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International Litigation

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I. Foreign Sovereign Immunities Act

A foreign state is presumptively immune from suit, and its property presumptively immune from attachment and execution, unless an exception enumerated in the Foreign Sovereign Immunities Act (FSIA) applies. In *Republic of Argentina v. NML Capital, Ltd.*, the U.S. Supreme Court analyzed the question of whether a foreign state's immunity from attachment and execution under the FSIA itself limits discovery concerning a foreign sovereign's extraterritorial assets.[1] In a 7-to-1 decision, the Court (Scalia, J.) answered the question in the negative, reasoning that the text of the FSIA contains no such limitation.[2] At issue were two subpoenas served on New York banks that sought information about Argentina's "worldwide" assets, notwithstanding that the FSIA does not contemplate execution on sovereign property located abroad. The Court noted that "'other sources of law,'" including the Federal Rules of Civil Procedure and principles of international comity, "ordinarily will bear on the propriety of discovery requests of this nature and scope."[3]

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* This article summarizes developments in international litigation during 2014. The article was edited by Aaron Marr Page, managing attorney at Forum Nobis PLLC in Washington, D.C., with assistance from Peter Hogge, a staff attorney at the Maryland Court of Special Appeals. Jonathan I. Blackman and Carmine D. Boccuzzi, partners at Cleary Gottlieb Steen & Hamilton LLP in London and New York, respectively, authored Section I and VII, with assistance from Michael M. Brennan, James Blakemore, and Elizabeth Block, associates at the same firm. (The firm represented the Republic of Argentina and the Democratic Republic of the Congo in the cases discussed in Sections I and VII.) Erin Lawrence, an associate at Frommer Lawrence & Haug LLP in New York, authored Section II. Phillip B. Dye, Jr., a partner at Vinson & Elkins L.L.P. in Houston, Texas, authored Sections III and VIII, with assistance from Liane Noble and Page Somerville Robinson, associates at the same firm. Matthew D. Slater, a partner at Cleary Gottlieb Steen & Hamilton LLP in Washington, D.C., authored Section IV, with assistance from Caroline Stanton, an associate, and Gypsy Moore, a law clerk, at the same firm. Howard S. Zelbo, a partner at Cleary Gottlieb Steen & Hamilton LLP in New York, authored Section V, with assistance from Christopher P. DeNicola and Esti Tambay, associates at the same firm. Charles A. Patrizia, Joseph R. Profaizer, and Igor V. Timofeyev, partners at Paul Hastings LLP in Washington, D.C., authored Sections VI and IX, with assistance from Danielle Acker Susanj, an associate at the same firm.

1. 134 S. Ct. 2250, 2255 (2014).
2. *Id.* at 2256-58.
3. *Id.*

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Justice Ginsburg dissented, favoring an interpretation of the FSIA that would limit discovery to sovereign property "used in connection with . . . commercial activities," and noting that the plaintiff had not shown "the sky [to] . . . be the limit" in foreign jurisdictions either.[4]

In *European Community v. RJR Nabisco, Inc.*, the Second Circuit for the first time held that an entity created by numerous individual foreign states to qualify as a foreign-state "organ" under the FSIA.[5] The European Community argued that it should be considered an "organ" of a foreign state—and therefore meets the definition of "foreign state"—under the Act.[6] Applying the five-factor "organ" balancing test set forth in *Filler v. Hanvit Bank*,[7] the Second Circuit found that the European Community was created for a national purpose, is supervised by its member states, holds exclusive rights in those nations, is treated as a government entity under their laws, and has public employees.[8] The Court acknowledged that the member states themselves do not employ the public employees, but found the distinction "of small importance," noting that in any event the "factors are merely issues to be considered," and need not all be satisfied.[9]

In *Export-Import Bank of the Republic of China v. Grenada*, the Second Circuit adopted the strict "used for" test applied by the Fifth and Ninth Circuits to determine whether property falls under Section 1610's threshold immunity exception requirement that the property be "used for a commercial activity in the United States."[10] Plaintiffs sought to satisfy a judgment against Grenada by executing on funds owed by third parties to Grenadian corporate entities, arguing that the funds' origin from purportedly commercial activity meant that they were "used for" a commercial activity under Section 1610(a).[11] The Second Circuit, favoring the straightforward reading of the words "used for" adopted by the other circuits, held that the relevant inquiry under Section 1610(a)'s "used for" exception is not how the funds were generated but how the sovereign actively uses them, noting that this approach is consistent with the structure and purpose of the FSIA, which affords broader immunity from execution than from jurisdiction.[12]

In *Calderon-Cardona v. Bank of New York Mellon*, the Second Circuit considered, on first impression, whether an electronic fund transfer (EFT) blocked midstream qualifies as sovereign property subject to attachment under FSIA Section 1610(g).[13] The Court held that Section 1610(g) does not preempt New York state property law governing EFTs, with the result that the only entity with a property interest in a blocked EFT is the entity immediately preceding the blocking bank.[14] The Second Circuit remanded the case to determine whether a sovereign entity had transmitted any of the blocked EFTs directly to the blocking bank, thereby creating an attachable property interest in the funds.[15]

4. *Id.* at 2259 (Ginsburg, J., dissenting).
5. 764 F.3d 129 (2d Cir. 2014).
6. *Id.* at 146, 144-48.
7. 378 F.3d 213, 217 (2d Cir. 2004).
8. *RJR Nabisco*, 764 F.3d at 145-48.
9. *Id.* at 146.
10. 768 F.3d 75, 79 (2d Cir. 2014).
11. *Id.* at 88-89.
12. *Id.* at 89-90.
13. 2014 WL 5368880 (2d Cir. 2014).
14. *Id.*
15. *Id.* at 7.

