Show Me the Money: Evaluating Personal Jurisdiction over Foreign Nonparty Banks in Light of the *Gucci* Case

Xin Xu†

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Introduction

Three recent cases, all decided between June and September 2015, show that luxury brand owners have developed a new strategy for limiting

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† B.A., University of Rochester, 2014; J.D. Candidate, Cornell Law School, 2017; Managing Editor, *Cornell International Law Journal*, 2016–2017. I thank Professor Kevin M. Clermont and my fellow classmate, Xunming Cui, for their opinions and guidance. I also thank members of the *Cornell International Law Journal* for their invaluable contributions during the editing process. Lastly, I would like to express gratitude to my family and friends for their support and encouragement throughout law school.

counterfeits: they bring lawsuits against individuals responsible for manufacturing and selling counterfeit goods.[1] The defendants in all three cases sold counterfeit versions of the plaintiffs' products on the Internet, including "Gucci" wallets, "Bottega Veneta" handbags, and other luxury brands' jewelry, wallets, and handbags.[2] These cases discuss the issue of whether nonparty foreign banks could be compelled, under U.S. federal civil procedure rules, to produce bank account information of individuals accused to have engaged in counterfeit activities.[3] Although the three cases share almost identical facts, in 2011, three Southern District of New York judges released differing opinions on this issue.[4]

In *Tiffany (NJ) LLC v. Qi Andrew*,[5] the court held that before asking the court to issue a federal subpoena under Federal Rule of Civil Procedure, Rule 45 ("FRCP 45"), plaintiffs should first request information located in China through the Hague Convention.[6] The court noted that plaintiffs may renew their applications to enforce a federal subpoena if such a process proved futile.[7]

On the other hand, in *Gucci America, Inc. v. Weixing Li* ("*Gucci I*"),[8] the court ordered the nonparty, Bank of China ("BOC"), to produce documents located in China pursuant to FRCP 45, reasoning that a Hague Convention request through the Chinese government would not be a "viable alternative."[9]

In another similar case initiated by Tiffany, *Tiffany (NJ) LLC v. Forbse*,[10] the court diverged from two previous cases and ruled that the BOC would be required to produce documents through the preliminary injunction order's discovery provision, while the two other Chinese banks could produce documents through a Hague Convention request.[11]

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1. *See* Minning Yu, Note, *Benefit of the Doubt: Obstacles to Discovery in Claims Against Chinese Counterfeiters*, 81 FORDHAM L. REV. 2987, 2996–97 (2013).

2. Gucci Am., Inc. v. Bank of China (*Gucci II*), 768 F.3d 122, 125 (2d Cir. 2014).

3. Megan C. Chang & Terry E. Chang, *Brand Name Replicas and Bank Secrecy: Exploring Attitudes and Anxieties Towards Chinese Banks in the Tiffany and Gucci Cases*, 7 BROOK. J. CORP. FIN. & COM. L. 425, 425 (2012).

4. *Id.*

5. Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 160–61 (S.D.N.Y. 2011).

6. FED. R. CIV. P. 45; Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter *Hague Convention*].

7. *Qi Andrew*, 276 F.R.D. at 160–61. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, to which the U.S. is also a party, was signed by the People's Republic of China in 1991 and ratified in 1992. *See Status Table, 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HAGUE CONF. ON PRIVATE INT'L L. (Oct.13, 2015), http://www.hcch.net/index_en.php?act=conventions.status&cid=17.

8. Gucci Am., Inc. v. Weixing Li (*Gucci I*), No. 10 Civ. 4974 (RJS), 2011 U.S. Dist. LEXIS 97814 (S.D.N.Y. Aug. 23, 2011).

9. *Id.* at *27, *38.

10. Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976 (NRB), 2012 U.S. Dist. LEXIS 72148 (S.D.N.Y. May 23, 2012).

11. *Id.* at *39.

Nonparty BOC appealed both decisions in *Gucci I* and *Forbse*.[12] On appeal, the Second Circuit Court of Appeals in *Gucci America, Inc. v. Bank of China* ("*Gucci II*") remanded both cases.[13] The court reasoned that because the decisions in *Gucci I*, *Forbse*, and *Qi Andrew* were decided based on a presumption that was later overruled in *Daimler AG v. Bauman*,[14] the district court should reconsider whether it could exercise specific personal jurisdiction over nonparty foreign banks based on the activities of the banks' in-state branches.[15]

On remand, the district court in *Gucci America, Inc. v. Weixing Li* ("*Gucci III*")[16] held that because New York's long-arm statute provides a statutory basis for exercising personal jurisdiction and the exercise of such specific personal jurisdiction comports with constitutional due process and principles of comity, the court could exercise specific personal jurisdiction over BOC.[17] BOC was then compelled to produce the requested documents pursuant to FRCP 45, including those located at the BOC's headquarters in China.[18]

Gucci III exemplifies one way district courts approach personal jurisdiction issues over a nonparty foreign bank in the post-*Daimler* era.[19] Given the case implications and the party involved, the decision will expectedly attract media attention and inspire discussion among practitioners.[20] The *Gucci* case highlights the uneasy relationship between nonparty discovery and personal jurisdiction. Although the Supreme Court has yet to address whether U.S. courts have specific jurisdiction over non-

12. *See* Gucci Am., Inc. v. Bank of China (*Gucci II*), 768 F.3d 122, 125 (2d Cir. 2014).

13. Tiffany (NJ) LLC v. China Merchants Bank, 589 Fed. Appx. 550, 551 (2d Cir. 2014); *Gucci II*, 768 F.3d at 145.

14. Daimler AG v. Bauman, 134 S. Ct. 746, 759–60 (2014) (holding that a foreign corporation may not be subjected to a court's general jurisdiction solely based on the contacts of its in-state subsidiary).

15. *Gucci II*, 768 F.3d at 145.

16. Gucci Am., Inc. v. Weixing Li (*Gucci III*), No. 10 Civ. 4974 (RJS), 135 F. Supp. 3d 87 (S.D.N.Y. Sept. 29, 2015).

17. *Id.* at 96, 101, 104.

18. *Id.* at 104.

19. On remand, plaintiff Tiffany in both cases moved to default judgment, which left the issue regarding specific personal jurisdiction over nonparty banks premature. *See* Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976 (NRB), 2015 U.S. Dist. LEXIS 129647, at *1–11 (S.D.N.Y. Sept. 22, 2015) (granting plaintiff's motion of default judgment without discussing issues of specific personal jurisdiction over the nonparty banks); Tiffany (NJ) LLC v. Qi Andrew, No. 10 Civ. 9471 (KPF) (HBP), 2015 U.S. Dist. LEXIS 77391, at *37 (S.D.N.Y. June 15, 2015) (declining to address the issues raised by the banks concerning personal jurisdiction and comity).

