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# International Litigation

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# International Litigation

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This article summarizes selected developments in international litigation during 2012.[1]

## I. Foreign Sovereign Immunities Act

A foreign state is presumptively immune from suit, and its property from attachment and execution, unless an exception enumerated in the Foreign Sovereign Immunities Act (FSIA) applies.[2] In *Rogers v. Petróleo Brasileiro, S.A.*, the Second Circuit considered the "commercial activity" exception to immunity in § 1605(a)(2) of the FSIA. First, the court rejected plaintiffs' argument under the second clause of § 1605(a)(2) that there was an "act performed in the United States" because plaintiffs were informed of defendant's decision

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1. For developments during 2011, see Katharine V. Jackson et al., *International Litigation*, 46 Int'l Law. 165 (2012). For developments during 2010, see Neale H. Bergman et al., *International Litigation*, 45 Int'l Law. 163 (2011).

2. *See* 28 U.S.C. §§ 1604, 1609 (2006).

not to convert their bearer bonds into preferred shares by an e-mail sent from defendant's New York office.[3] The court reasoned that the email constituted a notice to plaintiffs of an alleged breach that actually occurred in Brazil, and emphasized that when a foreign sovereign commits an omission — here, the alleged failure to convert the bonds — the act occurs in the foreign state, not in the United States.[4] Second, the court rejected plaintiffs' argument under the third clause of § 1605(a)(2) that there was a "direct effect" in the United States, observing that the bonds at issue (i) did not require payment to be made in the United States and (ii) did not give plaintiffs the right to designate the United States as the place for payment.[5]

Addressing an issue of first impression in *Abelesz v. Magyar Nemzeti Bank*, the Seventh Circuit held that the "rights in property" element of the FSIA's expropriation exception to immunity in § 1605(a)(3) applied to both tangible and intangible property — here, Holocaust victims' bank accounts expropriated by a Hungarian national bank.[6] The court also agreed with the Ninth and D.C. Circuits that the FSIA does not require exhaustion of domestic remedies before suing in the United States. But the court held that because plaintiffs claimed expropriation in violation of international law, they must either exhaust or convincingly demonstrate the inadequacy of Hungarian remedies.[7]

In *Leibovitch v. Islamic Republic of Iran*, the Seventh Circuit held that the terrorism exception to immunity in § 1605A applied to emotional distress claims brought against the Republic of Iran by the foreign national family members of a U.S. citizen injured during a terrorist attack allegedly carried out with the support of Iran.[8] The court reasoned that even though the federal cause of action created by the 2008 revisions of the terrorist exception showed Congress' intent to establish a narrow private right of action mainly for U.S. *claimants*, the broad jurisdictional exception remained for cases involving U.S. *victims*.[9]

In *Seijas v. Republic of Argentina*, the Second Circuit affirmed dismissal of plaintiffs' claim that Banco de la Nación Argentina (BNA) was an alter ego of Argentina and therefore liable for Argentina's debt, as well as denial of jurisdictional discovery on that question.[10] The court rejected as insufficient plaintiffs' proffered basis for an alter ego relationship, including the fact that Argentina could appoint and remove BNA's directors and that BNA made loans in Argentina's political interest.[11]

In *EM Ltd. v. Republic of Argentina*, the Second Circuit ordered post-judgment asset discovery of third parties concerning property of Argentina located outside the United States.[12] The Second Circuit rejected Seventh Circuit precedent that such discovery requires a plaintiff to identify specific non-immune assets subject to attachment.[13] Instead, the court reasoned that asset discovery does not implicate immunity because it involves

3. Rogers v. Petroleo Brasileiro, S.A., 673 F.3d 131, 137-38 (2d Cir. 2012).
4. *Id.* at 138.
5. *Id.* at 138-40.
6. Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 671-73 (7th Cir. 2012).
7. *Id.* at 678-85.
8. Leibovitch v. Islamic Rep. of Iran, 697 F.3d 561, 562 (7th Cir. 2012).
9. *Id.* at 568-72.
10. Seijas v. Republic of Arg., No. 11-1714-cv., 2012 WL 5259030, at *1 (2d Cir. Oct. 25, 2012).
11. *Id.* at *2.
12. EM Ltd. v. Rep. of Arg., 695 F.3d 201, 203 (2d Cir. 2012).
13. *Id.* at 209 (citing Rubin v. Islamic Rep. of Iran, 637 F.3d 783, 785-86 (7th Cir. 2011)).

producing information and not the attachment of sovereign property and because it was directed at third parties and not at Argentina itself.[14]

In ongoing litigation, the Second Circuit in *NML Capital, Ltd. v. Republic of Argentina* affirmed in part and remanded in part a district court injunction enjoining Argentina from making payments on performing bonds without making payments on defaulted bonds.[15]