In *Sachs v. Republic of Austria*, the Ninth Circuit ordered rehearing en banc to clarify whether the commercial-activity exception applies when a state-owned commercial common carrier sells a passenger ticket through a travel agency in the United States.[16] Reversing the courts below it, the en banc panel held that the FSIA does not abrogate common law principles of agency and that, as a result, an authorized agent's commercial activity in the United States can be imputed to a foreign state.[17]

II. International Service of Process

International service of process is governed by Rule 4(f) of the Federal Rules of Civil Procedure. Rule 4(f) requires that the means of international service of process comport with due process and not be prohibited by an international agreement.[18]

In *Freedom Watch, Inc. v. OPEC*,[19] the D.C. Circuit addressed international service of process in a case involving the Organization of the Petroleum Exporting Countries ("OPEC"). Freedom Watch, Inc., a political advocacy group, sued OPEC alleging that it violated United States antitrust laws by fixing gasoline prices. Freedom Watch attempted to serve OPEC by both hand delivering the complaint and mailing it through Austrian mail to OPEC's headquarters in Vienna, Austria. The district court dismissed the complaint for failure to effectuate service and denied Freedom Watch's retroactive request to allow service by alternative means under Rule 4(f)(3).[20]

The D.C. Circuit agreed with the district court that Freedom Watch did not substantially comply with Rule 4 and failed to effectuate service of process on OPEC because Rule 4(h), not Rule 4(f), governs service of process on a foreign unincorporated association such as OPEC, as opposed to an individual.[21] Rule 4(h) allows service abroad on a foreign business entity in any manner prescribed by Rule 4(f) except for personal delivery.[22]

The Court found that Rule 4(f)(1) could not apply in this case because there were no "internationally agreed [upon] means of service" between Austria and the United States.[23] The Court explained that there are no "internationally agreed [upon] means of service" with respect to OPEC since the United States and Austria are not signatories to any common international convention. The United States is not a party to the Hague Convention on Civil Procedure (although Austria is) and Austria is not a party to the Hague Conven-

16. 737 F.3d 584, 589 (9th Cir. 2013).

17. *Id.* at 592-94.

18. *See* Fed. R. Civ. P. 4(f)(1) (an individual may be served outside of the United States "by any internationally agreed means of service that is reasonably calculated to give notice"); Fed. R. Civ. P. 4(f)(3) (allowing service "by other means not prohibited by international agreement").

19. 766 F.3d 74 (2014).

20. *Id.*

21. The Court also noted that OPEC could not be served under the service provision of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608(a), because it was not "a political subdivision of a foreign state" but rather "an intergovernmental organization whose members are foreign sovereign states." *Freedom Watch*, 766 F.3d at 79.

22. *See* Fed. R. Civ. P. 4(h)(2).

23. *See* Fed. R. Civ. P. 4(f)(1).

tion on Service Abroad of Judicial and Extrajudicial Documents (although the United States is).[24]

Similarly, the Court found that Rule 4(f)(2) was also unavailing. Rule 4(f)(2) provides that when there are "no internationally agreed means," service may be accomplished (1) "as prescribed by the foreign country's law for service in that country in its courts of general jurisdiction"; (2) as directed by foreign authority in response to a "letter rogatory or letter of request"; or (3) by personal service "unless prohibited by the foreign country's law."[25] According to the Court, Freedom Watch could not effectuate service "as prescribed by the foreign country's law" because under Austrian law, service of process is a sovereign act that can only be done by a court unless an international convention provides otherwise.[26] Additionally, Rule 4(f)(2) did not apply because there were no letters rogatory or letters of request by Freedom Watch and personal service is not allowed under Rule 4(h).[27] The D.C. Circuit also noted that Freedom Watch's attempts at service violated Austrian law which prohibits service on an international organization holding privileges and immunity and also bars service of legal process within OPEC's headquarters without the express consent of OPEC's Secretary General.[28]

However, unlike the district court, the D.C. Circuit found that it could be possible for Freedom Watch to effectuate service by serving OPEC's United States counsel if accomplished by order of the court after a proper application under Rule 4(f)(3), which allows service "by other means not prohibited by international agreement, as the court orders."[29] While the appeals court agreed with the district court that service on OPEC through counsel was barred under Rule 4(h), which allows service on an entity through an authorized agent, it found that service on counsel with court authorization could be effective under Rule 4(f)(3). The appeals court recognized that authorization of alternative means of service under Rule 4(f)(3) is at the court's discretion (even if the proposed means would contravene foreign law), but because the district court had made no determination one way or the other, it remanded with the instruction that the lower court "must at least exercise its discretion under Rule 4(f)(3).[30]

III. Personal Jurisdiction

In early 2014, the Supreme Court issued a landmark decision in *Daimler AG v. Baumann*, arguably one of the most significant personal jurisdiction cases in years, which sharply clarified the boundaries of general jurisdiction.[31] In *Daimler*, Argentine plaintiffs filed suit in California against Daimler, a company headquartered in Germany, based on human rights violations allegedly committed by Daimler's Argentine subsidiary in Argentina. The Ninth Circuit held that it had general jurisdiction by using the agency theory of

24. *Freedom Watch*, 766 F.3d at 79.
25. Fed. R. Civ. P. 4(f)(2)(A)-(C).
26. *Freedom Watch*, 766 F.3d at 80.
27. *Id.*
28. *Id.*
29. The Circuit found that Freedom Watch's other two proposed means of service under court authorization (email and fax) "would constitute a substantial affront to Austrian law." *Id.* at 82 (citing *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 921 (11th Cir. 2003)).
30. *Id.* at 84.
31. 134 S. Ct. 746, 763 (2014).

personal jurisdiction to attribute all the "contacts" between California and Daimler's U.S. subsidiary to the German parent company.