20. For examples of media coverage and law firm publications, see Erika Kinetz, *Bank of China Ordered to Release Counterfeiter's Records*, Associated Press (Oct. 7, 2015, 12:16 AM), http://bigstory.ap.org/article/008d86537c0b4d40b8d2d9a95c34c861/bank-china-ordered-release-counterfeiters-records; Owen Pell et al., *The Second Circuit Limits the Power of Courts to Enforce Asset Restraints and Discovery Orders Against Foreign Banks*, White & Case, http://www.whitecase.com/publications/alert/second-circuit-limits-power-courts-enforce-asset-restraints-and-discovery-orders (last visited Oct. 15, 2015).

parties,[21] lower federal courts have tackled the issue by applying the same test they use to determine jurisdiction over civil defendants, whether domestic or foreign.[22] As the Second Circuit has recognized, there is no case on point regarding whether the exercise of personal jurisdiction is appropriate in the context of a *foreign* nonparty with only limited contacts in the forum.[23] With the growing volume and complexity of international litigation in American courts,[24] it would be important to assess such a test and provide clear and consistent guidance to future nonparties, because parties increasingly request documents from (distant) nonparties, such as Chinese banks.

This Note assesses the specific personal jurisdiction test for foreign nonparties applied in *Gucci III*. It argues that nonparties do not have a stake nor an interest in the conflict and that the exercise of specific personal jurisdiction has an extraterritorial effect affecting the sovereignty of other nations when weighed against the "traditional notion of fair play and substantial justice" due process demands.[25] Part I of this Note recounts the recent development of Supreme Court cases regarding personal jurisdiction over parties. Part II briefly discusses how lower courts treat domestic nonparties for jurisdictional purposes; it then proposes a revised personal-jurisdiction analysis designed for foreign nonparties. Part III discusses the facts and courts' analyses of the *Gucci II* and *Gucci III* cases. Part IV discusses the problems with the current analysis as applied to BOC as a foreign nonparty in the *Gucci III* case and how courts should rule under the proposed revised scheme. Part V discusses the potential consequences of upholding specific personal jurisdiction over foreign nonparties. The Note concludes that due process imposes limitations on personal jurisdiction over foreign nonparties, and that minimum contacts analysis should apply to foreign nonparties. The Note proposes that when assessing whether the court should exercise specific personal jurisdiction over a foreign nonparty, however, the court should differentiate foreign nonparties from defendants on both the minimum contacts framework and reasonableness prong by assigning more weight to international rapport and the fact that nonparties have no stake or interest in the conflict.

I. From *International Shoe* to *Daimler*: Modern U.S. Jurisprudence of Personal Jurisdiction

A. Minimum Contact

In *Pennoyer v. Neff*,[26] the Supreme Court held that a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the

21. Gucci Am., Inc. v. Bank of China (*Gucci II*), 768 F.3d 122, 136 (2d Cir. 2014).
22. *Id.* at 136–37.
23. *Id.* at 137–38.
24. *See, e.g.*, John H. Robinson, *The Extraterritorial Application of American Law: Preliminary Reflections*, 27 J.C. & U.L. 187, 203 (2000).
25. International Shoe v. Washington, 326 U.S. 310, 316 (1945).
26. Pennoyer v. Neff, 95 U.S. 714 (1878).

forum.[27] With time, however, that rigid territorial focus yielded to a less strict approach, spurred by "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity."[28]

The Supreme Court introduced the touchstone modern due process principle in *International Shoe Co. v. Washington*[29] and held that before a court may exercise jurisdiction over a person or an organization, that person or entity must have sufficient minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[30] Following *International Shoe*, the central concern of personal jurisdiction inquiries has focused on "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the state on which the rules of *Pennoyer* rest."[31]

Professors Arthur von Mehren and Donald Trautman first proposed the terms "general jurisdiction" and "specific jurisdiction" to categorize courts' treatment of personal jurisdiction over out-of-state defendants.[32] The Supreme Court adopted their formulations nearly forty years after *International Shoe* in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[33] and for the first time, differentiated between general and specific jurisdiction.[34] In *Helicopteros*, the Court concluded that the forum state has "specific jurisdiction" over a defendant in a suit arising out of or related to the defendant's contacts with the forum, and the forum state has "general jurisdiction" over a defendant in a suit not arising out of or related to the defendant's contacts with the forum.[35]

In a line of cases addressing specific jurisdiction, the Supreme Court distilled the minimum contacts inquiry to two issues: (1) the "purposeful availment" prong, whereby the court determines whether the defendant purposefully directed his activities in the forum;[36] and (2) the "related-

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27. *Id.* at 720; *see also* Shaffer v. Heitner, 433 U.S. 186, 197 (1977) (holding that under *Pennoyer*, "any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister states and exceed the inherent limits of the state's power").

28. Burnham v. Superior Court of California, 495 U.S. 604, 617 (1990).

29. *See International Shoe*, 326 U.S. at 316.

30. *Id.*

31. *Shaffer*, 433 U.S. at 204.

32. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). This article is the most cited source in Justice Ginsburg's majority opinions addressing the personal jurisdiction issue. Harvard Law Review, *Daimler AG v. Bauman*, 128 HARV. L. REV. 311, 318 (2014) (noting that von Mehren and Trautman's thinking influenced Justice Ginsburg's view of personal jurisdiction).

33. *See* Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414 (1984).

34. *Id.* at 414 nn.8-9.

35. *Id.*

36. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958). The Supreme Court has subsequently enforced this requirement of purposeful availment in several cases. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (holding that when a

ness" prong, whereby the court determines whether the litigation results from alleged injuries that arise out of or are related to those activities in the forum.[37]

To address whether exercising general jurisdiction over a non-resident defendant is proper, the Supreme Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*[38] refined the *International Shoe* standard to require that the contacts be "so continuous and systematic as to render them essentially at home in the forum state."[39] The *Goodyear* Court explained that general jurisdiction exists for an individual when the forum state is the individual's domicile; the Court also explained that general jurisdiction exists over a corporation when the forum state is a place that the corporation is fairly regarded as at home.[40] Importantly, *Goodyear* emphasized that specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction has played a reduced role.[41]

