psychological harm or otherwise

place the child in an intolerable situation." Hague Convention, art. 13(b). The judicial procedures under the Convention do not give to others, even a governmental agency, authority to determine these risks. The district court makes an independent finding of potential harm to the children, considering all offered relevant evidence. The prior consideration of similar concerns in a different forum are relevant, but we determine that an asylum grant does not remove from the district court the authority to make controlling findings on the potential harm to the child.

We note also that the evidentiary burdens in the asylum proceedings and those under ICARA's framework are different. To be granted asylum, the children were required to show their eligibility by a preponderance of the evidence. *See* 8 C.F.R. § 1208.13(a),(b)(1)(i). In order for a Convention exception to apply, a respondent must establish the exception by clear and convincing evidence. 42 U.S.C. § 11603(e). The level of participation by interested parties in the two proceedings may also be different, a point Sanchez makes when arguing she did not have an opportunity to make a meaningful presentation prior to the asylum grant.

As the district court recognized, the USCIS grants of asylum are relevant to any analysis of whether the Article 13(b) or 20 exception applies. When faced with a motion to stay the proceedings while the children's asylum application was pending, the district court determined that the interests of a prompt answer under the Convention outweighed the merits of a stay. Now that the children have been granted asylum, though, all available evidence from the asylum proceedings should be considered by the district court before determining whether to enforce the return order.

CONCLUSION

The district court's return order is VACATED. The case is REMANDED to the district court with instructions to determine the current physical and legal custodian; to join the Government, if it still retains temporary legal custody, as a party respondent; to appoint the children a guardian *ad litem;* and to consider the asylum grants, assessments, and any related evidence not previously considered that relates to whether Article 13(b) or 20 applies. Any remaining issues such as whether the oldest child is no longer subject to these proceedings can be addressed. Finally, we repeat our previous statement, which was echoed in the previous dissent, that the United States Government should take "all appropriate measures" to fulfill its Convention-imposed duties, including an obligation to "facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child." Hague Convention, art. 7.

* * * *

2. Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

On September 29, 2014, the President signed the Preventing Sex Trafficking and Strengthening Families Act. Pub. L. No. 113-183. Title III of that Act implements the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. Among other things, the Act mandates that U.S. states have in effect the 2008 amendments to the Uniform Interstate Family Support Act in order to qualify for continued federal funding under Title IV-D of the Social Security Act. On September 30, 2014, Secretary Kerry issued a press statement welcoming passage of the

Act. Secretary Kerry's press statement, available at *www.state.gov/secretary/remarks/2014/09/232337.htm*, includes the following:

> … I am grateful to Congress for passing this important implementing legislation. …
>
> The United States was the first country to sign the Convention in 2007. Protection of our most vulnerable citizens, our children, is fundamental to who we are. …We know that recovering child support when the child and one parent are in one country and the other parent is in another is difficult and too often impossible. The United States has a comprehensive system to establish, recognize and enforce domestic and international child support obligations. The Convention just requires that all treaty partners have similar systems in place and, as a result, more children in the United States and abroad will be receiving more support, more expeditiously than ever before.

C. INTERNATIONAL CIVIL LITIGATION

1. Arbitration

a. BG Group v. Argentina

As discussed in *Digest 2013* at 443-52, the United States filed two *amicus* briefs in the Supreme Court of the United States in a case challenging an award issued in an arbitration conducted under a bilateral investment treaty. On March 5, 2014, the Supreme Court decided the case. *BG Group PLC v. Argentina*, 134 S.Ct. 1198 (2014). The Supreme Court did not remand the case, as recommended in the U.S. brief. Seven justices voted to reverse the decision of the U.S. Court of Appeals for the District of Columbia Circuit, which had reversed the district court's decision confirming the award. Two justices dissented, with the dissenting opinion by Chief Justice Roberts taking a position similar to that articulated in the U.S. brief. The opinion of the Supreme Court includes the following introduction, summarizing the majority view:

> This case concerns the Treaty's arbitration clause, and specifically the local court litigation requirement set forth in Article 8(2)(a). The question before us is whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement *de novo*, or with the deference that courts ordinarily owe arbitration decisions. That is to say, who—court or arbitrator—bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy? In our view, the matter is for the arbitrators, and courts must review their determinations with deference.

A majority of the Supreme Court found that the treaty did not make the litigation requirement a condition of consent to arbitration, and therefore deferred to the arbitrators' jurisdictional determination as a reasonable interpretation and application of the treaty.

b. Commissions Import Export SA v. Republic of the Congo

On April 7, 2014, the United States submitted a brief as *amicus* in the U.S. Court of Appeals for the District of Columbia Circuit in in *Commissions Import Export SA v. Republic of the Congo*, No. 13-7004. Commissions Import Export S.A. ("Commisimpex") obtained an arbitral award in France in 2000, which it confirmed in an English court in 2009, resulting in a money judgment which it then sought to enforce in the United States under the District of Columbia Uniform Foreign-Country Money Judgments Recognition Act, D.C. Code § 15-361 *et seq*. The district court held that the Federal Arbitration Act, with its requirement that an action to confirm an arbitral award be brought within three years, preempted the action. The U.S. brief argues that the action is not preempted. Excerpts follow from the U.S. brief, which is available in full at *www.state.gov/s/l/c8183.htm*. The Court of Appeals issued its decision on July 11, 2014, agreeing with the U.S. view that enforcement of the "foreign court judgment by a lawful, parallel enforcement scheme does not stand as an obstacle to accomplishment of the purposes of FAA Chapter 2," and reversing the district court's dismissal of the case. 757 F.3d 321 (D.C. Cir. 2014).

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* * * *

The New York Convention does not establish a ceiling for enforcement of foreign arbitral awards in U.S. court, and the Foreign Arbitral Awards Convention Act does not preclude a Court from applying state law to recognize a foreign judgment arising out of an award.

1. The New York Convention does not contain any time limitations for recognizing or enforcing foreign arbitral awards. Enforcing the English judgment would thus not conflict with any provision of the Convention.

Nor do other provisions of the Convention have the effect of barring a Contracting Party from enforcing awards under different, more liberal criteria than would apply under the Convention itself. The Convention is properly understood to facilitate the enforcement of arbitration awards by requiring a Contracting Party to enforce awards that satisfy the criteria set out in the Convention. See *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366-367 (5th Cir. 2003) (recognizing that the Convention was intended "to facilitate the enforcement of arbitration awards"). The Convention thus sets a "floor," but not a "ceiling," for enforcement of arbitral awards.

Article III of the Convention provides for application of the procedural law of the forum—including the relevant limitations period—in an action to enforce an arbitral award, while requiring that those procedural rules may not be more onerous than the rules applied to the recognition and enforcement of domestic arbitral awards. Articles V(1) and V(2) of the New

York Convention establish exceptions to the affirmative obligation imposed by Article III, beginning with the prefatory statement that "[r]ecognition and enforcement of the award *may* be refused" in the specified circumstances. New York Convention, Art. V(1), (2) (emphasis added). This language is properly understood to allow, *but not to require*, a Contracting Party to deny enforcement of an arbitral award that meets one of the grounds for refusal set out in Article V. See Department of State Memorandum, Discussion of the Provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 21 (attached to President's Transmittal Letter, Apr. 24, 1968) (explaining that Article V(2) "*permits* the competent authority" to refuse recognition and enforcement of an arbitral award in its "discretion") (Addendum A-21); *Karaha Bodas*, 335 F.3d at 368 (Art. V "enumerates specific grounds on which the court *may* refuse enforcement if the party contesting enforcement provides proof sufficient to meet one of the bases for refusal" (emphasis in original)).