The Supreme Court reversed, noting that "[t]he Ninth Circuit's agency theory . . . would sweep beyond even the 'sprawling view of general jurisdiction' we rejected in *Goodyear*."[32] The Court found it need not address the theory directly because even "assum[ing] [the subsidiary's] contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California."[33] The Court rejected the contention that a corporation is subject to general jurisdiction wherever it "engages in a substantial, continuous, and systematic course of business" as "unacceptably grasping."[34] Rather, general jurisdiction over a foreign corporation is proper only when the corporation's affiliations with the forum state are so "constant and pervasive" or "'continuous and systematic" as to render it "essentially at home" in the forum state.[35] For a corporation, the paradigm forum for general jurisdiction is the place of incorporation and principal place of business. Because Daimler was not "at home" in California, the exercise of general jurisdiction did not comply with due process.[36]

Since the January 2014 decision, district courts in every circuit have applied *Daimler*'s narrow view of general jurisdiction, as have the Courts of Appeals of the Second, Fifth, and Seventh and Ninth Circuits.[37] The decision will have far-reaching consequences for defendants, such as manufacturers of widely sold products, who were previously believed to be subject to general jurisdiction in every state.

Cases resolving conflicts between *Daimler* and state long-arm statutes further illustrate the immediate impact of *Daimler* on the jurisdictional landscape. For instance, in *Brown v. CBS Corp.*, a plaintiff advocated the exercise of general jurisdiction based on the defendant's registration to do business in Connecticut.[38] Although Connecticut's long-arm statute expressly authorized the exercise of jurisdiction based on business registration, the court declined to exercise jurisdiction because the defendant was not "at home" in Connecticut under *Daimler*. Similarly, in *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.*, a Delaware district court found that a defendant's "compliance with Delaware's registration statutes—mandatory for doing business within the state—cannot constitute consent to jurisdiction" in compliance with *Daimler*.[39]

The Supreme Court also issued a significant decision on specific jurisdiction in *Walden v. Fiore*, narrowing the prevailing effects test and reiterating that personal jurisdiction can only be found where the "defendant himself" creates contacts with the forum state.[40] "It is the defendant's conduct that must form the necessary connection with the forum State," and "mere injury to a forum resident is not a sufficient connection to the forum."[41] Sub-

32. *Id.* at 759-60 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011)).
33. *Id.*
34. *Id.* at 761.
35. *Id.*
36. *Id.* at 763.
37. *See Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 223 (2d Cir. 2014); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 529 (5th Cir. 2014); *Snodgrass v. Berklee Coll. of Music*, 559 F. App'x 541, 542 (7th Cir. 2014); *Martinez v. Aero Caribbean*, 764 F.3d 1062 (9th Cir. 2014).
38. No. 3:12-cv-01495 (AWT), 2014 WL 1924469, at *1 (D. Conn. May 14, 2014).
39. No. 14-696-GMS, 2014 WL 5780213, at *5 (D. Del. Nov. 5, 2014).
40. 134 S. Ct. 1115, 1122 (2014).
41. *Id.* at 1122-23.

sequently, courts of appeal applying *Walden* have come to different conclusions on the significance of whether the defendant initiated the contact. For example, in *CW Downer & Co. v. Bioriginal Food & Science Corp.*, the First Circuit held that *Walden* does not require courts to "focus too much on who initiated a particular contact."[42] But the Fifth Circuit, in *Monkton Ins. Services, Ltd. v. Ritter*, declined jurisdiction because the defendant's communications to the forum state were initiated by the plaintiff.[43]

IV. The Act of State Doctrine

The act of state doctrine is a prudential limitation on the exercise of judicial review. It requires U.S. courts to decline to pass judgment on the validity of official acts of a foreign state performed in its own territory.[44]

A. Defining Official Sovereign Acts

In *Yale University v. Konowaloff*, the plaintiff claimed title to Vincent van Gogh's painting *The Night Café*, which he alleged the Russian Soviet Federative Socialist Republic confiscated from his great-grandfather pursuant to a 1918 decree abolishing private property, and which subsequently came into the university's possession.[45] Consistent with a 2012 decision of the Second Circuit involving the same plaintiff, the Connecticut district court held that the act of state doctrine precluded the court from making "an inquiry into the legal validity of the 1918 nationalization decree" since the successor state, the Russian Federation, had not renounced it.[46]

Von Saher v. Norton Simon Museum of Art at Pasadena also involved allegedly expropriated art, in this instance a claim by the heir of a Dutch art dealer whose inventory was looted by the Nazis.[47] The art works at issue were the subject of Dutch government proceedings and subsequent transfer to a third party, who later transferred them to the museum.[48] The Ninth Circuit reversed the district court's dismissal on preemption grounds without resolving whether the case could survive the act of state doctrine.[49] The appeals court directed the district court to determine whether the process by which the

42. No. 14–1327, 2014 WL 5861962, at *6 (1st Cir. Nob. 12, 2014) (finding specific personal jurisdiction where parties' contacts involved no physical presence in Massachusetts, but were by phone, e-mail, and internet over an international border, even though many of those contacts were initiated by the in-forum plaintiff).