## II. International Service of Process

Rule 4(f) of the Federal Rules of Civil Procedure governs international service of process.[16] In *Lozano v. Bosdet*, the Fifth Circuit dealt with the period within which an international defendant must be served process after a complaint is filed.[17] The Court took note of the flexible Ninth Circuit standard, which allows an unlimited window-of-opportunity for service under Rule 4(f),[18] compared with the stricter standard in the Second Circuit, which requires at least an attempt at foreign service within 120 days of filing the complaint.[19] The Fifth Circuit declined to follow the Second Circuit's approach because it found that Rule 4(m) — requiring service within 120 days — expressly "does not apply to service in a foreign country under Rule 4(f)" and because applying Rule 4(m) would "make it difficult for plaintiffs to use the less costly and potentially more efficient methods of serving foreign defendants" such as postal mail.[20] The Court also declined to follow the Ninth Circuit's unlimited approach because it found more support for "a flexible due diligence standard to determine whether the delay should be excused."[21] Applying this standard, the court reversed the district court's dismissal for failure to accomplish service.[22]

In *Santiago v. Anderson*, the Seventh Circuit dealt with a plaintiff-prisoner's service on an officer accused of using excessive force on the plaintiff and who was deployed to Iraq before domestic service could be made.[23] The Marshals Service filed an unexecuted summons with the Court with a notation that defendant was on military leave until the following year.[24] The district court dismissed the complaint without prejudice, reasoning that service on a deployed military member was unreasonable and plaintiff would not be harmed because the statute of limitations was tolled during defendant's deployment.[25] On appeal, the Seventh Circuit decided that "when a plaintiff proceeds *in forma pauperis*

14. *Id.* at 208-10.

15. NML Capital, Ltd. v. Rep. of Arg., 699 F.3d 246, 258-59 (2d Cir. 2012). On November 28, 2012, the Second Circuit stayed the district court orders that were issued following remand. *See* NML Capital, Ltd. v. Rep. of Arg., No. 08 Civ. 6978(TPG), 2012 WL 5895650, at *1 (S.D.N.Y. Nov. 21, 2012).

16. Fed. R. Civ. P. 4(f).

17. Lozano v. Bosdet, 693 F.3d 485, 486 (5th Cir. 2012).

18. Lucas v. Natoli, 936 F.2d 432, 432 (9th Cir. 1991).

19. USHA (India), Ltd. v. Honeywell Int'l, Inc., 421 F.3d 129, 133-34 (2d Cir. 2005).

20. *Lozano*, 693 F.3d at 488.

21. *Id.* at 488-89 (quoting Steven S. Gensler, Federal Rules of Civil Procedure: Rules and Commentary 60 (2012 ed.) (internal citations omitted)).

22. *Id.* at 489, 491.

23. Santiago v. Anderson, No. 11-1230, 2012 WL 3164293, at *1, *3 (7th Cir. Aug. 6, 2012), *cert. denied*, 133 S. Ct 769 (2012).

24. *Id.* at *3.

25. *Id.*

[under 28 U.S.C § 1915] . . . the Marshals Service is required to serve process."[26] The appeals court noted that the plaintiff "did all that was required of him, . . . completed to the extent possible the necessary paperwork," and that "[s]ection 1915(d) lists no exception for defendants who are abroad."[27] Although the Court found that the dismissal for lack of service was improper, it nonetheless dismissed plaintiff's claims for failure to exhaust administrative remedies.[28]

In *Angellino v. Royal Family Al-Saud*, the plaintiff filed a pro se complaint for breach of contract with the District Court for the District of Columbia and attempted to serve process on defendants — a Saudi Arabian royal family — by mailing a copy of the summons and complaint to the Embassy in Washington via first class mail.[29] At the time of service, defendants were considered an "agency or instrumentality of a foreign state" under § 1608 of the FSIA,[30] which lays out specific means of service, including service by a "special arrangement for communication and service."[31] Plaintiff argued that he made service by a "special arrangement" because it was done by the parties' usual means of transaction and communication.[32] The district court dismissed without prejudice.[33] The D.C. Circuit reversed the district court for abuse of discretion, finding that the court failed to provide the pro se plaintiff with "fair notice" of service requirements under Rule 4(f) and the FSIA and that "dismissal without prejudice for failure to serve process could affect the viability of his claim depending on the applicable statute of limitations."[34]

## III. Personal Jurisdiction

In 2011, the U.S. Supreme Court's *Goodyear Dunlop Tires Operations, S.A. v. Brown* decision clarified that a defendant is subject to general jurisdiction in a forum where its contacts are "so 'continuous and systematic' as to render [it] essentially at home in the forum State."[35] But the federal circuit courts have not uniformly applied *Goodyear* and at least one court has openly espoused a more flexible test.

In *Bauman v. DaimlerChrysler Corporation*, the Ninth Circuit held that DaimlerChrysler Aktiengesellschaft (DCAG), a German parent company with no operations or employees in the United States, was subject to general jurisdiction in California based solely on the actions of its wholly owned subsidiary, Mercedes Benz USA (MBUSA) in California.[36] Under a reformulated agency theory of personal jurisdiction, the Ninth Circuit imputed MBUSA's contacts to DCAG, finding both prongs of its agency test satisfied.[37] First, the

26. *Id.* at *4.
27. *Id.* The court stated that the Marshals could have contacted defendant's wife, military unit, or his place of employment to accept service because "surely [defendant] was receiving mail and e-mail while in Iraq." *Id.*
28. *Id.* at *5.
29. Angellino v. Royal Family Al-Saud, 681 F.3d 463, 465 (D.C. Cir.), *rev'd*, 688 F.3d 771 (D.C. Cir. 2012).
30. *Id.*
31. *Id.* at 446-67.
32. *Id.* at 466.
33. *Id.* at 467.
34. *Id.* at 470.
35. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 2__, 131 S. Ct. 2846, 2851 (2011).
36. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 912 (9th Cir. 2011).
37. *Id.* at 920-21.