Although *Goodyear* recognized that general jurisdiction exists at the corporation's place of incorporation and principal place of business, the opinion did not restrict general jurisdiction to those "paradigm" places.[42] The Supreme Court clarified *Goodyear* in *Daimler AG v. Bauman* by holding that Daimler AG ("Daimler"), a German public stock company, could not be subjected to California's general jurisdiction in a suit filed by Argentine plaintiffs over events occurring entirely outside the United States.[43] The Court reasoned that Daimler was not "at home" in California, even assuming that Daimler's U.S. subsidiary was "at home" in California and that the U.S. subsidiary's contact could be imputed to it on an agency theory.[44] In sum, *Daimler* closes the door on expanding general personal jurisdiction for corporations by reaffirming the restrictive test articulated in *Goodyear* that foreign corporations are not subject to general personal jurisdiction in a state unless they are "essentially at home" in that state—general jurisdiction exists for a corporation when the forum state is its principal place of business or the place of incorporation.[45] *Daimler* fur-

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corporation purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit in that state); Rush v. Savchuk, 444 U.S. 320, 329 (1980) (noting that the defendant had not engaged in any purposeful availment related to the forum that would make the exercise of jurisdiction reasonable); Kulko v. California Superior Court, 436 U.S. 84, 94 (1978) (noting that it is essential that defendants purposefully avail themselves of the privileges of conducting activities within the forum state to justify bringing them to suit there).

37. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). *International Shoe* created the concept of relatedness, requiring the defendant to be connected to the litigation. *See* International Shoe v. Washington, 326 U.S. 310, 316-18 (1945).

38. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

39. *Id.* at 2851.

40. *Id.* at 2853-54.

41. *Id.* at 2854; *see also* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988).

42. *See Goodyear*, 131 S. Ct. at 2854.

43. Daimler AG v. Bauman, 134 S. Ct. 746, 753-63 (2014).

44. *See id.* at 759-61.

45. *See id.* at 754.

ther clarified that where the alter ego test[46] is not satisfied, a corporate subsidiary's sizeable sales in the forum state or the importance of its services to its parent are not sufficient to support general jurisdiction over a foreign parent corporation.[47] *Daimler* reiterated the Supreme Court's position on personal jurisdiction in *Goodyear* by concluding that general jurisdiction has played a reduced role in modern jurisdiction theory.[48]

B. Reasonableness

Having established sufficient minimum contacts with the forum state, a court then considers several additional factors to assess the reasonableness of exercising specific jurisdiction over the defendant.[49] In *World-Wide Volkswagen*, the Supreme Court listed several factors while considering the reasonableness of jurisdiction: (1) "the burden on the defendant," (2) "the forum state's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) the "shared interest of the several states in furthering fundamental substantive social policies."[50] However, in contrast to the burden of establishing sufficient minimum contacts with the forum state, which is placed on the plaintiff, the burden to persuade the court that the exercise of specific jurisdiction is unreasonable belongs to the defendant.[51] Therefore, when a plaintiff has shown that a defendant has purposefully directed his activities in a forum state, the defendant must present a *compelling* case that the presence of some other considerations would render jurisdiction unreasonable.[52] On the other hand, if a plaintiff presents a lesser showing of minimum contacts than would otherwise be required, the considerations suggested in *World-Wide Volkswagen* would sometimes serve to establish the reasonableness of jurisdiction.[53] Justice Brennan quietly reiterated this in the *Burger King* opinion to undermine the minimum contacts test so that a defendant's insufficient minimum contacts would not be fatal, perhaps even doing so unethically.[54] Although subsequent cases have ignored this part of *Burger King*, the Supreme Court has not overruled that holding,

46. The two prongs of the "alter ego" test are as follows: "(1) that there is such unity of interest and ownership that the separate personalities of the two entities no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice. The first prong of this test has alternately been stated as requiring a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former." Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 920 (9th Cir. 2011) (citing Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001)).

47. *See Daimler*, 134 S. Ct. at 759–61.

48. *See Goodyear*, 131 S. Ct. at 2854.

49. *Daimler*, 134 S. Ct. at 762 n.20. The reasonableness test will only be invoked in a case where the court is exercising specific jurisdiction. When a corporation is determined to be genuinely "at home" in the forum state, "any second-step inquiry [of reasonableness] would be superfluous." *See id.*

50. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

51. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

52. *Id.*

53. *Id.*

54. *See id.*

and it is therefore still good law. Notably, in situations where defendants purposefully engage in forum activities, defendants may still defeat specific jurisdiction if the exercise of jurisdiction would be unreasonable.[55]

The Supreme Court in *Asahi Metal Industry Co. v. Superior Court of California* specifically addressed the reasonableness prong in evaluating the exercise of personal jurisdiction over a foreign country defendant.[56] Although the *Asahi* court did not agree on the minimum contact analysis, eight justices agreed that the assertion of personal jurisdiction over a Japanese defendant was unreasonable and unfair, so as to violate the Due Process Clause of the Fourteenth Amendment.[57]

In *Asahi*, Gary Zurcher was severely injured and his wife was killed after the motorcycle that they were riding collided with a tractor on a California highway.[58] Zurcher filed a products liability suit in California state court, alleging that the motorcycle tire, tube, and sealant were defective.[59] Zucher named Cheng Shin Rubber Industrial, Co., Ltd., the Taiwanese manufacturer of the tube, as a defendant.[60] Cheng Shin then filed a third-party cross-complaint against Asahi Metal Industry Co., Ltd., the Japanese corporation that manufactured the valve assembly of the tube.[61] Asahi moved to quash the service of this third-party complaint, arguing that the California court could not assert personal jurisdiction over it.[62] In support of this motion, Asahi's president submitted an affidavit indicating that Asahi never contemplated that it could be subject to suit in California through Asahi's sales of tire valves to Cheng Shin in Taiwan.[63] The California court denied the motion and the Supreme Court of the United States granted certiorari.[64]

When addressing the reasonableness prong, the *Asahi* court first considered the "severe" burden California litigation would impose upon Asahi and noted that Asahi not only had to travel the distance between Japan and California, but also submit the dispute with Cheng Shin to a foreign nation's judicial system.[65] The Court noted that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should

55. *Burger King*, 471 U.S. at 477–78. Assertion of specific jurisdiction, which is determined to be unreasonable, would contradict the traditional notion of "fair play and substantial justice." *Id.* at 476 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

56. *See* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 113–15 (1987).

57. *Id.* at 116. Justice Scalia concurred with this portion of Justice O'Connor's opinion, finding that there were constitutionally insufficient minimum contacts. *Id.* at 121–22.

58. *Id.* at 105.

59. *Id.* at 106.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 107.

64. *Id.* The case went to the Supreme Court of the United States after the Supreme Court of California reversed and discharged the writ issued by the Court of Appeal of the State of California, which commended the Superior Court to quash service of summons. *Id.* at 107–08.