Furthermore, the exceptions set out in Article V(1) of the Convention are affirmative defenses that must be invoked and proven by an arbitral party, *not* limitations on a Contracting Party's enforcement authority. They do not reflect an intent to require Contracting Parties to deny enforcement in any case in which an exception applies. See Restatement (Third) of U.S. Law of International Commercial Arbitration, § 4-32 Tentative Draft No. 3, Comment e (Apr. 16, 2013) ("denial of enforcement under the [New York and Panama] Conventions is permissive rather than mandatory").

This construction of the New York Convention is also supported by Article VII, which provides that the Convention "shall not * * * deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon" or under existing bilateral or multilateral treaties. As the State Department explained, the "basic purpose" of Article VII "is to safeguard existing agreements which stipulate more liberal provisions than the conventions." Department of State Memorandum 22, Addendum 22. The rationale underlying this provision is that "the Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon." Albert Jan van den Berg, *The New York Convention of 1958: An Overview* 20 (June 6, 2008).

Analyzing this text and structure, courts and commentators have concluded that "[n]othing in Article V, nor the basic structure and purpose of the Convention, imposes" an obligation on a Contracting Party to deny recognition to an arbitral agreement or arbitral award that is not required to be enforced under the Convention. Gary B. Born, II *International Commercial Arbitration* 2722 (2009); accord Roy Goode, *The Role of the* Lex Loci Arbitri *in International Commercial Arbitration*, 17 Arb. Int'l 19, 22 (2001) ("It is clear that Article V is mandatory only in precluding refusal of enforcement on grounds other than those set out in it. Proof of the existence of one of those grounds entitles the courts of a Convention state to refuse recognition and enforcement but does not oblige them to do so."); *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Achille Lauro*, 712 F.2d 50, 54 (3d Cir. 1983); *Termorio SA ESP v. Electrificadora del Atlantico SA ESP*, 421 F. Supp.2d 87, 93 (D.D.C. 2006); see also Gary B. Born, II *International Commercial Arbitration* 2724 n.97 (collecting citations).

It would thus be inconsistent with the terms and structure of the Convention to conclude that its minimum requirements for recognition and enforcement of a foreign arbitral award have the effect of preempting state laws that provide more lenient standards for award recognition and enforcement.

2. Like the Convention itself, the implementing federal legislation in Title 9, Chapter 2 reflects Congress' intent to require enforcement of arbitral agreements and arbitral awards that satisfy certain requirements. "Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award," and "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the" Convention. 9 U.S.C. § 207. In the view of the United States, however, the district court erred in concluding that application of state law to enforce the English judgment would undermine the goals and policies of the Foreign Arbitral Awards Convention Act. See *id.* at 477-478.

The Foreign Arbitral Awards Convention Act was intended to "set[] up the legal structure that [was] required to implement the [New York] Convention." Statement of Amb. Kearney at Senate Committee on Foreign Relations, Feb. 9, 1970, reprinted as appendix to S. Rep. No. 91-702 (1970); see also H. Rep. No. 91-1181, at 1, reprinted in 1970 U.S.C.C.A.N. 3601, 3601. The legislative history explains that the Act "will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts." *Id.*; see also 116 Cong. Rec. 22,731-22,732 (Jul. 6, 1970) (Sen. Jacobs, explaining that the New York Convention and implementing legislation are intended to permit enforcement of arbitration awards in summary proceedings).

The district court reasoned that the limitations period in 9 U.S.C. § 207 reflects a congressional intent to "protect[] potential defendants' interest in finality." JA 363. Although, at some level of generality, any limitations period can be viewed as promoting finality, there is no evidence in the statute or its legislative history that § 207 was intended to preclude enforcement of a money judgment like the English judgment here. The provision merely implements the New York Convention's provision allowing parties to the Convention to apply domestic procedural rules in arbitration actions to recognize or enforce arbitral awards, including "the limitations period applicable to such actions, provided it is not unreasonably short." George A. Bermann, *'Domesticating' the New York Convention: the Impact of the Federal Arbitration Act*, 2 J. Int'l Disp. Settlement 317, 325 & n.29 (2011).

The district court also reasoned that Congress intended for arbitration actions governed by the New York Convention to be decided under "uniform federal procedures." JA 362. The district court construed Article XI of the Convention to give Contracting Parties the option to implement the Convention either "at the federal or at the sub-national (*i.e.* state or province) level." JA 8-9. The court then deduced from the fact that the United States implemented the New York Convention through federal legislation that Congress must have intended to adopt uniform federal procedures and that enforcement of the English judgment would be inconsistent with that intent. JA 360-361. That reasoning was erroneous.

Article XI is not intended to give Contracting Parties a choice of how to implement the Convention, but to reflect that in some countries, the competence to enforce arbitral awards rests at the sub-federal rather than the federal level. See Dirk Otto, *Article XI*, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*

494 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port, eds., 2010) (explaining that Australia insisted on such a provision because its federal government had no power to require its states to enforce arbitral awards). Article XI(a) provides that if the Contracting Party is a federal government that has the power to comply with some or all of the Convention, it must implement those obligations as would a unitary state. Article XI(b) provides that a federal government need only make a recommendation to the constituent states or provinces if parts of the Convention fall outside of its jurisdiction. In the case of the United States, Congress enacted federal legislation implementing the Convention because it had the power to do so, and therefore was required to do so under Article XI(a).

B. Enforcement Of A Foreign Judgment Arising Out Of An Arbitral Award Is Distinct From Enforcement Of An Arbitral Award, And Is Not Governed By The New York Convention Or Its Implementing Legislation.

Neither the New York Convention nor its implementing legislation was intended to preempt a state-law action enforcing a money judgment that is in turn based on an arbitral award governed by the Convention that is brought beyond the three-year limitations period in 9 U.S.C. § 207. There is a critical difference between such an action and an action to enforce a foreign money judgment. Any preemptive force attributed to § 207 should not be extended to this latter context.

It is essential to recognize that a foreign court judgment confirming an arbitral award is not governed by the New York Convention or the Foreign Arbitral Awards Convention Act. As a matter of U.S. law, the mechanism for obtaining recognition and enforcement of a foreign money judgment arising out of an arbitral award has been understood to be distinct from an action seeking recognition and enforcement of an arbitral award. See, *e.g.*, *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 582-583 (2d Cir. 1993). Enforcement of a foreign court money judgment has traditionally been governed by state law. See Restatement (Third) of Foreign Relations Law of the United States § 481 comment a (1987); see also Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Foreign Country Money Judgments Recognition Acts (1962 & 2005).

U.S. law reflects international law and practice, which also distinguishes between the two types of actions, and has traditionally provided for a party to have a "parallel entitlement" to pursue both forms of relief. As the draft Restatement (Third) of the U.S. Law of International Commercial Arbitration explains,

> If a foreign award has been reduced to judgment by a court in the arbitral seat, a party may seek either: (1) recognition or enforcement of the award in accordance with the provisions of this Chapter; or (2) recognition or enforcement of the judgment in accordance with the foreign judgment recognition and enforcement standards of the forum in which such relief is sought.