43. 768 F.3d 429 (5th Cir. 2014).

44. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Credit Suisse v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 130 F.3d 1342, 1346 (9th Cir. 1997). *See also W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l.*, 493 U.S. 400, 409 (1990) (doctrine "requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid").

45. 5 F. Supp. 3d 237, 238-39 (D. Conn. 2014).

46. *Id.* at 241-42. *See Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 145 (2d Cir. 2012). In contrast, in *Republic of Iraq v. ABB AG*, the Second Circuit held that Iraq's claims that ABB conspired with the former Iraqi regime, even if they involved an official act, were not barred by the act of state doctrine because it does not "prevent the current government of a foreign state from repudiating the conduct of a prior government on the foreign state's territory." 768 F.3d 145, 176-77 (2d Cir. 2014).

47. 754 F. 3d 712 (9th Cir. 2014).

48. *Id.* at 718.

49. *Id.*

Dutch government transferred the property should be considered a sovereign act and, if so, whether inquiry into its validity was required and would be barred by the act of state doctrine.[50]

In *Doe v. Exxon Mobil Corp.*, the D.C. district court held that the act of state doctrine did not bar claims by Indonesian citizens for grave injuries allegedly perpetrated by Indonesian soldiers employed by Exxon to provide security services. Exxon "made no showing that plaintiffs were injured pursuant to official military orders,"[51] and, even if the acts were sovereign, their "validity . . . as a matter of Indonesian law is not at issue in this case."[52]

B. Violations of International Law

In *Du Daobin v. Cisco Systems, Inc.*, the United States District Court for the District of Maryland addressed claims of Chinese political dissidents under the Alien Tort Statute that Cisco assisted the Chinese Communist Party, acting under color of law, in the design and implementation of a nation-wide surveillance program which was used "to identify and torture dissidents," including plaintiffs.[53] The court held that the act of state doctrine barred adjudicating the plaintiffs' claims because they "effectively ask[ed] the Court to decide that the Chinese government . . . has engaged in multiple violations of international law."[54]

Conversely, in *Warfaa v. Ali*, the Virginia district court held that a Somali national's claims under the Torture Victims Protection Act against a former colonel in the Somali National Army were not barred by the act of state doctrine because *jus cogens* violations, namely torture and attempted extrajudicial killing, are not "official sovereign acts" as contemplated by the doctrine.[55]

V. International Discovery

A. Obtaining U.S. Discovery for Use in Foreign Proceedings

In 2014, several U.S. courts addressed the requirements for obtaining discovery for use in proceedings before foreign or international tribunals, pursuant to 28 U.S.C. § 1782(a)[56] and under the factors set out in *Intel Corp. v. Advanced Micro Devices, Inc.*[57]

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50. *Id.* at 726.
51. No. 01-1357(RCL), 2014 WL 4746256, at *5 (D.D.C. Sept. 23, 2014).
52. *Id.* at 6.
53. 2 F. Supp. 3d 717, 720 (D. Md. 2014).
54. *Id.* at 726.
55. No. 1:05-cv-701 (LMB/JFA), 2014 WL 3734121, at *6 (E.D. Va. July 29, 2014).
56. *See* 28 U.S.C. § 1782(a) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.").
57. 542 U.S. 241, 243 (2004). In *Intel*, the Supreme Court noted three statutory requirements for invoking Section 1782(a): (1) the discovery must be sought from a person residing in the district of the court to which the application is made; (2) the discovery must be for use in a proceeding before a foreign tribunal; and (3) the applicant must be a foreign or international tribunal or an interested person. In addition, the Court noted several discretionary factors a court should consider in determining whether to grant discovery pursuant to Section 1782(a). These factors include: (1) whether the person for whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the proceedings and the "receptivity" of the foreign court to

Several cases discussed whether discovery was being sought from a "participant" in a foreign proceeding. In *Intel*, the Supreme Court observed that "when the person from whom discovery is sought is a participant in a foreign proceeding, the need for § 1782(a) aid is generally not as apparent as . . . when evidence is sought from a non-participant."[58] In *In re Owl Shipping LLC*[59] and *In re Request for Subpoena by Ryanair Ltd.*,[60] courts compelled discovery from non-participants, whereas in *In the Matter of Application of Leret*, the United States District Court for the District of Columbia upheld the denial of a discovery request on the grounds that the discovery target was "a party to two of the three foreign proceedings" and had "voluntarily offer[ed] to submit to [applicants'] discovery requests in Venezuela."[61] Another court found that the mere fact that a defendant was a criminal suspect in a related foreign criminal and civil proceeding "would not render him a participant," and granted the discovery request.[62]

Two courts addressed whether § 1782 requires that the material sought be located in the United States. The Southern District of New York suggested that § 1782 imposes a "threshold requirement" that documents sought be located in the United States, and noted it had not been "persuaded . . . that the documents sought are located in the United States." However, it did not reach the issue because it found that the statutory requirements had not otherwise been met.[63] On the other hand, the U.S. District Court for the District of Delaware took a balancing approach, considering "comity and parity concerns," and concluding that "while the four *Intel* factors favor granting discovery, the location of the remaining documents [abroad] . . . tilt[s] the overall balance towards quashing the discovery requests."[64]

B. Obtaining Discovery from Abroad for Use in U.S. Proceedings

In 2014, several U.S. courts considered the discretionary factors in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa* in evaluating discovery requests for information located in foreign jurisdictions for use in U.S. proceedings.[65]

United States federal court assistance; (3) whether the application is an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country; and (4) whether the request is unduly burdensome or intrusive. *Id.* at 264-65.