65. *Id.* at 114.

have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[66]

The Court then assessed the interests of both the plaintiff and the forum and held that such interests played a slight role in the jurisdictional question over Asahi.[67] The court emphasized that Cheng Shin, as the third-party plaintiff, had not demonstrated that it would be more convenient to litigate its claim against Asahi in California rather than in Taiwan or Japan.[68]

Finally, the Supreme Court was extremely concerned about "the interests of the 'several states,' . . . in the efficient judicial resolution of the dispute and the advancement of substantive police."[69] Given the international components of the case, the Court explicitly held that in the international context, the procedural and substantive interests of other nations in a court's assertion of jurisdiction over an alien defendant as well as the Federal Government's interest in its foreign relations policies, deserved a careful inquiry into the reasonableness of the assertion of jurisdiction.[70] Having conducted thorough analysis of the reasonableness prong in evaluating the assertion of personal jurisdiction over Asahi, the Court had no difficulty concluding that the exercise of personal jurisdiction was unreasonable.[71]

II. Revised Personal Jurisdiction over Foreign Nonparties

Although the above-discussed framework is well suited for determining whether a court could assert jurisdiction over a foreign defendant, the Supreme Court has not addressed specific jurisdiction over nonparties.[72] The case that comes closest is *Philips Petroleum Co. v. Shutts*,[73] in which the Court considered whether due process protection could be applied to a non-defendant.[74] In that case, the defendant argued that the Kansas court lacked personal jurisdiction over absent non-named class-action plaintiffs, who automatically joined the case through a class "opt out" notice and lacked any pre-litigation contacts with the forum state.[75] The Supreme Court upheld the Kansas trial court's assertion of personal jurisdiction over absent non-named class-action plaintiffs, reasoning that although the

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 115.
70. *Id.*
71. *Id.* at 116.
72. Gucci Am., Inc. v. Bank of China (*Gucci II*), 768 F.3d 122, 136 (2d Cir. 2014). The preferred route for roping foreign nonparties into general jurisdiction is specific jurisdiction, mainly because for a corporation, the paradigm forum for the exercise of general jurisdiction is one in which the corporation is fairly regarded as at home. As a result, there would be many less-qualified forums to subject foreign nonparties to general jurisdiction as compared to the number of forums to subject foreign nonparties to specific jurisdiction.
73. Philips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).
74. *See generally id.*
75. *Id.* at 802.

minimum contacts analysis was originally designed to protect defendants from litigation in a distant forum,[76] "[t]he Fourteenth Amendment does protect 'persons,' not 'defendants.'"[77] Specifically, the Court reasoned that the Due Process Clause does not and need not afford an absent class plaintiff as much protection from state-court jurisdiction as it does an absent defendant in non-class suit.[78] Therefore, a state places fewer burdens upon the former than it does upon the latter.[79] Only a minimum procedural due process protection, rather than minimum contacts, is required for a forum state to exercise jurisdiction over the claim of an absent class plaintiff.[80]

In assessing the question whether federal courts may properly exercise jurisdiction over a *domestic* nonparty, the courts have adapted the similar minimum contacts test used for defendants.[81] In the international context, the Ninth Circuit in *Reebok Int'l Ltd. v. McLaughlin* concluded that district courts lack the specific personal jurisdiction to order *foreign* nonparty banks without contacts in the United States to comply with an asset freeze injunction.[82] *McLaughlin*, however, does not provide much guidance on how to conduct the minimum contacts analysis in the context of a foreign nonparty with only limited contacts in the forum state. First, the district court found that the foreign nonparty had a "super contact" with the forum state, because defendant's act of assisting in an injunction violation through aiding and abetting amounted to a contact, albeit significantly different from the traditional meaning of "contact" under the minimum contacts framework.[83] Second, the Ninth Circuit held that the district court lacked specific personal jurisdiction mainly because of international comity considerations—the court emphasized that the simple fact that "the mandate of an injunction issued by a federal district court runs nationwide" did not apply to a situation where "[a] national of a foreign country . . . followed the law . . . of its own country . . . when it did acts within that country."[84] No other case has applied this analysis in the context of a foreign nonparty with only limited contacts in the forum state.[85] Law review articles have addressed this issue narrowly, determining the applicability of specific jurisdiction over a nonparty when assessing the nonparty

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76. *Id.* at 807.

77. *Id.* at 811.

78. *Id.*

79. *Id.*

80. *Id.*

81. Gucci Am., Inc. v. Bank of China (*Gucci II*), 768 F.3d 122, 137 (2d Cir. 2014). These courts first evaluate the relevance between the nonparty's contacts with the forum state and the order at issue, and then decide whether asserting jurisdiction for the purpose of the order would be consistent with fair play and substantial justice. *See, e.g.*, Application to Enforce Administrative Subpoenas Duces Tecum of the S.E.C. v. Knowles, 87 F.3d 413, 418 (10th Cir. 1996) (upholding specific jurisdiction where the "subpoena enforcement action" at issue "ar[ose] out of [the nonparty's] contacts" with the forum).

82. *See* Reebok Int'l Ltd. v. McLaughlin, 49 F.3d 1387, 1391–95 (9th Cir. 1995).

83. *See id.* at 1391.

84. *See id.* at 1391, 1394.

85. *Gucci II*, 768 F.3d at 137.

discovery requests.[86]

Therefore, much discussion is needed on the injury of how to evaluate specific jurisdiction over foreign nonparties in general. This Note proposes that the due process minimum contacts analysis should still apply to foreign nonparties, albeit with some alterations to reflect parties and nonparties' differing interests in the underlying lawsuit. The adequate minimum contacts analysis for foreign nonparties would focus on: (1) nonparties' contacts with the forum state and (2) the relatedness between such contacts and the party's cause of action.

Regarding the reasonableness inquiry, the five-factor balancing test outlined in *World-Wide Volkswagen*[87] should be adjusted to reflect the difference between the foreign nonparty and the defendant. Explicitly, when determining whether to exercise personal jurisdiction over a foreign nonparty, the reasonableness prong's balancing test should involve the following: (1) "the burden on the [foreign nonparty],"[88] (2) the nonparty's interest in not being involved with the plaintiff's lawsuit, (3) "the forum state's interest in adjudicating the dispute,"[89] (4) "the plaintiff's interest in obtaining convenient and effective relief,"[90] (5) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies,"[91] (6) the procedural and substantive interests of other nations in a court's assertion of jurisdiction over an alien nonparty,[92] and (7) the federal government's interest in its foreign relations policies.[93] Although the last two factors were explicitly articulated under the due process reasonableness prong in *Asahi*, federal courts usually either neglect analyzing them or discuss them separately in the international comity analysis.[94]

A. Minimum Contacts for Foreign Nonparty

As previously discussed, in *Philips Petroleum*, the Supreme Court held that because the Fourteenth Amendment protects "persons," as opposed to only "defendants," the Due Process Clause protection, and by extension, the minimum contacts framework, extends to plaintiffs as well.[95] Along the same line of reasoning, the minimum contacts framework should also

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86. *See, e.g.*, Ryan W. Scott, Note, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 Minn. L. Rev. 968, 1005–06 (2004).

87. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 115 (1987).

93. *Id.*

94. *See, e.g.*, Gucci Am., Inc. v. Weixing Li (*Gucci III*), No. 10 Civ. 4974 (RJS), 135 F. Supp. 3d 87, 94 (S.D.N.Y. Sept. 29, 2015) (explicitly declining to consider China's substantive interest in the Chinese bank secrecy law, in the context of assessing the reasonableness of an exercise of personal jurisdiction); *see also* Ballard v. Savage, 65 F.3d 1495, 1501 (9th Cir. 1995) (holding that "[a]ny clash between the forum law and the substantive policies of another state" should be considered through choice-of-law rule rather than through personal jurisdiction analysis).

95. *See* Philips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

apply to foreign nonparties. Seventy years after *International Shoe*, the minimum contacts framework has become the only modern standard for evaluating personal jurisdiction under the Due Process Clause[96] and there is no sign that the Court will deviate from its current personal jurisdiction's jurisprudence.[97] Therefore, unless the Court changes direction, the minimum contacts analysis must serve as the incumbent technique when evaluating personal jurisdiction over both defendants and foreign nonparties. Specifically, the "purposeful availment" prong should remain the same in the context of foreign nonparties, so courts can determine whether the foreign nonparties' in-forum conducts were "deliberate and recurring," rather than "random, isolated[,] or fortuitous."[98]

The second prong of the minimum contracts inquiry, relatedness, should be modified to reflect the difference between parties and nonparties. In the context of a foreign nonparty, the appropriate inquiry for the "relatedness" prong should assess the relatedness between a *nonparty*'s in-forum activities and the parties' cause of actions in the underlying lawsuit.[99] More specifically, the court should evaluate whether a plaintiff's causes of action fall within a nonparty's foreseeable zone-of-risk based on its in-forum contacts. This modified relatedness prong allows courts to determine whether the controversy in the underlying lawsuit arose out of or related to the nonparty's in-forum conducts. This reading of the relatedness prong is consistent with its meaning in the context of a defendant, in which a state can exercise specific jurisdiction over a defendant when the cause of action "arise[s] out of or relate[s] to the defendant's contacts with the forum."[100] Indeed, the foreseeable-zone-of-risk standard complies with the due process demands because it provides a nonparty an opportunity to assess to what extent it should operate its business in the forum state so that it "should reasonably anticipate being haled into court there."[101]

B. Reasonableness for Foreign Nonparty

Most factors of the modified balancing test of assessing the specific jurisdiction over a foreign nonparty are similar to those articulated in the previous section adopted for assessing the specific jurisdiction over a defendant. The only differences are the following factors: (2) the non-

96. *See* Twitchell, *supra* note 41, at 611; Scott, *supra* note 86, at 1003.

97. *See generally* Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (adopting the minimum contacts framework in the most recent case involving the issue of personal jurisdiction).

98. Licci v. Lebanese Canadian Bank, 732 F.3d 161, 171 (2d Cir. 2013); *Gucci III*, 135 F. Supp. 3d at 97.

99. *See* Ramirez v. Lagunes, 794 S.W.2d 501, 504 (Tex. App. 1990) (dismissing a bill of discovery against a nonparty bank for lack of personal jurisdiction, holding that "merely locating monies in a Texas bank account did not invoke the court's jurisdiction because . . . the cause of action [for divorce did not arise] from the opening of those accounts").

100. *See* Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

101. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

party's interest in not being involved with the plaintiff's lawsuit, (6) other nations' procedural and substantive interests in a court's assertion of jurisdiction over an alien nonparty, which replaces the original factor of "shared interest of the several states in furthering fundamental substantive social policies," and (7) the Federal Government's interest in its foreign relations policies. Because "the burden on the [foreign nonparty]" analysis is not significantly different from the original "burden on the defendant" analysis, it is not listed as a difference.

To accurately reflect the difference between a defendant and a nonparty, a nonparty's interest in not being involved with the plaintiff's lawsuit should be assessed closely within the minimum contacts framework. When determining whether exercising personal jurisdiction over a nonparty would accord with the "fair play and substantial justice" overall due process demands, a court should recognize that nonparty status might affect the equities of asserting jurisdiction.[102] On the one hand, a "person who is subjected to liability . . . far from home may have better cause to complain of an outrage to fair play" than a nonparty.[103] In such a situation, a court should have little difficulty exercising specific jurisdiction over a nonparty, assuming the purposeful availment prong and relatedness prong are both satisfied. On the other hand, "a nonparty with few if any connections to the activities giving rise to the suit may have a strong interest in its freedom to take actions that are 'genuinely independent' of any intent to frustrate a court's injunction."[104] In the nonparty discovery context, some courts recognize that, unlike parties who would expect invasive discovery in modern litigation, "[n]onparties have a different set of expectations," and "concerns for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs."[105] In this situation, a court should give due concern to a nonparty's interest in not being involved with the plaintiff's lawsuit.

When a nonparty has only limited, yet sufficient, minimum contacts with a forum, and a plaintiff's injury does not arise out of the nonparty's in-forum contacts, a court should weigh heavily the nonparty's interest in its freedom and should treat such a nonparty as a complete stranger to the lawsuit. In this case, the court should be more reluctant to exercise specific personal jurisdiction. On the other hand, when a nonparty's contacts with the forum are more substantial, and a plaintiff's injury falls within the nonparty's foreseeable zone-of-risk, the nonparty's "complaint of an outrage to fair play" should weigh less. In such a scenario, the court should treat the nonparty as a party and feel more comfortable exercising specific personal jurisdiction.

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102. Gucci Am., Inc. v. Bank of China (*Gucci II*), 768 F.3d 122, 137 n.17 (2d Cir. 2014).

103. First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 20 (2d Cir. 1998).

104. *Gucci II*, 768 F.3d at 137 n.17 (citing Heyman v. Kline, 444 F.2d 65, 65–66 (2d Cir. 1971)).

105. Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998); *see* Haworth, Inc. v. Herman Miller, Inc., 998 F.2d 975, 978 (Fed. Cir. 1993); Dart Indus. Co. v. Westwood Chem. Co., 649 F.2d 646, 649 (9th Cir. 1980).