Restatement (Third) of U.S. Law of International Commercial Arbitration, § 4- 3(d), Tentative Draft No. 2 (Apr. 16, 2012). "Once an award has been confirmed by a foreign court at the arbitral seat, the prevailing party may seek to have it recognized or enforced either as an award or as a foreign judgment, or both." *Id*., comment g. If the party seeks to enforce the award as a foreign money judgment, "the forum applies its own standards on the recognition or enforcement of foreign judgments." *Id*.

As a practical matter, furthermore, seeking enforcement of a foreign money judgment arising out of an arbitral award may lead to a substantively different outcome than seeking to enforce a foreign arbitral award. Here, the English judgment sought to be enforced by the

plaintiffs includes not only the amount due under the original arbitral award, but also interest, costs, and fees awarded by the English court. Those amounts would not have been encompassed by a timely effort by Commisimpex to have the arbitral award recognized under the Foreign Arbitral Awards Convention Act.

Admittedly, the "parallel entitlement" approach to enforcement of arbitration awards and judgments can give rise to what may seem to be anomalies, such as by permitting a party to enforce a judgment recognizing or enforcing an arbitral award when an action to recognize or enforce the underlying arbitral award itself would be barred by a limitations period. See Restatement (Third) of U.S. Law of International Commercial Arbitration, § 4-3(d), Reporter's Notes g, Tentative Draft No. 2 (Apr. 16, 2012). This result, however, is "consistent with the language of the [New York Convention] and [its] underlying purpose to increase the potential enforceability of arbitral awards." *Id*.; see also *id*. (noting that permitting enforcement of money judgment entered by foreign court "would appear to enhance the prospects for the effective recognition and enforcement of awards generally"). Neither the New York Convention nor the Foreign Arbitral Awards Convention Act poses a categorical bar to recognizing and enforcing foreign money judgments in the circumstances now before the Court.

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

As discussed in *Digest 2013* at 452-59, the United States filed an *amicus* brief in the U.S. Supreme Court in *DaimlerChrysler AG v. Bauman*, arguing that U.S. courts lacked personal jurisdiction over an out-of-state corporation when that jurisdiction was based on the corporation's subsidiary's substantial contacts with a U.S. state. On January 14, 2014, the Supreme Court decided the case. *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). Excerpts follow (with footnotes omitted) from the Court's opinion, which, like the U.S. *amicus* brief, concludes that U.S. courts lacked personal jurisdiction over Daimler.

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This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States. The litigation commenced in 2004, when twenty-two Argentinian residents filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company, headquartered in Stuttgart, that manufactures Mercedes–Benz vehicles in Germany. The complaint alleged that during Argentina's 1976–1983 "Dirty War," Daimler's Argentinian subsidiary, Mercedes–Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes–Benz USA, LLC (MBUSA), a subsidiary of Daimler

incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.

The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint. Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise. For example, as plaintiffs' counsel affirmed, under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California. See Tr. of Oral Arg. 28–29. Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ——, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011), we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." *Id.*, at ——, 131 S.Ct., at 2851. Instructed by *Goodyear*, we conclude Daimler is not "at home" in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina.

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Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. See Fed. Rule Civ. Proc. 4(k)(1)(A) (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"). Under California's long-arm statute, California state courts may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code Ann. § 410.10 (West 2004). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. We therefore inquire whether the Ninth Circuit's holding comports with the limits imposed by federal due process. See, *e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

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"The canonical opinion in this area remains *International Shoe* [*Co. v. Washington*], 326 U.S. 310 [66 S.Ct. 154, 90 L.Ed. 95 (1945)], in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Goodyear*, 564 U.S., at ——, 131 S.Ct., at 2853 (quoting *International Shoe*, 326 U.S., at 316, 66 S.Ct. 154). Following *International Shoe*, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer*, 433 U.S., at 204,

97 S.Ct. 2569.

International Shoe ‘s conception of “fair play and substantial justice” presaged the development of two categories of personal jurisdiction. …

International Shoe distinguished between, on the one hand, exercises of specific jurisdiction, … and on the other, situations where a foreign corporation’s “continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” 326 U.S., at 318, 66 S.Ct. 154. As we have since explained, “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” *Goodyear*, 564 U.S., at ——, 131 S.Ct., at 2851; see *id.*, at ——, 131 S.Ct., at 2853–2854; *Helicopteros*, 466 U.S., at 414, n. 9, 104 S.Ct. 1868.

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Our post- *International Shoe* opinions on general jurisdiction … are few. “[The Court’s] 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.” *Goodyear*, 564 U.S., at ——, 131 S.Ct., at 2856 (internal quotation marks and brackets omitted). The defendant in *Perkins*, Benguet, was a company incorporated under the laws of the Philippines, where it operated gold and silver mines. Benguet ceased its mining operations during the Japanese occupation of the Philippines in World War II; its president moved to Ohio, where he kept an office, maintained the company’s files, and oversaw the company’s activities. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448, 72 S.Ct. 413, 96 L.Ed. 485 (1952). The plaintiff, an Ohio resident, sued Benguet on a claim that neither arose in Ohio nor related to the corporation’s activities in that State. We held that the Ohio courts could exercise general jurisdiction over Benguet without offending due process. *Ibid.* That was so, we later noted, because “Ohio was the corporation’s principal, if temporary, place of business.” *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780, n. 11, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).

The next case on point, *Helicopteros*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404, arose from a helicopter crash in Peru. Four U.S. citizens perished in that accident; their survivors and representatives brought suit in Texas state court against the helicopter’s owner and operator, a Colombian corporation. That company’s contacts with Texas were confined to “sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas-based helicopter company] for substantial sums; and sending personnel to [Texas] for training.” *Id.*, at 416, 104 S.Ct. 1868. Notably, those contacts bore no apparent relationship to the accident that gave rise to the suit. We held that the company’s Texas connections did not resemble the “continuous and systematic general business contacts ... found to exist in *Perkins*.” *Ibid.* “[M]ere purchases, even if occurring at regular intervals,” we clarified, “are not enough to warrant a State’s assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.” *Id.*, at 418, 104 S.Ct. 1868.

Most recently, in *Goodyear*, we answered the question: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State? " 564 U.S., at ——, 131 S.Ct., at 2850. That case arose from a bus accident outside Paris that killed two boys from North Carolina. The boys' parents brought a wrongful-death suit in North Carolina state court alleging that the bus's tire was defectively manufactured. The complaint named as defendants not only The Goodyear Tire and Rubber Company (Goodyear), an Ohio corporation, but also Goodyear's Turkish, French, and Luxembourgian subsidiaries. Those foreign subsidiaries, which manufactured tires for sale in Europe and Asia, lacked any affiliation with North Carolina. A small percentage of tires manufactured by the foreign subsidiaries were distributed in North Carolina, however, and on that ground, the North Carolina Court of Appeals held the subsidiaries amenable to the general jurisdiction of North Carolina courts.