58. *Id.* at 244.

59. Case No. 14-5655 (AET), 2014 WL 5320192 (D.N.J. Oct. 17, 2014).

60. Case No. 5:14-mc-80270-BLF-PSG, 2014 WL 5088204 (N.D. Cal. Oct. 9, 2014).

61. Misc. Case No. 13-939(RCL-JMF), 2014 WL 1803573, at *3 (D.D.C. June 20, 2014).

62. *In the matter of Application of Action & Prot. Found.*, No. C 14-80076 MISC EMC (LB), 2014 WL 2795832, at *5 (N.D. Cal. June 19, 2014).

63. *In re Petition of Certain Funds, Accounts, and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC*, No. 14 Civ. 1801(NRB), 2014 WL 3404955, at *4 (S.D.N.Y. July 8, 2014).

64. *Pinchuk v. Chemstar Prods. LLC*, No. 13-mc-306-RGA, 2014 WL 2990416, at *2 (D. Del. June 26, 2014).

65. 482 U.S. 522, 539 (1987) (holding that the Hague Convention is not the exclusive means for obtaining evidence located abroad); Restatement (Third) of Foreign Relations Law § 442(1)(c) (1987) (setting out five factors: "[(1)] the importance to the . . . litigation of the documents or other information requested; [(2)] the degree of specificity of the request; [(3)] whether the information originated in the United States; [(4)] the availability of alternative means of securing the information; and [(5)] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located"). Courts in the Second

Following what has become the general trend in these cases, courts have continued the trend toward ruling in favor of disclosure of foreign materials, even in the face of blocking statutes with potential sanctions. In *In re Activision Blizzard, Inc.*, the Delaware Court of Chancery ordered discovery in the face of a blocking statute, holding that "Delaware has a substantial interest in providing an effective forum for litigating disputes involving the internal affairs of Delaware corporations," especially when the defendant had submitted to the jurisdiction of Delaware courts.[66] The Court also noted that the defendant had "chosen previously to sue in the United States to take advantage of . . . American-style discovery" and the decision "to disregard the Blocking Statute when advantageous undercut its ability to invoke the Blocking Statute now."[67] Similarly, in *BrightEdge Techs., Inc. v. Searchmetrics, GmbH.*, the court ordered production despite German and EU data privacy laws because those laws themselves stated that they did not apply to block discovery when the "subject has given . . . consent" or the transfer of information is necessary to the "exercise or defense of legal claims."[68] And in *Wultz v. Bank of China Ltd.*, defendant obtained discovery of a non-party Israeli bank, despite a contrary earlier ruling in a related case,[69] because such discovery was "critically important in testing the veracity . . . of plaintiff's [scienter] allegation."[70]

By contrast, U.S. courts have shown more willingness to show comity in favor of restraining discovery of materials located abroad where a foreign regulator intervenes or otherwise informs a U.S. court that its own enforcement action would be impeded by U.S. discovery. For example, in *In re Cathode Ray Tube (CRT) Antitrust Litigation*, the court denied a request for production of a confidential European Commission decision in light of "the EU's sovereign interest in governmental information produced within its borders."[71] The court emphasized a letter supplied by the European Commission stating that while its antitrust investigation was over, disclosure could frustrate ongoing aspects of its cartel detection and enforcement initiatives.[72] The court added, "[t]he EC also relies on cooperation from U.S. law enforcement agencies, including the [Department of Justice], and . . . the cooperation of U.S. and E.U. agencies is an aspect of comity."[73]

VI. Extraterritorial Application of United States Law

A. Alien Tort Statute

Federal courts continued to grapple with the meaning of the Supreme Court's admonition in *Kiobel v. Royal Dutch Petroleum Co.* that a claim must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against

Circuit also consider "the hardship of compliance on the party or witness from whom discovery is sought . . . [and] the good faith of the party resisting discovery." *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

66. 86 A.3d 531, 547 (Ch. Del. 2014).

67. *Id.* at 550.

68. No. 14-cv-01009-WHO (MEJ), 2014 WL 3965062, at *4 (N.D. Cal. Aug. 13, 2014).

69. *Linde v. Arab Bank, P.L.C.*, 706 F.3d 92, 112 (2d Cir. 2013).