court found that MBUSA performed services for DCAG in California that were "sufficiently important" to DCAG such that if MBUSA did not perform the services, DCAG's "own officials would undertake to perform substantially similar services."[38] Second, the court found that control existed pursuant to the distributorship agreement between DCAG and MBUSA that provided DCAG with the right to control MBUSA's operations.[39] The court explained that DCAG's *actual* control of MBUSA was not required (as typically necessary for an alter-ego finding), but rather an agency relationship could be based on DCAG's *right* to control MBUSA.[40] The Ninth Circuit denied en banc rehearing of *DaimlerChrysler* despite protests that its decision conflicted with *Goodyear*, the law of at least six other circuit courts, and the limits of the due process clause.[41] Nevertheless, as it stands, the law of the Ninth Circuit represents a unique challenge for foreign defendants with relationships to domestic subsidiaries attempting to avoid personal jurisdiction.

Other circuit courts have applied *Goodyear* more strictly. In *Pervasive Software, Inc. v. Lexware GmbH & Co.*, the Fifth Circuit held that defendant was "in no sense at home" in Texas and not subject to general jurisdiction when its only contacts were "intermittent communications" into Texas and relatively modest sales to Texas billing addresses.[42] Lexware's sales alone were deemed insufficient to support general jurisdiction over a cause of action unrelated to those sales.[43] Similarly, in *Abelesz v. OTP Bank*, the Seventh Circuit held that Hungarian banks with "the type of business contacts that many large foreign banks have with the United States" were not subject to general jurisdiction in the United States.[44] According to the court, the bank's modest number of U.S. customer accounts did not satisfy the "demanding standard" set forth by *Goodyear*.[45]

Regarding specific jurisdiction, courts have applied different tests to determine whether a cause of action "arises out of or is related to" a defendant's contacts with the forum, including "but-for" relatedness, proximate cause, "sliding scale" relationship, and substantial connection tests.[46] In *Myers v. Casino Queen, Inc.*, the Eighth Circuit announced a new — and relatively relaxed — "foreseeability" test, holding that an Illinois casino was subject to specific jurisdiction in neighboring Missouri.[47] Plaintiff, a Missouri customer, was robbed on his way home from the casino and brought suit in Missouri.[48] In its analysis, the court emphasized that the casino purposefully advertised to Missouri customers, knew of previous "follow home" robberies, and typically provided winning customers with es-

38. *Id.* at 921-22. In departure from other agency cases, the Ninth Circuit held that importance could not be measured based upon the amount of revenue alone, emphasizing that the U.S. market accounted for 19 percent of DCAG's Mercedes Benz sales worldwide and "nearly 50 [percent] of DCAG's overall revenue." *Id.* at 922, 926.

39. *Id.* at 922-24.

40. *Id.* at 924.

41. *See generally* Bauman v. DaimlerChrysler Corp., 676 F.3d 774 (9th Cir. 2011) (dissenting opinion from denial of rehearing by Judge O'Scannlain), *petition for cert. filed*, No. 12-385, 2012 WL 4467660 (Sept. 27, 2012).

42. Pervasive Software, Inc. v. Lexware GmbH & Co., 688 F.3d 214, 230-31 (5th Cir. 2012).

43. *Id.* at 231.

44. Abelesz v. OTP Bank, 692 F.3d 638, 654 (7th Cir. 2012).

45. *Id.*

46. *See* Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 579-86 (Tex. 2007) (reviewing different tests).

47. Myers v. Casino Queen, Inc., 689 F.3d 904, 912-13 (8th Cir. 2012).

48. *Id.* at 908-09.

cort security.[49] The casino, therefore, could "reasonably foresee" its negligent actions having consequences in Missouri.[50] The court acknowledged that plaintiff's cause of action "did not arise out of Casino Queen's advertising activities in a strict proximate cause sense," but found it sufficient that the injuries were "related to Casino Queen's advertising activities because [plaintiff] was injured after responding to the solicitation."[51]

## IV. The Act of State Doctrine

The act of state doctrine is a prudential limitation on the exercise of judicial review requiring U.S. courts to decline to pass judgment on the validity of official acts of a foreign state performed in its own territory.[52]

### A. Determining Whether Acts Are Sovereign Acts

In *McKesson Corp. v. Islamic Republic of Iran*, the D.C. Circuit rejected Iran's invocation of the act of state doctrine to bar plaintiff's claim that its investment in an Iranian dairy company was effectively expropriated after government agents took over the company's board of directors and froze out the plaintiff from the business.[53] The court held that because the alleged harm arose from the Iranian agents acting as corporate shareholders, the acts were commercial and not sovereign in nature. Accordingly, the court would not need to determine the validity of "conduct that is by nature distinctly sovereign, i.e., conduct that cannot be undertaken by a private individual or entity."[54]