We reversed, observing that the North Carolina court's analysis "elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Id.*, at ——, 131 S.Ct., at 2855. Although the placement of a product into the stream of commerce "may bolster an affiliation germane to *specific* jurisdiction," we explained, such contacts "do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Id.*, at ——, 131 S.Ct., at 2857. As *International Shoe* itself teaches, a corporation's "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U.S., at 318, 66 S.Ct. 154. Because Goodyear's foreign subsidiaries were "in no sense at home in North Carolina," we held, those subsidiaries could not be required to submit to the general jurisdiction of that State's courts. 564 U.S., at ——, 131 S.Ct., at 2857. See also *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. ——, ——, 131 S.Ct. 2780, 2797–2798, 180 L.Ed.2d 765 (2011) (GINSBURG, J., dissenting) (noting unanimous agreement that a foreign manufacturer, which engaged an independent U.S.-based distributor to sell its machines throughout the United States, could not be exposed to all-purpose jurisdiction in New Jersey courts based on those contacts).

* * * *

With this background, we turn directly to the question whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts. In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the *specific* jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction. While plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point have they maintained that MBUSA is an alter ego of Daimler.

Daimler, on the other hand, failed to object below to plaintiffs' assertion that the California courts could exercise all-purpose jurisdiction over MBUSA. But see Brief for Petitioner 23, n. 4 (suggestion that in light of *Goodyear*, MBUSA may not be amenable to general jurisdiction in California); Brief for United States as *Amicus Curiae* 16, n. 5 (hereinafter U.S. Brief) (same). We will assume then, for purposes of this decision only, that MBUSA qualifies as at home in California.

A

In sustaining the exercise of general jurisdiction over Daimler, the Ninth Circuit relied on an agency theory, determining that MBUSA acted as Daimler's agent for jurisdictional purposes and then attributing MBUSA's California contacts to Daimler. The Ninth Circuit's agency analysis derived from Circuit precedent considering principally whether 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." 644 F.3d, at 920 (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (C.A.9 2001); emphasis deleted).

This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary. Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego. The Ninth Circuit adopted a less rigorous test based on what it described as an "agency" relationship. …

The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: "Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." 676 F.3d, at 777 (O'Scannlain, J., dissenting from denial of rehearing en banc). The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear*. 564 U.S., at ——, 131 S.Ct., at 2856.

B

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.

* * * *

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." Brief for Respondents 16–17, and nn. 7–8. That formulation, we hold, is unacceptably grasping.

As noted, … the words "continuous and systematic" were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. See 326 U.S., at 317, 66 S.Ct. 154 (jurisdiction can be asserted where a corporation's in-state activities are not only "continuous and systematic, but also give rise to the liabilities sued on"). Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit ... *on causes of action arising from dealings entirely distinct from those activities*."

Id., at 318, 66 S.Ct. 154 (emphasis added… Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." 564 U.S., at ——, 131 S.Ct., at 2851.

Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.*, 471 U.S., at 472, 105 S.Ct. 2174 (internal quotation marks omitted).

It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.

C

Finally, the transnational context of this dispute bears attention. The Court of Appeals emphasized, as supportive of the exercise of general jurisdiction, plaintiffs' assertion of claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350. See 644 F.3d, at 927 ("American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses."). Recent decisions of this Court, however, have rendered plaintiffs' ATS and TVPA claims infirm. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ——, ——, 133 S.Ct. 1659, 1669, 185 L.Ed.2d 671 (2013) (presumption against extraterritorial application controls claims under the ATS); *Mohamad v. Palestinian Authority*, 566 U.S. ——, ——, 132 S.Ct. 1702, 1705, 182 L.Ed.2d 720 (2012) (only natural persons are subject to liability under the TVPA).

The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is "domiciled," a term defined to refer only to the location of the corporation's "statutory seat," "central administration," or "principal place of business." European Parliament and Council Reg. 1215/2012, Arts. 4(1), and 63(1), 2012 O.J. (L. 351) 7, 18. See also *id.*, Art. 7(5), 2012 O.J. 7 (as to "a dispute *arising out of the operations of a branch, agency or other establishment*," a corporation may be sued "in the courts for the place where the branch, agency or other establishment is situated" (emphasis added)). The Solicitor General informs us, in this regard, that "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." U.S. Brief 2 (citing Juenger, The American Law of General Jurisdiction, 2001 U. Chi. Legal Forum 141, 161–162). See also U.S. Brief 2 (expressing concern that unpredictable applications of general jurisdiction based on activities of U.S.-based subsidiaries could discourage foreign investors); Brief for Respondents 35 (acknowledging that "doing business" basis for general jurisdiction has led to "international

friction"). Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the "fair play and substantial justice" due process demands. *International Shoe*, 326 U.S., at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)).

* * * *

3. International Comity

a. Arab Bank v. Linde

On May 23, 2014, the United States filed a brief in the Supreme Court of the United States as *amicus curiae* in response to an order of the Court inviting the views of the United States in *Arab Bank, PLC v. Linde et al.*, No. 12-1485. The United States brief identifies several errors in the analysis of the district court in the case, but argues that the Supreme Court should nonetheless deny the petition for a writ of certiorari because of the extraordinary nature of the mandamus remedy sought by the petitioner in the court of appeals. Petitioner, Arab Bank, declined to produce certain bank records located in foreign jurisdictions due to bank secrecy laws. The records were sought in a suit brought, pursuant to the Antiterrorism Act of 1990, 18 U.S.C. § 2331 *et seq*. ("ATA"), by victims of terrorism who alleged that Arab Bank knowingly supported foreign terrorist organizations. The district court sanctioned Arab Bank for its nonproduction and Arab Bank sought a writ of mandamus to vacate the sanctions order. The court of appeals denied the writ of mandamus. Excerpts below from the U.S. brief (with footnotes omitted) detail the lower courts' errors in considering international comity concerns. The U.S. brief is available in full on the website of the Department of Justice at *www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2012-1485.pet.ami.inv.pdf*. On June 30, 2014, the Supreme Court denied the petition for certiorari.

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The lower courts' comity analysis was flawed in several respects.

1. The lower courts erred in suggesting that petitioner's reliance on foreign bank secrecy laws in this private action did not reflect good faith simply because petitioner previously produced some of the documents to the Departments of the Treasury and Justice. … That reasoning fails to account for the distinct United States and foreign interests implicated when the government, as opposed to a private party, seeks disclosure. It also threatens to undermine important United States law-enforcement and national-security interests by deterring private entities and foreign jurisdictions from cooperating with government requests.

The United States has a compelling sovereign interest in obtaining documents located abroad for use in criminal prosecutions, civil enforcement actions, and other proceedings through which the government investigates and addresses violations of United States law and protects the Nation. See, *e.g.*, *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-118 (S.D.N.Y. 1981). When it decides whether to

seek documents assertedly covered by foreign bank secrecy laws, the government balances the need for the information sought and the public interest in the investigation against the interests of the foreign jurisdictions where the information is located and any potential consequences for our foreign relations. See *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-415 (2003). A government request for production therefore reflects the Executive Branch's conclusion, in the exercise of its responsibility for both foreign affairs and the enforcement of laws requiring production, that disclosure would be consistent with both the domestic public interest and international comity concerns.