In the context of a foreign nonparty, and especially when the subject matter jurisdiction is based on a federal question,[106] a court, in the reasonableness inquiry, should consider both (1) the procedural and substantive interests of other nations which are affected by the assertion of jurisdiction, and (2) the federal government's interest in its foreign relations policies.[107] Although these two factors are similar to those of the international comity analysis,[108] a court should consider them in the due process framework instead. Due process concerns relate to a court's *power* over a foreign nonparty, and the Fourteenth Amendment's Due Process Clause limits state courts' power to exercise personal jurisdiction over an entity.[109] In contrast, international comity, in the legal sense, is not "a matter of absolute obligation,"[110] and therefore state courts do not have an obligation to conduct international comity analysis.

Meanwhile, the Supreme Court's intention to include those two factors as a part of due process demands is clear. In *Asahi*, the Court explicitly explained that a court in evaluating the reasonableness in exercising personal jurisdiction over a defendant should take into consideration the interests of the "several [s]tates," and when the entity is an international one, the court should consider such interests as "the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction."[111] Moreover, the *Asahi* Court also held that "the

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106. When the subject matter is a federal question, the United States' substantive interests in enforcing U.S. law become much stronger than in the context of diversity jurisdiction.

107. Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 115 (1987).

108. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403. Section 403(2) identifies eight non-exclusive factors of the international comity analysis to be evaluated when determining whether a court should exercise jurisdiction over an entity in a given case:

> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of the regulation to the international political, legal, or economic system;
> (f) the extent to which the regulation is consistent with the traditions of the international system;
> (g) the extent to which another state may have an interest in regulating the activity; and
> (h) the likelihood of conflict with regulation by another state.

Id.

109. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

110. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 543 n.27 (1987).

111. *Asahi Metal Indus. Co.*, 480 U.S. at 115 (emphasis added).

Federal interest in Government's foreign relations policies [would] be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case."[112] The same reasoning is reinforced in the recent *Daimler* case.[113]

III. *Gucci* on Appeal and Remand

A. Background of *Gucci* cases

In or around June 2010, Gucci and its affiliates ("plaintiffs") discovered that defendants were selling counterfeit versions of plaintiffs' products on the Internet.[114] On June 25, 2010, plaintiffs initiated a lawsuit against defendants pursuant to the Lanham Act, and related state-law causes of action.[115] Plaintiffs presented evidence indicating that the profits from defendants' allegedly illicit operation were wired to specific accounts at the Chinese headquarters of BOC.[116] The district court granted plaintiffs' preliminary injunction request and, following the injunction and pursuant to FRCP 45, plaintiffs served BOC with a subpoena (the "2010 Subpoena") to force BOC to turn over documents related to "any BOC accounts maintained by [d]efendants."[117] The 2010 Subpoena named two specific BOC accounts.[118] In February 2011, plaintiffs served BOC with a second subpoena (the "2011 Subpoena"), which included the two accounts identified in the 2010 Subpoena, along with six additional accounts.[119]

On August 23, 2011, the district court issued an order (the "August 23rd Order") that granted plaintiffs' motion to compel BOC to comply with the 2010 Subpoena and the asset freeze provisions of the injunction.[120] The district court further denied BOC's cross-motion to modify the injunction to try to exclude assets held by BOC in any of its locations in China.[121] Ultimately, BOC produced documents relating to the two accounts identified in the 2010 Subpoena.[122]

On November 30, 2011, BOC moved for reconsideration of the district court's August 23rd Order on the basis that China would likely impose sanctions on BOC if it complied with the Order.[123] To support its motion for reconsideration, BOC cited a November 3, 2011 letter that the district

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112. *Id.*
113. Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014) (quoting *Asahi Metal Indus. Co.*, 480 U.S. at 115) (recognizing that "the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction" was indeed a factor to assess the reasonableness of exercising *specific* jurisdiction over an entity).
114. Gucci Am., Inc. v. Weixing Li (*Gucci III*), No. 10 Civ. 4974 (RJS), 135 F. Supp. 3d 87, 91 (S.D.N.Y. Sept. 29, 2015).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 92.
122. *Id.*
123. *Id.*

court received from the People's Bank of China and the China Banking Regulatory Commission (collectively, the "Chinese Regulators").[124] In the letter, the Chinese Regulators informed the district court that:

> (i) China's banking confidentiality laws prohibit banks such as BOC from disclosing information about accounts located in China or freezing or turning over funds in such accounts pursuant to a U.S. court order; (ii) China has "material interests" in the enforcement of its banking confidentiality laws and the Chinese government believes those laws to be an important part of engendering client confidence in China's relatively undeveloped banking system, thereby promoting its further development; and (iii) U.S. court orders compelling production of bank account information located in China or freezing or turning over assets located in China will have an adverse impact on U.S.-China relations and ongoing efforts to foster cross-border legal cooperation.[125]

The letter also stated that BOC's production of documents identified in the 2010 Subpoena violated Chinese bank secrecy law, and explained that as a result, the Chinese Regulators had issued a stern warning and were evaluating appropriate further sanctions against BOC.[126] In the letter, the Chinese Regulators also expressed commitment to the Hague Convention's procedures for document requests.[127]

On May 18, 2012, the district court denied BOC's motion for reconsideration, and BOC appealed the district court's August 23rd and May 18th orders to the Second Circuit.[128] On September 17, 2014, the Second Circuit affirmed the district court's authority to issue the injunction.[129] Nevertheless, in accordance with the Supreme Court's opinion on general personal jurisdiction in *Daimler*, the Second Circuit vacated the August 23rd and May 18th orders enforcing the injunction and the 2010 Subpoena.[130] The case was then remanded to the district court to consider whether the district court has specific personal jurisdiction over BOC to compel compliance with these orders, and if so, whether exercising such jurisdiction is consistent with international comity.[131]

On December 1, 2014, plaintiffs moved to compel BOC's compliance with the 2010 and 2011 Subpoenas.[132] BOC filed its memorandum of law in opposition to the motion to compel on January 23, 2015, and plaintiffs then filed their reply memorandum of law.[133] After the matter was fully briefed, the district court in *Gucci III* held that it "has specific personal

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124. *Id.*
125. Memorandum of Law in Support of Its Motion for Reconsideration at 4-5, Gucci Am., Inc. v. Weixing Li, No. 10-cv-04974-RJS (S.D.N.Y. Nov. 30, 2011), ECF No. 90 [hereinafter *Letters from Chinese Regulators*] (citations omitted).
126. *Id.* at 5.
127. *Id.*
128. *Gucci III*, 135 F. Supp. 3d at 92.
129. *Id.*
130. *Id.*
131. Gucci Am., Inc. v. Bank of China (*Gucci II*), 768 F.3d 122, 145 (2d Cir. 2014).
132. *Gucci III*, 135 F. Supp. 3d at 92. On remand, plaintiffs did not move to compel BOC to comply with an asset freeze injunction.
133. *Id.*

jurisdiction over BOC with respect to the 2010 and 2011 Subpoenas and that exercising such jurisdiction comports with due process and principles of comity."[134]