### B. Foreign Affairs Interests and Doctrine's Applicability

In *United States v. One Etched Ivory Tusk of African Elephant*, the federal government sought forfeiture of an elephant tusk, arguing it failed to meet statutory standards for legal importation.[55] The district court, sua sponte, raised whether the act of state doctrine was implicated by the government's claim that the tusk's Zimbabwean export permit was invalid.[56] Ultimately, the court held that it could decline to apply the doctrine based on "whether the policies that underlie the doctrine justify [its] application in [a] particular case," including whether adjudication of the foreign governmental act could "embarrass or

49. *Id.* at 908.
50. *Id.* at 914.
51. *Id.* at 913.
52. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); *see also* W.S. Kirkpartrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) ("the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid").
53. McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066 (D.C. Cir. 2012), *rev'g* Civ. No. 82-0220(RJL), 2009 WL 4250767, at *17-18 (D.D.C. Nov. 20, 2009).
54. *See McKesson Corp.*, 672 F.3d at 1073-74; *but see* Sikhs for Justice v. Nath, No. 10 Civ. 2940, 2012 WL 4328329, at *13 (S.D.N.Y. Sept. 21, 2012) (district court declined to enter a default judgment against a political party because it was possible that the act of state doctrine might provide a meritorious defense against plaintiff's claim, which could be construed to allege that the atrocities complained of resulted from public acts of a government controlled by the political party).
55. United States v. One Etched Ivory Tusk of African Elephant, 871 F. Supp. 2d 128, 130 (E.D.N.Y. 2012), *reh'g denied*, No. 10-CV-308(NGG)(SMG), 2012 WL 4076160 (E.D.N.Y. Aug. 27, 2012).
56. *See id.* at 135.

hinder the executive branch's foreign policy."[57] The court observed that, the government having initiated suit, "clearly the court need not worry that it will intrude into an area that the executive branch does not want it."[58] The court also found the doctrine's rationale was absent because the claims were based on an endangered-species trafficking treaty in which sovereign signatories have "agreed to a precise set of rules that other nations would be expected to enforce."[59]

### C. Relationship to the Foreign Sovereign Immunities Act

In *In re Fresh and Process Potatoes Antitrust Litigation*, defendant United Potato Growers of Canada (UPGC), an organization comprised of agencies constituted by Canada's provincial governments, successfully invoked the act of state doctrine to dismiss allegations that UPGC had illegally conspired to restrict potato production.[60] Although the district court held that UPGC was not "an organ of a foreign state" within the meaning of the FSIA, partly because it was not created by Canadian law to implement sovereign functions,[61] the court found the act of state doctrine could apply when a claim required it to question the validity of a sovereign act.[62] Because the plaintiffs' claims challenged export control decisions entrusted to UPGC member-agencies under Canadian law, resolution of the claims would have required the court to decide the validity of government action.[63] The court also drew a contrast with the FSIA in deciding that there is no commercial activity exception to the act of state doctrine.[64]

## V. International Discovery

### A. Obtaining U.S. Discovery For Use In Foreign Proceedings

In 2012, several U.S. courts addressed the requirements for obtaining discovery for use in foreign proceedings pursuant to 28 U.S.C. § 1782(a)[65] and the related factors set out in *Intel Corp. v. Advanced Micro Devices, Inc.*[66]

In *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, the Second Circuit held that the admissibility of the requested discovery in the foreign proceeding is not relevant in a § 1782 application and has "no bearing on international comity."[67] The court observed

57. *Id.* at 142.
58. *Id.* at 142-43.
59. *Id.* at 143.
60. *In re* Fresh and Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1180 (D. Id. 2011).
61. *Id.* at 1177.
62. *Id.* at 1180.
63. *Id.*
64. *Id.*
65. *See* 28 U.S.C. § 1782(a) (2006) ("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.").
66. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 243 (2004). In *Intel*, the Supreme Court noted three basic statutory requirements for invoking section 1782(a) and articulated four discretionary factors courts should additionally consider. *Id.* at 264-65.
67. Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 82 (2d Cir. 2012).

that requiring district courts to consider foreign admissibility would require them to interpret foreign law, a practice "fraught with danger."[68]

In *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, the Eleventh Circuit created a circuit split when it held that a private arbitral panel was a foreign tribunal under § 1782.[69] The Eleventh Circuit reasoned that "after receiving evidence from the parties, [the arbitral panel] will render a first-instance binding decision on the merits that is subject to judicial review," thereby meeting the "functional criteria articulated in *Intel*."[70] The issue of whether private arbitral panels are foreign tribunals under § 1782 remains unsettled.

## B. Obtaining Discovery From Abroad for Use in U.S. Proceedings

In 2012, judges in the Southern District of New York considered the discretionary factors in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa* in evaluating whether litigants must use the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention)[71] to acquire evidence located in China for U.S. proceedings in light of China's bank secrecy laws.[72] Two Chinese financial regulators — the People's Bank of China and the China Banking Regulatory Commission — submitted a letter to four Southern District of New York judges, urging them to require parties seeking discovery from China to rely on the Hague Convention and expressing their intent to coordinate with China's Ministry of Justice and judicial organs regarding such requests.[73] In *Tiffany (NJ) LLC v. Forbse*, Judge Buchwald found that China had not yet had a meaningful opportunity to demonstrate whether it would comply with a Hague Convention request in light of its regulators' letter of intent.[74] The court thus required plaintiff to direct its discovery requests to two Chinese banks through the Hague Convention.[75] With respect to a third Chinese bank, however, the court reached a different result after finding that the bank had recently acted as an acquiring bank for an infringing website, thus suggesting bad faith and possession of im-

68. *Id.*

69. *In re* Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987, 990 (11th Cir. 2012); *cf.* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999); Rep. of Kaz. v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).