70. 298 F.R.D. 91, 101 (S.D.N.Y. 2014)

71. No. C 07-5944 SC MDL, 2014 WL 1247770, at *2 (N.D. Cal. Mar. 26, 2014).

72. *Id.*

73. *Id.* at *3.

extraterritorial application."[74] Applying *Kiobel*, the Fourth Circuit refused to dismiss on extraterritoriality grounds claims concerning abuses at Abu Ghraib prison in Iraq, reasoning that the alleged torture was committed by United States citizens employed by an American corporation under a federal government contract, that the acts took place at a government-operated military facility, and that company managers in the United States allegedly attempted to cover up the misconduct.[75] Taken together, the court held, those factors displaced the presumption against extraterritoriality.[76]

In *Mastafa v. Chevron*, the Second Circuit articulated a two-step test for determining whether the extraterritoriality presumption has been overcome.[77] Drawing on the Supreme Court's earlier decision in *Morrison v. National Australian Bank Ltd.*,[78] the Second Circuit held that the first step is to isolate from the complaint the alleged conduct that touches and concerns the United States to determine whether it is enough to displace the presumption. Then the court must ask whether that same conduct also involves a violation of the ATS. Applying that process, the Second Circuit determined that a claim that United States oil purchasers financed alleged human rights abuses by Saddam Hussein's regime did touch and concern the United States. The complaint alleged that oil purchasers had paid illegal surcharges to Hussein's regime, knowing that the extra payments were financing abuses. But the claim failed on the second step because it alleged that defendants acted "merely *knowingly* in aiding and abetting the underlying violations of the law of nations," whereas Second Circuit precedent requires that the violation be purposeful.[79]

The Eleventh Circuit similarly determined that *Morrison's* instruction about conduct should be used to interpret "touch and concern" in the first step of the *Morrison* analysis. In *Baloco v. Drummond Co.*, the court decided that murders of union members by guerillas in Colombia were extraterritorial, even though the union members worked for an American company, because the relevant conduct was outside the United States.[80]

B. Fourth and Fifth Amendments

In *Hernandez v. United States*, the Fifth Circuit determined that a Mexican boy who was standing in Mexico when he was shot in the face and killed by an agent standing in Texas could not allege a violation of the Fourth Amendment by the agent.[81] The court, applying Supreme Court precedent,[82] held that the boy did not have sufficient connections with the United States to invoke the Fourth Amendment.[83] But the court decided that the "sufficient connections" test did not apply to the Fifth Amendment and applied factors derived

74. 133 S. Ct. 1659, 1669 (2013).

75. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528-29 (4th Cir. 2014) (remanding on the political question issue).

76. *Id.* at 530-31.

77. 770 F.3d 170 (2d Cir. 2014).

78. 561 U.S. 247 (2010).

79. *Mastafa*, 770 F.3d at 191-94 (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009)).

80. 767 F.3d 1229 (11th Cir. 2014).

81. 757 F.3d 249, *reh'g en banc granted*, 2014 WL 5786260 (5th Cir. 2014). The boy's parents also brought a claim under the Alien Tort Statute, alleging that the shooting violated several treaties, but the court of appeals held that the United States had not consented to suit. *See id.* at 259.

82. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

83. *Id.* at 266.

from *Boumediene v. Bush*[84] to determine that the boy had Fifth Amendment rights. The court noted that while not an American citizen, the boy did not have an "enemy alien" status that militated against application of the Fifth Amendment.[85] Moreover, the nature of the sites where the alleged violation occurred, on the border of the United States and Mexico, suggested that the United States had some control over the area.[86] And the court noted that if the Fifth Amendment did not apply in this situation to protect against "arbitrary conduct that shocks the conscience," no other sovereign would be able to force the agent to answer for his act committed in the United States.[87] The Fifth Circuit recently granted rehearing en banc of the decision.

C. Securities Law

In several cases, the Second Circuit refined its application of *Morrison*. In *City of Pontiac Policemen's & Firemen's Retirement System v. UBS AG*, it held that where foreign securities were purchased on foreign exchanges, the fact that the securities were cross-listed on domestic exchanges was not enough to displace the presumption against extraterritoriality.[88] In *Loginovskaya v. Batratchenko*, the Second Circuit decided that the rule of *Morrison* also barred extraterritorial application of the Commodities Exchange Act.[89] And in a case interpreting Dodd-Frank, the court held that its whistleblower provisions do not apply extraterritorially.[90]

D. RICO

The Second Circuit determined that the Racketeer Influenced and Corrupt Organizations Act (RICO) can apply extraterritorially, but only where the statute containing the relevant RICO predicate itself permits extraterritorial application.[91] The court acknowledged that its holding diverged from that of the Ninth Circuit in *United States v. Chao Fan Xu*, which found a general "presumption that RICO does not apply extraterritorially in a civil or criminal context."[92]

VII. Recognition and Enforcement of Foreign Judgments

In U.S. courts, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards, otherwise known as the "New York Convention," governs the recog-

84. 553 U.S. 723 (2008).
85. *Id.* at 268-69.
86. *Id.* at 269-70.
87. *Id.* at 270-71.
88. 752 F.3d 173 (2d Cir. 2014).
89. 764 F.3d 266 (2d Cir. 2014).
90. *Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014)
91. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014).
92. *Id.* at 139 n.6 (citing *United States v. Chao Fan Xu*, 706 F.3d 965, 974-75 (9th Cir. 2013)).

nition and enforcement of most foreign arbitral awards.[93] However, State law governs the recognition and enforcement of foreign court judgments.[94]

A. Foreign Arbitral Awards

In *BG Group PLC v. Republic of Argentina*, the Supreme Court held 7-2 that arbitrators acted within their power in concluding that a bilateral investment treaty between the United Kingdom and Argentina did not obligate a private investor to bring its claims under the treaty before an Argentine court prior to arbitration.[95] The arbitrators had found that they had jurisdiction to decide the merits of a dispute arising under the treaty despite the fact that BG Group, by bringing its claims directly to arbitration, had bypassed the investment treaty's requirement that any dispute be brought first in Argentina and at least eighteen months prior to any arbitration.[96] The Supreme Court (Breyer, J.) agreed, holding that the arbitrators had jurisdiction to decide the issue because the local litigation requirement, which "determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate," was procedural rather than substantive.[97] The Court concluded that courts reviewing an arbitrator's decision as to whether it has jurisdiction in a dispute regarding a treaty with a local litigation provision must do so with "considerable deference."[98] Chief Justice Roberts and Justice Kennedy dissented, arguing that submitting the dispute to the courts is a "condition on consent to arbitrate" and therefore "whether an investor has complied with that requirement is a question a court must decide *de novo*, rather than an issue for the arbitrator to decide subject only to the most deferential judicial review."[99]