Although the United States government may seek to compel disclosure of foreign bank records in court when necessary, the United States also relies heavily on cooperative methods for obtaining documents. Government agencies often negotiate voluntary disclosures or agreements that allow examination of documents consistent with both United States and foreign law. The United States may also make state-to-state requests for information pursuant to mutual legal assistance treaties (which apply in criminal matters) and other bilateral and multilateral agreements that govern official requests for information. See, e.g., United Nations International Convention for the Suppression of the Financing of Terrorism, art. 12, Dec. 9, 1999, 2178 U.N.T.S. 235 (providing for mutual legal assistance in connection with criminal investigations, which may not be refused on bank-secrecy grounds); International Organization of Securities Commissions, Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, paras. 6(b), 7(b), May 2012, http://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf (providing for mutual state-to-state assistance in securities matters notwithstanding domestic secrecy laws). As such treaties and agreements reflect, many sovereigns recognize that government document requests reflect important sovereign interests and should be dealt with cooperatively when possible. That cooperation, by both foreign sovereigns and private entities under their auspices, directly advances the United States government's ability to investigate violations of United States law.

The balance of relevant interests is materially different when a private party seeks documents located in foreign jurisdictions. Private requests may intrude more deeply on foreign sovereign interests because private parties often do not "exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) (internal quotation marks and citation omitted); see Restatement § 442 rep. note 9. And although private litigants may be asserting a federal statutory claim that embodies important United States interests, their document requests do not reflect a specific determination by the government that the request is sufficiently in the public interest to warrant the adverse consequences that could ensue. In addition, banks may be able to produce documents to government agencies—but not private parties—consistent with foreign bank secrecy laws because of exceptions in the laws, applicable treaty provisions, or approval by governmental authorities. And a foreign state considering whether to permit or facilitate a bank's cooperation with a disclosure request—or whether to prosecute a bank for its disclosures—may view the matter differently based on whether the party requesting the information is a government entity or a private one. …

The lower courts therefore erred in concluding that petitioner had engaged in "selective compliance" with foreign bank secrecy laws by producing documents to United States agencies but not to respondents. … The district court appears to have relied solely on the fact of petitioner's production to government agencies, rather than on any conclusion that petitioner actually violated applicable foreign laws when it produced documents to the United States. …

The courts below also erred in assuming that petitioner would not be subjected to penalties for producing documents in this private action solely because it apparently was not prosecuted for providing documents to the United States. …

By equating the status of government and private-party document requests, the lower courts' reasoning may undermine the United States' ability to obtain documents located in foreign jurisdictions through cooperation by the entity in question or the foreign jurisdiction. If a foreign financial institution's previous cooperation with governmental authorities may be used against it when it resists production in private litigation, those institutions may restrict their cooperation with governmental authorities in the first place. And the United States' foreign-government partners may similarly be deterred from facilitating cooperation with government requests if their financial institutions may later have that cooperation weighed against them in private litigation.

2. The district court also gave insufficient weight to the interests of foreign governments in enforcing their own laws within their own territories. Although it is "well settled" that foreign laws "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate" those laws, *Aérospatiale*, 482 U.S. at 544 n.29, the extent to which "compliance with the request would undermine important interests of the state where the information is located" is an important component of the comity analysis. Restatement § 442(1)(c).

Here, criminal statutes governing bank secrecy in a number of foreign jurisdictions prohibit disclosing the records sought by respondents. … The lower courts identified no reason to conclude that those statutes were enacted to shield wrongdoers from foreign legal process, like the blocking statute at issue in *Aérospatiale*, or that they are anything other than laws of general applicability that reflect legitimate sovereign interests in protecting foreign citizens' privacy and confidence in the nations' financial institutions. …

Although the district court acknowledged that "maintaining bank secrecy is an important interest of the foreign jurisdictions where the discovery sought here resides," Br. in Opp. App. 21a-22a, the court gave that interest scant weight because it believed that "[b]oth Jordan and Lebanon[] have recognized the supremacy of [the] interest[]" in combating terrorism "over bank secrecy," *id*. at 22a. In so concluding, the court relied on those governments' adoption of a memorandum of understanding in which the signatory governments pledged not to rely on bank secrecy "as a basis for refusing requests for mutual legal assistance" in terrorist financing investigations. *Id*. at 22a n.5; Memorandum of Understanding Between the Governments of the Member States of the Middle East and North Africa Financial Action Task Force Against Money Laundering and Terrorist Financing, Nov. 30, 2004, *http://www.sic.gov.lb/downloads/MENAFATF_MOU_EN.pdf*. But that memorandum of understanding pertains only to official state-to-state requests for mutual legal assistance. It does not suggest that member states have agreed to subordinate their interest in protecting certain banking information from public disclosure when private litigants seek documents.…

3. Finally, in considering whether the United States' interests would be furthered by sanctioning petitioner for non-production, the lower courts did not consider the broad range of interests implicated by this case, including those that could favor a lesser sanction. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014). The lower courts viewed the government's interest in combatting terrorism by means of the ATA's private right of action as the sole United States interest at stake. … While private actions under the ATA can be one important means of

disrupting terrorism financing and compensating victims of terrorism, … other important interests are at stake as well.

a. The sanctions order could undermine the United States' vital interest in maintaining close cooperative relationships with Jordan and other key regional partners in the fight against terrorism. A primary means by which the United States government protects American citizens from international terrorism is by ensuring that foreign governments and entities continue to cooperate in United States-led counterterrorism efforts. See, *e.g.*, U.S. Dep't of State, *Bureau of Counterterrorism*, *http://www.state.gov/j/ct/index.htm* (last visited May 15, 2014). Jordan in particular is an invaluable partner in the region. The United States relies on Jordan in accomplishing a host of critical security and foreign-policy interests, including combatting terrorism. See White House Office of the Press Secretary, *Remarks by President Obama and His Majesty King Abdullah II of Jordan in a Joint Press Conference* (Mar. 22, 2013).

The sanctions order may have an impact on these important counterterrorism relationships. Jordan views the sanctions order as a "direct affront" to its sovereignty. Jordan Amicus Br. 14. The State Department has informed this Office that the governments of Saudi Arabia and the Palestinian Authority have also expressed significant concerns about the order and its effect on their relationships with the United States.

The sanctions order's potential to harm counterterrorism efforts is exacerbated by the lower courts' reasoning. … As discussed above, the possibility that foreign financial entities could be penalized based on their cooperation with United States government agencies may deter foreign private entities and governments from assisting in United States investigations or enforcement actions.

b. The United States has a significant interest in the stability of Jordan's financial and political system. Petitioner is the single largest financial entity in Jordan. … This Office is informed by the Departments of State and the Treasury that petitioner is responsible for processing financial assistance to Jordan through various United States foreign aid programs. Those Departments also report that petitioner is a constructive partner with the United States in working to prevent terrorist financing, including by reporting suspicious financial activities to the government of Jordan, which in turn exchanges information with the United States through international sharing arrangements. For example, petitioner is a leading participant in a number of regional forums on anti-money laundering and combatting the financing of terrorism.