70. *Consorcio*, 685 F.3d at 995, 998.

71. Taking of Evidence Abroad Convention, Oct. 7. 1972, 23 U.S.T. 2555, 847 U.N.T.S. 231.

72. Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa, 482 U.S. 522, 539 (1987) (holding that the Hague Convention is not the exclusive means for obtaining evidence located abroad) (citing Restatement (Third) of Foreign Relations Law § 442 (1987), which sets 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 Circuit also consider "the hardship of compliance on the party or witness from whom discovery is sought . . . [and] the good faith of the part resisting discovery." Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

73. *See* Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2012 WL 1918866, at *6 (S.D.N.Y. May 23, 2012), *reh'g denied*, No. 11 CIV. 4976 NRB, 2012 WL 3686289 (S.D.N.Y. Aug. 23, 2012).

74. *Id.* at *10.

75. *Id.* at *10-11.

portant information. The court ordered this bank to respond to discovery requests directly and on an expedited basis.[76]

By comparison, in *Gucci America, Inc. v. Weixing Li*, Judge Sullivan held that the Chinese regulators' letter did not constitute "newly discovered evidence" sufficient to compel him to reverse a prior order compelling discovery.[77] Moreover, the letter "would still not have changed the outcome" of that order because the "severe warning" in the letter of Chinese law sanctions that might be imposed on the banks for producing discovery did not change the Court's conclusion that the threat of liability was "unduly speculative."[78]

### C. Obtaining Discovery From Foreign Sovereigns

Courts also wrestled with issues relating to discovery from foreign sovereigns themselves. In *Thai-Lao Lignite (Thailand) Co. v. Government of Lao People's Democratic Republic*, Judge Wood held that a foreign government is not a "person" under § 1782 and thus cannot be compelled to produce discovery through this mechanism.[79] Judge Wood noted that the D.C. Circuit had found that although the word "person" under Rule 45 of the Federal Rules of Civil Procedure does encompass a sovereign, a district court must have an independent basis for jurisdiction before applying the Federal Rules.[80]

In *Lantheus Medical Imaging, Inc. v. Zurich American Insurance Co.*, the district court considered whether the FSIA applies to letters rogatory.[81] Although discovery through a Rule 45 subpoena can be used if a U.S. court has jurisdiction over the source of information through the FSIA, because the issuance of letters rogatory inherently does not require a U.S. court to compel discovery, the court need not have jurisdiction over the non-party.[82] Thus, the court held the FSIA inapplicable to its review of a request for letters rogatory.[83]

## VI. Extraterritorial Application of U.S. Law

### A. Securities Law

Interpreting the Supreme Court's landmark 2010 extraterritoriality decision in *Morrison v. National Australian Bank*,[84] the Second Circuit in *Absolute Activist Value Master Fund Ltd. v. Ficeto* articulated a test for determining when a security not listed on a U.S. exchange constitutes a "domestic transaction" subject to § 10(b) of the Securities and Exchange Act.[85] The Second Circuit held that transactions in such securities are "domestic" only "if

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76. *Id.*

77. Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974(RJS), 2012 WL 1883352, at *3 (S.D.N.Y. May 18, 2012).

78. *Id.* at *4-5.

79. Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Rep., No. 11 Civ. 4363 (KMW), 2012 WL 966042, at *3 (S.D.N.Y. Mar. 20, 2012).

80. *Id.* at *3 n.3.

81. Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769 (S.D.N.Y 2012).

82. *Id.* at 781-82.

83. *Id.*

84. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

85. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 67 (2d Cir. 2012).

irrevocable liability is incurred or title passes within the United States."[86] Subsequently, a district court applying *Absolute Activist* questioned whether a securities purchase could constitute a "domestic transaction" under *Morrison* when it is "functionally equivalent" to a purchase on a U.S. stock exchange.[87]

### B. Antitrust Law

In *Minn-Chem, Inc. v. Agrium, Inc.*,[88] the Seventh Circuit issued an important interpretation of the scope of the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA).[89] Overruling prior precedent, the court held that the FTAIA is an element of the claim, rather than a subject-matter jurisdiction requirement.[90] Next, the Seventh Circuit adopted a broad reading of the "domestic effects" exception, reading the statute's requirement of "direct" effects on U.S. commerce as imposing a proximate causation standard and rejecting the Ninth Circuit's requirement of no intervening event between cause and effect.[91]

The Northern District of California, overseeing the long-running liquid crystal display panel (LCD) price-fixing multidistrict litigation, issued two decisions addressing the FTAIA's scope. First, under the "domestic effects" exception to the FTAIA, a U.S.-based company that directed its purchasing operations from the United States can recover for all purchases, including those that occurred abroad. Such negotiation and decision-making formed the basis for a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.[92] Second, the FTAIA's import exclusion permits a foreign company to recover for purchases shipped directly to the company's U.S. subsidiary because these shipments constituted "import commerce."[93]