In *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, the District Court for the Southern District of New York revisited its 2011 judgment enforcing an arbitral award after the Malaysian High Court vacated that award in 2012.[100] The Government of the Lao People's Democratic Republic, which had succeeded in having the arbitral award vacated in Malaysia, moved to vacate the district court's judgment pursuant to Article V(1)(e) of the New York Convention.[101] Noting that a court may enforce "an arbitral award that has been nullified by a court in the state with primary jurisdiction over [it] . . . only when the foreign judgment setting aside the award is

93. The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, is implemented in U.S. law through Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201-08 (2013). The Inter-American Convention on International Commercial Arbitration governs the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified the convention, and this convention is implemented in U.S. law through Chapter 3 of the FAA, 9 U.S.C. §§ 301-07 (2013).

94. Many states have passed some version of the Uniform Foreign-Country Money Judgments Recognition Act.

95. 134 S. Ct. 1198, 1210 (2014).

96. *Id.* at 1204-05.

97. *Id.* at 1207.

98. *Id.* at 1210.

99. *Id.* at 1221 (Roberts, C.J., dissenting).

100. 997 F. Supp. 2d 214 (S.D.N.Y. 2014).

101. *Id.* at 215.

repugnant to fundamental notions" of decency and justice, the court declined to enforce the award.[102]

B. Foreign Court Judgments

In *Commissions Import Export S.A. v. Republic of the Congo*, the D.C. Circuit joined the Second Circuit in holding that Chapter 2 of the Foreign Arbitral Awards Convention Act ("FAA"), which implements the New York Convention, does not preempt state law recognition of foreign court judgments.[103] Specifically, the D.C. Circuit considered whether the statute of limitations to enforce arbitral awards in FAA Chapter 2 preempted the longer period to enforce foreign money judgments under the D.C. Uniform Foreign-Country Money Judgments Recognition Act. The court concluded that Congress did not intend Chapter 2 of the FAA—which makes no mention of foreign court judgments—to preempt state law governing the issue.[104] Instead, section 207 of the FAA "applies specifically to the confirmation of 'arbitral award[s] falling under the Convention.'"[105] The court reasoned that "it is unlikely that Congress would have intended its implementation of the New York Convention to cover both arbitral awards and judgments without mentioning the latter in FAA Chapter 2."[106]

VIII. *Forum Non Conveniens*

In *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, the Supreme Court provided clarity on the proper mechanism for enforcing forum-selection clauses.[107] Although *Atlantic Marine* involved a domestic, rather than an international, forum dispute, the case answers important procedural questions concerning the enforcement of forum-selection clauses in both the domestic and international context. The court made two important holdings impacting *forum non conveniens* litigation: (1) a forum-selection clause electing a state or foreign forum should be enforced through *forum non conveniens*, and (2) a forum-selection clause alters the private and public interest analysis such that the private interest factors weigh entirely in favor of the forum designated by the forum-selection clause and the court may only consider the public interest factors.[108]

The contract between the parties was to be performed in Texas but included a forum-selection clause designating Virginia as the appropriate forum.[109] After a dispute arose and the plaintiff brought suit in the Western District of Texas, the defendant moved to dismiss on venue grounds.[110] The district court denied the motion, and the Fifth Circuit denied the defendant's subsequent petition for a writ of mandamus, holding that where a forum-selection clause designates a non-federal forum, Rule 12(b)(3) provides the proper

102. *Id.* at 223 (internal citations omitted).
103. 757 F.3d 321, 323 (D.C. Cir. 2014).
104. *Id.* at 326-29.
105. *Id.* at 327.
106. *Id.* at 332.
107. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013).
108. *Id.* at 580-82.
109. *Id.* at 575.
110. *Id.* at 576.

avenue for dismissal.[111] The Supreme Court reversed, finding that *forum non conveniens*, rather than Rule 12(b)(3), is the appropriate enforcement mechanism when a forum-selection clause points to a state or foreign forum.[112]

The Fifth Circuit's holding in *Cotemar S.A. De C.V. v. Hornbeck Offshore Services, L.L.C.* illustrates how an atypical time bar can affect the *forum non conveniens* analysis.[113] *Cotemar* involved a limitation of liability proceeding—a procedure in maritime law by which a ship owner seeks to limit his liability to the value of his vessel.[114] In *Cotemar*, the parties' vessels collided forty-four miles off of the coast of Mexico.[115] Defendant filed two petitions in Mexican courts to limit liability.[116] Under Mexican limitation of liability procedure, claimants had to file their claims within a certain time.[117] The plaintiff failed to file a timely claim in the Mexico court and instead brought suit in federal district court in Texas after the deadline passed; the defendant filed a motion to dismiss on the basis of *forum non conveniens*.[118] After the district court granted the defendant's motion to dismiss, the Fifth Circuit remanded for more specific findings as to whether the district court's return jurisdiction clause adequately addressed the time bar presented by the plaintiff's failure to file a claim in the limitation of liability proceedings in Mexico.[119] It held that the district court must determine whether its return jurisdiction clause comports with the Fifth Circuit's prior holding that a plaintiff may not claim a private interest in a federal forum where unavailability of a foreign forum is a "plight of his own making."[120] The appeals court further observed that the district court's instruction to "waiv[e] any jurisdictional defenses" and to "'submit fully' to the Mexican judicial proceedings" could require "Appellees to waive any legitimate defenses relating to untimeliness that Appellees may have acquired based on Appellants' lack of diligence."[121] While not explicitly stated, the court alludes to the maritime law principle that a defendant's waiver of his right to limit liability as to one party impacts the rights of other parties, as the "'concursus' of claims compels all actions arising out of the casualty to be filed and disposed of in a single proceeding."[122]