Petitioner is also by market share the largest bank in the West Bank and Gaza, and it plays an important role in financing public debt there. See U.S. & Foreign Commercial Serv. & U.S. Dep't of State, *Doing Business in the West Bank & Gaza* 54-55 (updated June 12, 2013), http://export.gov/westbank/build/groups/public/@eg_we/documents/webcontent/eg_we_064047.pdf. In addition, petitioner processes the customs clearance revenues from Israel that represent the overwhelming majority of Palestinian Authority revenue. See U.N. Conference on Trade & Dev., *Report on UNCTAD assistance to the Palestinian people: developments in the economy of the Occupied Palestinian Territory* 8 (2013), *http://unctad.org/meetings/en/SessionalDocuments/tdb60d3_en.pdf.*

The district court's sanctions order, by (among other things) permitting the jury to draw an adverse inference with respect to petitioner's mental state, increases the likelihood that petitioner will be found liable at trial. … Beyond the obvious financial stakes for petitioner's shareholders, petitioner asserts… that correspondent banks and other counterparties could cease doing business with petitioner, and depositors might withdraw their accounts out of concern for petitioner's solvency. …

To be sure, petitioner would face the risk of losing at trial even in the absence of the sanctions imposed by the district court. But the sanctions order makes a finding of liability more likely by permitting the jury to draw inferences adverse to petitioner and by barring petitioner from presenting certain evidence. The possible effect of a judgment of liability on United States foreign-relations interests and the stability of the region was therefore a relevant consideration in determining the appropriate form and severity of the sanctions. See Restatement § 442 cmt. c.

* * * *

b. Gucci et al. v. Bank of China/Tiffany et al. v. China Merchants Bank et al.

On May 21, 2014, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the Second Circuit in consolidated cases brought by several manufacturers of luxury goods to enforce asset freeze injunctions against counterfeiters with bank accounts in China and to obtain discovery from a Chinese bank. *Gucci et al. v. Weixing Li*, and *Tiffany et al. v. China Merchants Bank et al*., Nos. 12-2317, 12-2330, 12-2349. The district courts in the cases denied motions of the Bank of China ("BOC") and other Chinese banks to modify the injunctions. The U.S. brief argues that the district courts erred in failing to perform a comity analysis with respect to the asset freeze. Excerpts follow (with footnotes omitted) from the U.S. brief, which is available in full at *www.state.gov/s/l/c8183.htm*.

* * * *

The district courts erred in reviewing the Banks' motions to modify plaintiffs' asset freeze injunctions because the courts failed to properly apply legal principles of comity. BOC identified an apparent conflict between the injunctions and China's banking laws, and in determining whether to modify the injunctions, the district courts should have evaluated the reasonableness of subjecting Chinese banks to extraterritorial obligations that could require them to violate Chinese laws. These cases should be remanded so that the district courts can properly consider the important foreign and U.S. sovereign interests at issue.

Regarding the document subpoena in Gucci, the district court, having conducted a comity analysis, did not abuse its discretion in compelling BOC to comply, but should have given closer attention to certain considerations when weighing sovereign interests. Specifically, the district court should have viewed China's banking secrecy laws as having a broader purpose than merely impeding discovery, and should have considered the United States' interests in the ability of Lanham Act plaintiffs to obtain relevant information about the finances of persons alleged to have engaged in large-scale infringement of their trademarks. Nevertheless, the court recognized the need to evaluate competing sovereign interests, and appropriately applied Supreme Court precedent in concluding that Gucci was not required to seek evidence through the Hague Convention in the first instance.

POINT I

The District Courts' Denial of the Banks' Motions to Modify the Asset Freeze Injunctions Should Be Vacated and Remanded for a Full Comity Analysis

A. The District Courts Had the Power to Issue Prejudgment Asset Freeze Injunctions Against the Alleged Counterfeiters

The district courts did not err in relying on their inherent equitable authority to enter the asset freeze injunctions at issue. …

A district court may issue a preliminary injunction restraining a defendant from dissipating assets pursuant to the court's inherent equitable powers when the plaintiff is pursuing a claim for final equitable relief, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999), and the injunction is ancillary to that final relief, *De Beers Consol. Mines v. United States*, 325 U.S. 212, 219–20 (1945).

Plaintiffs in trademark infringement actions may recover defendants' profits, 15 U.S.C. § 1117(a), and it is settled that such an "accounting" of profits is an equitable remedy. …

* * * *

B. The District Courts Erred in Their Analyses of the Banks' Motions to Modify the Asset Freeze Injunctions as to the Banks

While district courts have the equitable power to enjoin Lanham Act defendants from disposing of assets during the pendency of the litigation, regardless of whether the assets in question are located in the United States or abroad, whether a court should exercise that authority in a particular case is a separate question that implicates additional considerations. After the Banks objected to the application of the asset freeze injunctions to them and asserted that there was a conflict between the obligations imposed by the injunctions and the requirements of Chinese banking law, the district courts were required to conduct a full comity analysis. Because the district courts did not sufficiently analyze the competing sovereign interests at stake, their orders should be vacated to allow those courts to perform a thorough comity inquiry.

In challenging the injunctions, the Banks identified foreign sovereign interests and asserted that foreign law conflicted with the district courts' orders. Namely, the Banks introduced declarations from Chinese law experts to demonstrate that Chinese banking laws prohibited them from freezing bank accounts pursuant to a foreign court order and that doing so could subject them to civil and criminal liability.… The 17 Banks also submitted the November 3 Letter from Chinese banking regulators stating that "China's commercial banks …may not … freeze or deduct funds from such accounts pursuant to a U.S. court's order." … The November 3 Letter set forth China's interests in enforcing banking secrecy laws to "help engender client confidence in the banking system and therefore promote the further development of the banking system." …

Legal principles of comity required the district courts to fully consider these issues. The doctrine of international comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n.27 (1987). Comity "is neither a matter of absolute obligation . . . nor of mere courtesy and good will," but is rather "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to

international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163– 64 (1895).

Here, the comity doctrine should have shaped the district courts' review of the Banks' motions to modify the asset freeze injunctions. Although case law regarding the extraterritorial enforcement of asset freeze injunctions as to international third parties is sparse, this Court has suggested that when the extraterritorial operation of a United States court order would infringe on sovereign interests of a foreign state, it is appropriate to conduct an analysis using the framework of Section 403 of the Restatement (Third) of Foreign Relations Law, entitled "Limitations on Jurisdiction to Prescribe." See *United States v. Davis*, 767 F.2d 1025, 1036–37 (2d Cir. 1985) (using Section 403 factors to hold that district court properly ordered litigant to terminate litigation in the Cayman Islands); see also, *e.g.*, *In re Grand Jury Proceedings*, 40 F.3d 959, 965–66 (9th Cir. 1994) (conducting Section 403 analysis to affirm court order that would potentially violate Austrian law by requiring Austrian citizen to execute a directive authorizing disclosure of bank information from foreign banks).

Section 403 instructs that when a state has jurisdiction, it should not exercise it "to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." RESTATEMENT § 403(1). It goes on to identify eight non-exclusive relevant factors to be evaluated in determining reasonableness, and notes that where a conflict exists between the reasonable exercise of jurisdiction of two states, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction." *Id*. § 403(2)–(3). In the context of this suit—where the Banks presented argument and evidence to the district courts that they should be relieved from the asset freeze injunctions because complying with the orders would cause them to violate China's banking laws and subject them to potential civil and criminal liability in China—the district courts should have conducted a comity analysis that takes account of the sorts of considerations identified in Section 403.

As described more fully in Point II below, before ordering discovery, the *Gucci* and *Tiffany* courts conducted relatively comprehensive analyses to weigh relevant interests, including foreign sovereign interests, under Restatement § 442, which offers a test to determine when a court may order production of foreign documents by a person subject to the court's jurisdiction. In contrast, in deciding whether to modify the asset freeze order, the *Gucci* court engaged in no express comity analysis and the *Tiffany* court merely relied on its discovery analysis. … The *Gucci* court's failure to address comity was error, as was the *Tiffany* court's inadequate approach.