### C. Criminal Law

In *United States v. Dire*, the Fourth Circuit upheld as a piracy offense under 18 U.S.C. § 1651 the conviction of Somali pirates for a failed attack on a U.S. navy frigate.[94] The Fourth Circuit held that "piracy" under 18 U.S.C. § 1651 is defined by evolving customary international law and is not limited to earlier domestic definitions of "robbery at sea."[95] By contrast, the Eleventh Circuit in *United States v. Bellaizac-Hurtado*[96] vacated convictions under the Maritime Drug Law Enforcement Act,[97] effectively limiting Con-

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86. *Id.* at 67-68.
87. *In re* Optimal U.S. Litig., 865 F. Supp. 2d 451, 455-56 (S.D.N.Y. 2012).
88. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012) (en banc).
89. 15 U.S.C. § 6a (2006).
90. *Minn-Chem*, 683 F.3d at 853.
91. *Id.* at 857.
92. Motorola Mobility, Inc. v. AU Optronics Corp., No. M 07-1827 SI, 2012 WL 3276932, at *2-4 (N.D. Cal. Aug. 9, 2012).
93. Nokia Corp. v. AU Optronics Corp., No. M 07-1827 SI, 2012 WL 3763616, at *1-2 (N.D. Cal. Aug. 29, 2012).
94. United States v. Dire, 680 F.3d 446, 469 (4th Cir. 2012).
95. *Id.* at 466-69.
96. United States v. Bellaizac-Hurtado, No. 11-14049, 2012 WL 5395281, at *3, *12 (11th Cir. Nov. 6, 2012).
97. Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501-70508 (2006).

gress' ability to criminalize conduct abroad to violations of customary international law, which do not include drug trafficking.[98]

### D. Bankruptcy Law

Relying on *Morrison*, a bankruptcy court in the Southern District of New York found that where depletion of an estate occurred in the United States, application of 11 U.S.C. § 550 was domestic, not extraterritorial.[99] In any event, the court concluded that Congress intended § 550 to apply extraterritorially.[100]

### E. Alien Tort Statute

In another important development, the Supreme Court heard reargument in *Kiobel v. Royal Dutch Petroleum Co.* on the question of whether, in light of *Morrison*, the Alien Tort Statute recognizes a cause of action for violations of the law of nations occurring in the territory of a foreign state.[101]

## VII. Recognition and Enforcement of Foreign Judgments

In U.S. courts, the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards governs the recognition and enforcement of most foreign arbitral awards.[102] State law governs the recognition and enforcement of foreign court judgments.[103]

### A. Foreign Arbitral Awards

In Republic of *Argentina v. BG Group PLC*, the D.C. Circuit considered an appeal of confirmation of an arbitral award by Argentina, which argued that the tribunal had "exceeded its authority by ignoring the terms of the parties' agreement" in finding Argentina liable to BG Group, a U.K. company in the Argentine gas industry.[104] The D.C. Circuit stated that "[t]he 'gateway' question [was] "arbitrability;" specifically whether the Argentine-U.K. bilateral investment treaty (BIT) "intend[ed] that an investor under the [BIT]

98. *Bellaizac-Hurtado*, 2012 WL 5395281, at *3, *12.

99. Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (*In re* Bernard L. Madoff), 480 B.R. 501, 523-25 (Bankr. S.D.N.Y. 2012).

100. *Id.* at 526-28.

101. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, No. 10-1491 (U.S. Oct. 17, 2011).

102. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (implemented in U.S. law through Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201-08 (2006)). The Inter-American Convention on International Commercial Arbitration governs the recognition and enforcement of awards among member states of the Organization of American States who are party and is implemented in U.S. law through Chapter 3 of the FAA, 9 U.S.C. §§ 301-07 (2006).

103. Many states have adopted the Uniform Foreign Money Judgments Recognition Act, which is based upon the comity principles expressed in *Hilton v. Guyot*, 159 U.S. 113 (1895). In 2005, the Uniform Law Commission promulgated a revised act, the Uniform Foreign Country Money Judgments Recognition Act, which has been enacted by several states.

104. Rep. of Arg. v. BG Group PLC, 665 F.3d 1363, 1365 (D.C. Cir. 2012); *see* 9 U.S.C. § 10(a)(4) (2006).

could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in [the host country's courts]."[105] The D.C. Circuit held that arbitrability was for the court to decide because arbitration under the UNCITRAL Arbitration Rules was "triggered . . . only after an Argentine court first has an opportunity to resolve the dispute" and the BIT was "silent on who decides arbitrability when that precondition is disregarded."[106] Requiring "clear and unmistakable" evidence of arbitrability, the D.C. Circuit concluded that the dispute was not arbitrable, and reversed the district court's orders and vacated the award.[107]

In *Schneider v. Kingdom of Thailand*, the Second Circuit also addressed arbitrability in considering Thailand's appeal of confirmation of an award against it in favor of Walter Bau, a German company involved in a road project in Thailand.[108] The Second Circuit criticized the district court for "refus[ing] to determine independently whether the tollway project involved 'approved investments' [under the BIT] without first finding clear and unmistakable evidence of the parties' intent to submit that question to arbitration."[109] Nonetheless, the Second Circuit rejected the appeal, finding that the parties' agreement to use the UNCITRAL Arbitration Rules constituted such evidence.[110]