B. Legal Analysis of *Gucci* Cases

1. Gucci I: It is All About Comity

The district court in *Gucci I* discussed two issues: first, whether the district court has authority to restrain defendants' overseas assets, and second, whether the district court has power to enforce a subpoena to compel BOC to produce defendants' account information located in China.[135] As to the first issue, the district court reasoned that "subject to the principles of equity,"[136] the Lanham Act entitles a plaintiff who establishes a violation of his rights in connection with a registered trademark to recover defendant's profits.[137] Once personal jurisdiction of a *party* is obtained, the district court has authority to issue an injunction to freeze the property under *the party*'s control.[138] Therefore, whether the district court has personal jurisdiction over a nonparty is irrelevant with respect to the district court's authority to issue an asset restraint order.

As to the second issue, the district court did not entertain the issue of personal jurisdiction over BOC; rather, the district court focused on conflicts of law[139] and employed the five-factor comity analysis set forth in the Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c).[140] Section 442(1)(c) requires the consideration of five factors:

134. *Id.* at 104.

135. Gucci Am., Inc. v. Weixing Li (*Gucci I*), No. 10 Civ. 4974 (RJS), 2011 U.S. Dist. LEXIS 97814, at *2 (S.D.N.Y. Aug. 23, 2011).

136. 15 U.S.C. § 1117(a) (2015).

137. *Gucci I*, 2011 U.S. Dist. LEXIS 97814, at *8.

138. *Id.* at *12.

139. Various Chinese banking laws allegedly conflicted with U.S. laws:

(a) Article 6 of the Commercial Bank Law, stating that "commercial banks shall safeguard the legal rights and interests of depositors against the encroachment of any entity or individual";

(b) Article 24 of the Corporate Deposit Regulation, stating that "a financial institution shall keep secret the deposits of corporate depositors";

(c) The Provisions on the Administration of Financial Institutions'Assistance in the Inquiry into, Freeze, or Deduction of Deposits, requiring that any of the foregoing actions may be taken *only if* (1) the request for inquiry into, freezing, or debiting funds is from an "authorized governmental entity" *and* (2) such authorized governmental agency presents the bank with a notice confirming the latter's assistance with the inquiry into, or freezing, or deduction of funds;

(d) Various damages provisions, providing for fines of up to RMB 500,000 Yuan, civil liability, and disciplinary punishment for personnel by the institution itself; and

(e) Article 253(A) of China's Criminal Law, providing for criminal liability with a term of imprisonment of up to three years for personnel at financial institutions who illegally provide personal information of citizen account holders to others in violation of Chinese law.

See Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 150 (S.D.N.Y. 2011).

140. *Gucci I*, 2011 U.S. Dist. Lexis 97814, at *15–16. The reason why the issue of personal jurisdiction was not discussed in the decision is that, prior to *Daimler*, precedent in the Second Circuit was clear that a foreign bank with a branch in New York was

> (i) "the importance to the investigation or litigation of the documents or other information requested;" (ii) "the degree of specificity of the request;" (iii) "whether the information originated in the United States;" (iv) "the availability of alternative means of securing the information;" and (v) "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."[141]

While analyzing the five-factor test, the district court in *Gucci I* reached a different conclusion to the similarly situated case in *Qi Andrew*, and found that the test strongly weighed in favor of ordering BOC to comply with the subpoena.[142] The difference mainly focused on factor four (whether a Hague Convention request to China was an "alternative means" for plaintiffs to obtain the documents sought), and factor five (balance of national interests).[143]

The *Gucci I* court held that plaintiffs provided evidence that suggested the "Hague Convention is of limited utility in China in large part because its implementation remains uncertain and unpredictable." Therefore, a Hague Convention request to China was not a viable alternative method of securing the information plaintiffs sought.[144] Moreover, the *Gucci I* court stated that a finding that there was *some* likelihood of compliance with the Convention did not end the inquiry; rather, the particular facts of the case had to be scrutinized to determine the "likelihood that resort to those procedures w[ould] prove *effective*."[145]

In balancing the states' interests under the fifth factor, the *Gucci I* court found that U.S. interest in enforcing the Lanham Act outweighed China's "limited" interest in enforcing its bank secrecy laws, particularly because the protections under China's bank secrecy laws could be waived by individuals and certain public bodies (specifically, the "people's court," "taxation authority," "public security organ," "industrial commercial administrative organ," and "securities regulation organ"). The court reasoned that this suggested that these laws "merely confer an individual privilege on customers rather than reflect a national policy entitled to substantial deference."[146]

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properly subject to general personal jurisdiction. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94–95 (2d Cir. 2000). Under prior controlling precedent of the Second Circuit, BOC was subject to general jurisdiction because it engaged in a continuous and systematic course of doing business in New York through the activity of its New York branch. *See* Gucci Am. v. Bank of China (*Gucci II*), 768 F.3d 122, 136 (2d Cir. 2014).

141. Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c).

142. *Gucci I*, 2011 U.S. Dist. LEXIS 97814, at *27.

143. *See* Chang & Chang, *supra* note 3, at 432–33.

144. *Gucci I*, 2011 U.S. Dist. LEXIS 97814, at *27.

145. *Id.* at *34–35 (emphasis added).

146. *Id.* at *29.

2. *Gucci II: Think Twice*

On appeal, the Second Circuit affirmed the district court's authority to issue the asset freeze injunction and held that personal jurisdiction over the defendants, not *nonparty* BOC, was all that was required for the district court to restrain the *defendants*' assets pending trial.[147] The Second Circuit, however, vacated the district court's August 23rd Order that compelled BOC to comply with the injunction and subpoenas. The Second Circuit reasoned that a district court can enforce an injunction and a subpoena against a nonparty only if it has personal jurisdiction over that nonparty.[148] In light of the *Daimler* decision, the Second Circuit held that the district court erred in subjecting BOC to general jurisdiction in New York merely because BOC engaged in a continuous and systematic course of doing business in New York through the activity of its New York branch.[149] The Second Circuit remanded the case to the district court to consider whether it may exercise specific personal jurisdiction over BOC and, if so, whether proper application of the principles of comity allows the exercise of specific personal jurisdiction.[150]

3. *Gucci III: Nothing but Specific*

On remand, the district court first held that New York's long-arm statute provides a basis for personal jurisdiction.[151] The district court then conducted a jurisdictional inquiry and concluded that exercise of specific personal jurisdiction met constitutional due process demands.