Some overlap exists with respect to the factors laid out in Sections 403 and 442 of the Restatement, but the considerations relating to general extraterritorial enforcement of law differ from those that apply specifically to discovery. Compare RESTATEMENT § 403 with RESTATEMENT § 442. Of note, Section 403 identifies the following reasonableness factors that arguably are not reflected in Section 442:

> (a) the link of the activity to the territory of the regulating state; . . .
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; . . .
> (d) the existence of justified expectations that might be protected or hurt by the regulation; . . .

> (e) the importance of the regulation to the international political, legal, or economic system; . . .
> (g) the extent to which another state may have an interest in regulating the activity; and
> (h) the likelihood of conflict with regulation by another state.

RESTATEMENT § 403(2). These factors capture interests that may otherwise be excluded when conducting a discovery analysis, and indeed reflect the types of considerations that are inherent in determinations that the United States undertakes, through its agencies, before pursuing foreign asset restraints in public enforcement actions.

In conducting their analyses of the asset restraints on remand, the district courts should consider a number of factors. These include the professed Chinese Government interests in its banking laws, as stated in the Regulators' Letter and otherwise, with appropriate weight given to the foreign sovereign's views regarding the purpose, importance, and requirements of its laws and regulations. The courts should weigh the United States' strong interest in enforcing the Lanham Act and providing robust remedies for private litigants. The Banks' justified expectations concerning regulation should be addressed, bearing in mind that they are not defendants in the litigation. As banks headquartered in China, they are subject to general regulation and enforcement by China; they have also chosen, however, to do business in the United States and have thereby subjected themselves to American regulatory and judicial authority. The courts should consider the location of the assets to be frozen and, consistent with *Grupo Mexicano*, also consider whether assets restrained abroad will ultimately be subject to attachment by plaintiffs. The courts should also bear in mind that this is a dispute between private litigants, rather than an action (such as a government enforcement action) "in furtherance of the public interest," where courts' equity powers would typically be broader. *First Nat'l City Bank*, 379 U.S. at 383 (quotation marks omitted).

In sum, these cases should be remanded for the district courts to conduct balancing analyses under Restatement Section 403.

POINT II

The Gucci Court Did Not Abuse Its Discretion in Ordering Compliance with Gucci's Subpoena

In contrast, there was no reversible error in the Gucci court's order compelling BOC to comply with Gucci's document subpoena and declining to require Gucci to seek evidence via the Hague Convention. The Gucci court conducted a multi-factored comity analysis, and while the parties disagree on the outcome of that analysis, they are in agreement (as is the United States) that the court considered the appropriate factors. The United States does wish to point out certain considerations the district court should have analyzed more closely in its comity analysis, but does not believe that the court's analysis amounted to an abuse of discretion. The government also wishes to clarify any ambiguity regarding revisions to a website maintained by the Department of State, and respond to certain representations in the Regulators' Letter.

The district court did not err in declining to require Gucci to seek evidence from BOC through the Hague Convention in the first instance. The Hague Convention "prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state." *Aérospatiale*, 482 U.S. at 524. However, the Hague Convention is not the exclusive means for obtaining evidence located abroad, and U.S. courts need not require litigants to resort to the Convention's procedures in the first instance. *Id*. at 539, 542. District courts may decide whether to apply Hague Convention procedures case by case, looking to "the particular facts, sovereign interests, and likelihood that resort to these procedures will prove

effective." *Id*. at 544. The Supreme Court has advised United States courts to "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state," but has declined to "articulate specific rules to guide this delicate task of adjudication." *Id*. at 546.

In deciding whether to compel extraterritorial discovery, district courts within this Circuit employ a seven-factor test that incorporates the five factors identified in Section 442 of the Restatement (Third) of Foreign Relations Law, entitled "Requests for Disclosure: Law of the United States." See, *e.g.*, *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522–23 (S.D.N.Y. 1987) (deriving factors from Restatement (Second) of Foreign Relations Law § 40 (superseded by Section 442), *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972), and *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208–13 (1958)); *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 552 (S.D.N.Y. 2012).

Before granting Gucci's motion to compel BOC to comply with the document subpoena, the Gucci court analyzed all seven factors: (1) the importance to the litigation of the documents requested; (2) the specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; (5) the extent to which noncompliance would undermine important interests of the United States, or compliance would undermine important interests of the state where the information is located; (6) the hardship of compliance; and (7) whether a party has proceeded in bad faith. … In performing its analysis, the district court evaluated the record before it, and on the whole, its decision to accord more weight to certain factors than others did not amount to an abuse of discretion.

While the United States has not identified an abuse of discretion necessitating reversal or remand, it believes that the district court did not give adequate weight to certain considerations relevant to the fifth factor—the balancing of sovereign interests— which the court concluded weighed in Gucci's favor. … Specifically, the court appears to have discounted the importance of China's banking secrecy laws by incorrectly characterizing them as "blocking statutes." … Blocking statutes, like the French law at issue in *Aérospatiale*, exist solely to prohibit the disclosure of evidence in foreign judicial proceedings outside a treaty or international agreement. *Aérospatiale*, 482 U.S. at 526 n.6. China's banking secrecy laws have a broader purpose: according to the expert declarations submitted by BOC and the November 3 Letter, those laws were enacted to engender confidence in and promote the development of China's banking system, and China has an interest in enforcing them to achieve those goals. The November 3 Letter also undercuts the Gucci court's conclusion that "China's bank secrecy laws merely confer an individual privilege on customers rather than reflect a national policy entitled to substantial deference." …Particularly with respect to the November 3 Letter, the Gucci court should have been more mindful that a "foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference," *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), and should not have summarily dismissed representations describing the national importance of China's banking secrecy laws.

Additionally, in balancing national interests under the fifth factor, the Gucci court relied mainly on the United States' general interests in enforcing acts of Congress. … But it also should have weighed additional relevant considerations. Enforcing the Lanham Act is of special importance because the United States has a strong continuing interest in keeping counterfeit

goods out of the domestic marketplace: counterfeiting is not simply a violation of a private citizen's property rights, but also entails a significant risk to public health and safety involving products as diverse as medications, food products, aircraft parts, and key components of national defense systems. Apart from its interests in the specific statute at issue, the United States has a strong interest in maintaining a litigation system that provides for timely and fair opportunities for parties to obtain evidence that lies outside their control, and in securing the good-faith participation of entities that choose to do business in the United States. These interests should also have been part of the district court's analysis.

Regarding the sixth factor—hardship of compliance—the *Gucci* court based its conclusion that any hardship to BOC was unduly speculative on a review of expert declarations describing the potential consequences of violating China's banking secrecy laws, cases in which banks were found liable under those laws, and (on BOC's motion for reconsideration) the November 3 Letter's statement that the regulators issued a "severe warning" to BOC and were considering further sanctions. … Only after BOC filed and briefed its appeal did a December 4, 2013, decision from a Chinese court show that certain of the infringers in the *Gucci* case sued BOC for freezing their accounts. … The Chinese court ordered BOC to resume services to those infringers and ordered BOC to pay a court fee of 70 renminbi (approximately eleven U.S. dollars). …If this information had been properly before the district court, it should have been considered along with the other facts in the record in evaluating the actual extent of any hardship to BOC in complying with an order that could conflict with China's banking secrecy laws.