### B. Foreign Court Judgments

In *Chevron Corp. v. Naranjo*, the Second Circuit considered the district court's grant of a preliminary injunction barring attempts to enforce outside of Ecuador an allegedly fraudulent judgment entered by an Ecuadorian court against Chevron.[111] The Second Circuit reversed the district court, finding that New York's Foreign Money Judgments Recognition Act did not support Chevron's suit, which Chevron preemptively filed before the judgment-creditors had even sought enforcement in New York or elsewhere.[112] Stating that the Recognition Act does "not create an affirmative cause of action to declare foreign judgments void and enjoin their enforcement," the Second Circuit vacated the injunction and remanded to the district court with instruction to dismiss.[113]

## VIII. Forum Non Conveniens

In *Ferraz v. Republic of Peru*, the Second Circuit considered the application of the forum non conveniens in the context of an action seeking enforcement of a $21 million judgment against a state agency of Peru.[114] Peruvian courts had refused to enforce most of the judgment based on a domestic statute limiting recovery to 3 percent of the Peruvian agency's annual budget.[115] In the enforcement action in New York, Peru invoked forum

105. *Id.* at 1369.
106. *Id.* at 1369-71.
107. *Id.* at 1371-72.
108. Schneider v. Kingdom of Thai., 688 F.3d 68, 71-72 (2d Cir. 2012).
109. *Id.* at 72 (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943-44 (1995)).
110. *Id.* at 72-74.
111. Chevron Corp. v. Naranjo, 667 F.3d 232, 239-44 (2d Cir. 2012).
112. *Id.* at 240.
113. *Id.*
114. Ferraz v. Rep. of Peru, 665 F.3d 384, 386-87 (2d Cir. 2011).
115. *Id.* at 387-88.

non conveniens, arguing that the district court should decline to exercise jurisdiction out of deference for the domestic policies reflected within Peru's judgment-limiting statute.[116] The Second Circuit agreed that there was "a public interest in assuring respect for a sovereign nation's attempt to limit the rate at which its funds are spent to satisfy judgments" and dismissed.[117] The court affirmed that forum non conveniens is a "procedural rule" that can block enforcement of a judgment under the New York Convention.[118]

In *In re West Caribbean Airways*, representatives of individuals killed in an airline crash while en route from Panama to Martinique brought suit in the Southern District of Florida under the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention).[119] The district court dismissed under *forum non conveniens* in favor of the alternative forum of Martinique.[120] After the Eleventh Circuit affirmed dismissal, the plaintiffs filed suit in Martinique and subsequently convinced Martinique's highest court to dismiss the case on the theory that Southern District of Florida was the proper forum under the Montreal Convention (i.e. the treaty interpretation that the Eleventh Circuit had rejected).[121] The plaintiffs then moved for the district court in Florida to vacate its dismissal in light of the "exceptional circumstances" and forum unavailability wrought by the Martinique ruling.[122] The district court refused, finding that while principles of comity require federal courts to respect the rulings of foreign courts regarding their domestic laws, the same does not hold true for their interpretations of international treaties.[123] Rather, in matters of international law, "neither court is bound by the analysis of the other."[124] The district court consequently felt free to maintain its finding of Martinique as an "available" forum despite the Martinique high court's contrary conclusion.[125] The district court also based its decision on the exceptional circumstances that "even assuming Plaintiffs face some hardship, they invited it" by contesting jurisdiction in the alternate forum.[126]

In an important development, the Ninth Circuit recently declined to reconsider its decision in *Carijano v. Occidental Petroleum Corp.*[127] The district court had dismissed the plaintiffs' environmental claims for forum non conveniens without first examining its own subject matter jurisdiction[128] — a practice permitted where the "foreign tribunal is plainly

116. *Id.* at 391.

117. *Id.* at 392 (stating "We agree . . . that the cap statute is a highly significant public factor warranting [forum non conveniens] dismissal.").

118. *Id.*

119. *In re* West Caribbean Airways, No. 06-22748-CIV, 2012 WL 1884684, at *1 (S.D. Fl. May 16, 2012) (Order on Motion to Vacate).

120. *Id.* at *2.

121. *Id.* at *4-6.

122. *Id.* at *6.

123. *Id.* at *7.

124. *Id.*

125. *See id.*

126. *See id.* at *7-10 (finding that "[E]ven where there is a barrier to jurisdiction in the alternate forum, this Court is entitled to make an independent evaluation of availability," and citing other cases where courts refused to recognize forum unavailability where plaintiffs had a hand in rendering the forum unavailable).

127. Carijano v. Occidental Petrol. Corp., 686 F.3d 1027, 1029 (9th Cir. 2012) (Order Denying Reh'g en Banc), *petition for cert. filed*, No. 12-385, 2012 WL 4467660 (Sept. 27, 2012).