IX. Parallel Proceedings

In *Ace Arts, LLC v. Sony/ATV Music Publishing, LLC*, the Southern District of New York refused to stay a lawsuit involving the use of Beatles songs in a documentary about the band because of another pending lawsuit in English courts.[123] The court declined to depart from the general rule permitting simultaneous proceedings in the same *in personam*

111. *Id.*
112. *Id.* at 580.
113. 569 F. App'x 187 (5th Cir. 2014).
114. *See* 2 Thomas J. Schoenbaum, Admiralty & Mar. Law § 15-1 (5th ed.).
115. *Cotemar S.A. De C.V.*, 569 F. App'x at 189.
116. *Id.*
117. *Id.* at 191.
118. *Id.* at 189.
119. *Id.* at 190.
120. *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1248 n.10 (5th Cir. 1983).
121. *Id.* at 191.
122. 2 Thomas J. Schoenbaum, Admiralty & Mar. Law § 15-5 (5th ed.).
123. No. 13-cv-7307, 2014 WL 4804465 (S.D.N.Y. Sept. 26, 2014).

claim, given that the parties and the claims in the two proceedings were not sufficiently the same, the English litigation was not sufficiently advanced, and the future preclusive effect of any judgment from that court was uncertain.[124]

In *Clientron Corp. v. Devon IT, Inc.*,[125] the U.S. District Court for the Eastern District of Pennsylvania similarly declined to stay an action to enforce a foreign arbitration award while defendant sought to set the award aside in a parallel proceeding in Taiwan. Applying the six-factor test of *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*,[126] the court concluded that arbitration's purpose of a speedy resolution of disputes counseled against a stay, that plaintiff properly filed its enforcement action in a U.S. court because defendant was a U.S. company, and that defendant did not provide security for the stay period.

The Eleventh Circuit in *GDG Acquisitions, LLC v. Belize*, addressed a comparatively rare case where plaintiff sought to apply international comity prospectively to dismiss or stay a case before the filing of any actual parallel foreign proceeding.[127] Holding that the district court improperly dismissed breach-of-contract claims against Belize in favor of litigation in that country's courts, the court of appeals noted that "[p]rospective international comity requires a serious problem that would be created by [domestic] proceedings but that would not be present if the matter were adjudicated abroad."[128] Distinguishing its 2004 decision in *Ungaro-Benages v. Dresdner Bank AG*,[129] the Eleventh Circuit emphasized that the United States had no significant interest in the foreign adjudication, and submitted no statement of interest, and that Belize's preference to handle the suit in its own courts was "not a cognizable prospective international comity interest."[130]

The Ninth Circuit, by contrast, affirmed the dismissal on prospective comity grounds of state-law personal injury claims brought by Colombian citizens against U.S. companies for alleged complicity in the bombing of plaintiffs' village by the Colombian military.[131] In *Mujica v. Airscan, Inc.*, the Ninth Circuit distinguished earlier precedent and held that a "'true conflict between domestic and foreign law'" is not required in instances of "adjudicatory comity."[132] Courts within the Ninth Circuit had previously found that comity is only proper where a true conflict existed.[133] The *Mujica* decision clarifies that the "true conflict" inquiry is a threshold issue only for prescriptive (or legislative) comity, and just "one factor in, rather than a prerequisite to, the application of [adjudicatory] comity."[134]

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124. *Id.* at *4-*5.

125. No. 13-05634, 2014 WL 940406 (E.D. Penn. March 10, 2014).

126. 156 F.3d 310 (2d Cir. 1998).

127. 749 F.3d 1024, 1030 (11th Cir. 2014).

128. *Id.* at 1031-34.

129. 379 F.3d 1227, 1239-41 (11th Cir. 2004) (abstaining from considering claims against German banks to recover assets stolen during the Nazi era in favor of a claims-resolution mechanism established under an agreement between the United States and Germany as the exclusive forum for such claims).

130. *GDG Acquisitions*, 749 F.3d at 1031-33.

131. *Mujica v. Airscan, Inc.*, 2014 WL 5839817 *Id.* at *1, *11-*27.

132. 2014 WL 5839817 at *15 (quoting *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998)).

133. *See, e.g., Oak Point Partners, Inc. v. Lessing*, No. 11-03328, 2013 WL 1703382 (N.D. Cal. Apr. 19, 2013). Indeed, the dissenting judge in *Mujica* disagreed that *In re Simon* was solely a prescriptive comity case. *See Mujica*, 2014 WL 5839817 at *32 (Zilly, J., concurring in part and dissenting in part).

134. *Mujica*, 2014 WL 5839817 at *16.

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