Finally, with respect to the fourth factor in its comity analysis—the availability of alternative means of securing information—the *Gucci* court concluded that the Hague Convention was "not a viable alternative method of securing the information Plaintiffs seek." … The United States does not make or report compliance determinations with respect to the operation of the Hague Convention in other states. However, the *Gucci* court was properly "reluctant to discount Plaintiffs' evidence and the case law cited . . . solely because of an unexplained revision to the State Department's website." … BOC presented evidence to the district court that in 2011, the State Department removed language from its website stating that Hague Convention requests in the People's Republic of China "have not been particularly successful in the past." … We have been informed by the State Department that it did not intend to express any opinion by eliminating characterizations of other countries' practices on its website, and that the revision does not reflect any conclusion concerning China's performance under the Hague Convention. The Gucci court appropriately declined to read meaning into this website revision, and future courts should as well.

The Regulators' Letter does not contain any information compelling reversal of the Gucci court's discovery order. As indicated above, official statements by foreign governments regarding the effect of extraterritorial applications of United States law on their sovereign interests are to be respectfully received and evaluated, and official representations about the requirements of foreign laws and the scope of sovereign interests associated with such laws should be given due consideration by courts in the framing and enforcement of judicial orders with extraterritorial effect.

In this case, however, the Regulators' entreaty to United States courts to require use of the Hague Convention as the exclusive means of foreign evidence-gathering is contrary to the Supreme Court's decision in *Aérospatiale*. 482 U.S. at 539, 542. …

* * * *

As the U.S. brief recommended, the Court of Appeals remanded the *Gucci* and *Tiffany* cases so that a full comity analysis could be conducted by the district courts. On September 17, 2014, the Court of Appeals for the Second Circuit vacated the district court's orders in the *Gucci* case and remanded in order for the district court to "consider its jurisdiction over the Bank and, if jurisdiction exists, apply principles of comity to determine whether compliance with its orders should be compelled." *Gucci America Inc., et al. v. Weixing Li*, 768 F.3d 122 (2d. Cir. 2014). The Court issued a summary order in the *Tiffany* case simultaneously with its opinion in *Gucci*. The Court also held that the district court failed to consider whether it could properly exercise jurisdiction over the Bank to compel compliance with its orders.[**] Excerpts follow (with footnotes omitted) from the opinion of the Court of Appeals regarding the comity analysis.

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BOC next argues that the district court's August 23 Order (compelling the Bank to comply with the Asset Freeze Injunction and denying the Bank's motion to modify it) must also be vacated because the district court failed properly to consider legal principles of comity. Although we need not reach this issue, we do so in order to give guidance to the district court in the event that the district court concludes that the exercise of personal jurisdiction over BOC is appropriate. If it so concludes, the district court should undertake a comity analysis before ordering the Bank to comply with the Asset Freeze Injunction.

Before the district court, the Bank, which is domiciled and principally based in China, identified an apparent conflict between the obligations set forth in the Asset Freeze Injunction and applicable Chinese banking laws. Specifically, the Bank introduced a declaration from a Chinese law expert, Professor Zhipan Wu, asserting that Chinese banking laws prohibit BOC from freezing bank accounts pursuant to a foreign court order, and that doing so could render it civilly and criminally liable. The Bank also submitted the November 3 Regulators' Letter with its motion for reconsideration, which states that "China's commercial banks . . . may not . . . freeze or deduct funds from such accounts pursuant to a U.S. court's order." …According to the Bank's expert and the November 3 Regulators' Letter, China's sovereign interest in such laws is to "engender client confidence in the banking system and therefore promote the further development of the banking system." …

In such circumstances, where the Bank objected to application of the Asset Freeze Injunction to it, specifically citing an apparent conflict with the requirements of Chinese banking law, comity principles required the district court to consider the Bank's legal obligations pursuant to foreign law before compelling it to comply with the Asset Freeze Injunction. Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its

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[**] Editor's note: The Court of Appeals for the Second Circuit applied the Supreme Court's decision in *Daimler*, discussed *supra*, to conclude that the district court in *Gucci* erred in exercising general jurisdiction over the Bank.

laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). The doctrine of international comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 10 (1987).

We have previously suggested that when a court order will infringe on sovereign interests of a foreign state, district courts may appropriately conduct an analysis using the framework provided by § 403 of the Restatement (Third) of Foreign Relations Law, entitled "Limitations on Jurisdiction to Prescribe." See *United States v. Davis*, 767 F.2d 1025, 1036-39 (2d Cir. 1985) (using § 403 factors to hold that district court properly ordered a litigant to terminate litigation in the Cayman Islands); see also *Republic of Arg. v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2258 n.6 (2014). (noting that "other sources of law" — including "comity interests" — might limit district courts' discretion when issuing orders extraterritorially). As the district court recognized with regard to § 442 and the 2010 Subpoena, courts in this circuit, before "order[ing] a party to produce documents in contravention of the laws of a foreign country," already conduct a comity analysis pursuant to Restatement(Third) 5 of Foreign Relations Law § 442(1)(c), entitled "Requests for Disclosure: Law of the United States." … See also *Gucci Am., Inc. v. Curveal Fashion*, No. 09-cv-8458, 7 2010 WL 808639, at *2 (S.D.N.Y. Mar. 8, 2010); *Strauss v. Credit Lyonnais*, S.A., 249 8 F.R.D. 429, 438 (E.D.N.Y. 2008). A comity analysis drawing upon § 403 is similarly appropriate before ordering a nonparty foreign bank to freeze assets abroad in apparent contravention of foreign law to which it is subject.

Acknowledging that the district court did not conduct such an analysis, plaintiffs make three arguments opposing vacatur and remand on this basis, but none are persuasive. First, they argue that remand would serve no purpose because the district court, in analyzing whether to order BOC to produce documents in response to the 2010 Subpoena, considered the comity factors listed in § 442, which overlap with the factors in § 403. Ordering compliance with an asset freeze, however, implicates different concerns from those implicated by an order for the production of documents. And while the factors in §§ 403 and 442 of the Restatement partially overlap, subsections 403(2)(a), (c), (d), (e), (g), and (h), in particular, are not fully reflected in § 442.

Second, plaintiffs posit that by not requesting that the district court apply § 403 below, the Bank has waived the issue. It is correct that the Bank did not make this argument below. However, given the important role that comity plays in ensuring the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience," see *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 9 1046 (2d Cir. 1996) (quoting *Hilton*, 1259 U.S. at 164), we do not deem the issue forfeited.

Finally, plaintiffs review a variety of the comity factors and urge that remand is not necessary because even upon a full analysis employing § 403's factors, the August 23 Order properly issued. We express no view on this question, but conclude simply that the district court on remand should conduct a comity analysis in the first instance if it determines that it has specific jurisdiction over the bank. In doing so, it should give due regard to the various interests at stake, including: (1) the Chinese Government's sovereign interests in its banking laws; (2) the Bank's expectations, as a nonparty, regarding the regulation to which it is subject in its home state and also in the United States, by reason of its choice to conduct business here; and (3) the United States' interest in enforcing the Lanham Act and providing robust remedies for its violation.

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Cross References

Hague Abduction Convention, **Chapter 2.B.2.**
Exceptions to immunity from jurisdiction: commercial activity, **Chapter 10.A.2.**
Antitrust, **Chapter 11.G.1.**
International Financial System, **Chapter 11.G.3.**