128. *Id.* at 1032 ("The district court did not address standing, and we need not—indeed, could not—do so in the first instance here.").

the more suitable arbiter of the merits of the case."[129] For the purpose of appeal, the Ninth Circuit also assumed its own jurisdiction, reversing the forum non conveniens dismissal and remanding the case to the district court with instructions to evaluate the plaintiff's standing.[130] By declining to rehear *Carijano*, the Ninth Circuit affirmed its position that in some instances, plaintiffs can defeat a motion to dismiss for forum non conveniens without first proving that they are properly before the court.[131]

## IX. Parallel Proceedings

### A. Colorado River Abstention and International Comity

In *Optimum Nutrition, Inc. v. Upper 49th Imports, Inc.*, the District Court for the Northern District of Illinois found that even though an action pending in Canada was parallel to the action before the court, Colorado River[132] abstention was not warranted.[133] While the Canadian action was initiated first, the court noted that no rulings had been made and discovery had not started.[134] The court also noted the presence of "independent non-declaratory claims," which the district court determined that plaintiff should not be required to litigate in Canada.[135]

In *Ajuba Int'l, LLC v. Saharia*, defendants sought Colorado River abstention in favor of a proceeding in India.[136] While acknowledging that the Indian lawsuit was "undeniably related," the District Court for the Eastern District of Michigan found it was not a "parallel proceeding" because neither the parties nor the issues were substantially similar.[137] The court emphasized that "[t]he Indian suit will . . . not address any wrongs committed outside of India," whereas the Michigan suit "seeks recovery for damages caused by Defendants' actions in India, Michigan, and elsewhere."[138]

In *Quanzhou Joerga Fashion Co., Inc. v. Brooks Fitch Apparel Group, LLC*, the District Court for the Southern District of New York interpreted plaintiff's failure to provide the court with a complete overview of ongoing litigation in China as an "implicit application" to dismiss the New York suit in favor of that litigation.[139] The court found China "an adequate forum for litigation of Quanzhou's claims"[140] and found that judicial efficiency would be promoted by deferring to the Chinese courts because the pending Chinese action was filed first and was already in the appellate stage. But because plaintiff raised

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129. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007).
130. Carijano v. Occidental Petrol. Corp., 643 F.3d 1216, 1228 (9th Cir. 2011) (stating that the Ninth Circuit would "assume that Amazon Watch has standing for the purposes of [conducting] the *forum non conveniens* analysis.").
131. *See Carijano*, 686 F.3d at 1031.
132. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813-17 (1976).
133. Optimum Nutrition, Inc. v. Upper 49th Imports Inc., No. 11 C 5674, 2011 WL 5981784, at *2-3 (N.D. Ill. Nov. 29, 2011).
134. *Id.* at *8.
135. *Id.* at *9-10.
136. Ajuba Int'l, LLC v. Saharia, 871 F. Supp. 2d 671, 678-79 (E.D. Mich. 2012).
137. *Id.* at 694.
138. *Id.*
139. Quanzhou Joerga Fashion Co. v. Brooks Fitch Apparel Group, LLC, No. 10 Civ. 9078 MHD, 2012 WL 4767180, at *10-11 (S.D.N.Y. Sept. 28, 2012).
140. *Id.* at *11.

concerns regarding its ability to collect on a judgment, the district court stayed further proceedings rather than dismissing.[141]

### B. Anti-Suit Injunctions

In *H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*,[142] the District Court for the Eastern District of Wisconsin issued a preliminary anti-suit injunction in a trademark action barring defendant from pursuing an action filed in Greece approximately three months after the U.S. filing.[143] After determining that the suit turned on an agreement containing a Wisconsin forum selection clause, the court deemed the Greek lawsuit "vexatious and oppressive" and granted the anti-suit injunction.[144] The Seventh Circuit affirmed.[145]

In *Microsoft Corp. v. Motorola, Inc.*, the Ninth Circuit, on interlocutory appeal, affirmed an anti-suit injunction where defendants filed patent litigation in Germany six months after the filing of the U.S. suit.[146] The Ninth Circuit reaffirmed based on the district court's application of the factors in *E&J Gallo Winery v. Andina Licores S.A.*[147] and emphasized its more recent and refined analysis in *Applied Medical Distribution Corp. v. Surgical Co. BV*.[148] Specifically, the Ninth Circuit concluded that the German and U.S. actions involved the same parties and issues, that the German action was vexatious, and that the impact on comity was tolerable.[149]

In *Travelport Global Distribution Systems B.V. v. Bellview Airlines*, the Southern District of New York issued an anti-suit injunction to prevent prosecution of an action in Nigeria after plaintiff sought to compel arbitration in the United States under an arbitration clause in a distribution agreement.[150] Even though neither party was a U.S. company, the district court issued the injunction, noting that the strong federal policy in favor of arbitration supported the granting of the injunction.[151]

141. *Id.* at *12.

142. H-D Michigan, LLC v. Hellenic Duty Free Shops S.A., No. 11-CV-00742, 2012 WL 404895, at *3 (E.D. Wis. Feb. 7, 2012).

143. *Id.* at *5.

144. *Id.* (noting that plaintiffs had already been subjected to conflicting orders).

145. H-D Michigan, LLC v. Hellenic Duty Free Shops S.A., 694 F.3d 827, 830 (7th Cir. 2012).

146. Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 875 (9th Cir. 2012).

147. E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 991 (9th Cir. 2006).

148. Applied Med. Distrib. Corp. v. Surgical Co. BV, 587 F.3d 909, 913 (9th Cir. 2009).

149. *Microsoft Corp.*, 696 F.3d at 886-87.

150. Travelport Global Distrib. Sys. B.V. v. Bellview Airlines, No. 12 Civ. 3484(DLC) 2012 WL 3925856, at *6-7 (S.D.N.Y. Sept. 10, 2012).

151. *Id.* at *7.