Under the minimum contacts inquiry, the district court determined that BOC's in-forum conduct is "deliberate and recurring, not random, isolated[,] or fortuitous," which amounts to purposeful availment, because "BOC has significant operations, employees, and physical locations in New York, actively solicits business and customers in New York, . . . [and] provides extensive services to its clients in New York, including a correspondent account at Chase that its Head Office established to facilitate U.S. dollar-denominated transfers."[152] As to the relatedness prong of the minimum contact inquiry, the district court determined that BOC's in-forum contacts are a "but-for" cause of plaintiffs' document requests. The district court reasoned that plaintiffs' subpoenas were based on the fact that defendants' proceeds from the sale of counterfeit goods were transferred through BOC's correspondent account in New York.[153]

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147. Gucci Am. v. Bank of China (*Gucci II*), 768 F.3d 122, 129 (2d Cir. 2014).
148. *Id.* at 134.
149. *Id.* at 133, 136.
150. *Id.* at 145.
151. The statute provides that a court "may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state" so long as the plaintiff's "cause of action aris[es] from" that "transact[ion]." N.Y. C.P.L.R. § 302(a)(1); Gucci Am., Inc. v. Weixing Li (*Gucci III*), No. 10 Civ. 4974 (RJS), 135 F. Supp. 3d 87, 93 (S.D.N.Y. Sept. 29, 2015).
152. *Gucci III*, 135 F. Supp. 3d at 98.
153. *Id.* at 99.

The district court also concluded that the exercise of personal jurisdiction comported with traditional notions of fair play and substantial justice.[154] First, the district court reasoned that BOC's subjection to jurisdiction in New York was not burdensome given that BOC maintained physical operations there and had previously initiated multiple lawsuits in the state.[155] Second, the district court determined that the forum state had a "manifest interest in providing effective means of redress for its residents," given that plaintiffs are incorporated in New York and have their principal place of business there.[156] Third, plaintiffs had a strong interest in BOC complying with the subpoenas because the documents sought would likely provide an effective measure of the revenues generated by defendants, and the alternative means (a Hague Convention request) might not be viable to solve the dispute.[157] Fourth, the international judicial system's interest in obtaining the most efficient resolution of the controversy favors the exercise of jurisdiction over BOC, since it would provide the fastest and most practical means of resolving the dispute.[158] Finally, a balance of the substantive social policies at issue tips towards exercising personal jurisdiction, since plaintiffs' interest in obtaining documents and the United States' interest in enforcing the Lanham Act outweigh BOC's interest in resisting compliance and China's interest in its bank secrecy laws.[159]

In its comity analysis, the district court considered how both the Beijing Intermediate Court Judgment and Beijing High Court Judgment (the Beijing judgments) affected its comity analysis in *Gucci I*. On remand, the district court reasoned that the Beijing judgments did not support BOC's assertion that China's bank secrecy laws are rigidly enforced and trump the United States' interest in enforcing the Lanham Act. The court held that the balancing of national interests still clearly weighs in favor of plaintiffs.[160] As to the hardship of compliance factor, the district court concluded that it weighed in favor of plaintiffs because BOC provided no legal authority to support the conclusion that Chinese banks are liable for disclosing their clients' bank account information. Moreover, the court reasoned that the Beijing judgments only resulted in the equivalent of $22.00 in court fees.[161]

IV. Would the Result Be Different?—Applying Proposed Scheme to *Gucci*

A. Minimum Contact Inquiry

Under the proposed revised scheme, the purposeful availment prong of the minimum contact inquiry would remain the same as in *Gucci III*.

154. *Id.* at 101.
155. *Id.* at 99.
156. *Id.* at 100.
157. *Id.*
158. *Id.*
159. *Id.* at 100-01.
160. *Id.* at 103.
161. *Id.* at 104.

Relatedness, the second prong of the minimum contacts inquiry, however, would be different. Under the proposed revised scheme, the appropriate inquiry would assess the relatedness between a nonparty's in-forum contacts and the causes of action between the parties in the initial lawsuit. To be more precise, the courts would be required to evaluate whether the plaintiffs' alleged causes of action fall within a nonparty's foreseeable zone-of-risk of its in-forum contacts.

Here, BOC's in-forum contacts are providing banking services to its clients to facilitate financial transactions; whereas Gucci's alleged cause of action in the underlying lawsuit is trademark infringement.[162] Arguably, Gucci's alleged trademark infringement does not fall within the foreseeable zone-of-risk of BOC's banking services. In the modern commercial world, almost every financial activity involves transferring funds, and if every transfer of funds within a bank's foreseeable zone-of-risk then that bank constantly would be purposefully availing the forum and would therefore be subject to specific personal jurisdiction of the forum state. Moreover, such an expansive view of relatedness would increase banks' costs of compliance because banks would be required to monitor all transactions to properly assess whether the transactions involve any illegal activity.

Applying these principles to the facts of this case, from BOC's perspective, transactions of proceeds generated from alleged trademark infringement are no different from other legal transactions: no fact suggests that the defendant in the underlying lawsuit should require extra attention from BOC. Therefore, if the defendants' alleged wrongdoings were not within nonparty BOC's foreseeable zone-of-risk, there is essentially no means for BOC to be aware of the potential litigation, such as the one in the *Gucci* cases.

A natural question one might ask is what types of offenses would be in a bank's foreseeable zone-of-risk to subject a foreign nonparty bank to the forum's jurisdiction. One answer to this question would be a constructively fraudulent transfer.[163] In this situation, an insolvent debtor, *without actual intent to hinder, delay, or defraud* any creditor of the debtor, transfers funds from his account at a bank's New York branch to another account at the bank's overseas branch. A creditor of the debtor could obtain a court order to require the bank to produce documents of the debtor's account information. In this example, the bank would still be a nonparty to the underlying claim, yet, the underlying claim of constructively fraudulent transfer is arguably within the bank's foreseeable zone-of-risk. Notably, in this hypothetical, the bank does not aid and abet in the assistance of the

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162. *Id.* at 91, 95.

163. U.F.T.A. § 5(a) (UNIF. LAW COMM'N 2013). The code provides that:

> a transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Id.

transfer, because it is a constructive fraudulent transfer rather than actual fraudulent transfer.

Thus, unlike the conclusion in *Gucci III*, under the proposed revised scheme, BOC's in-forum contacts would fall on the *less* substantial end of the sliding scale test because Gucci's cause of actions are not within BOC's foreseeable zone-of-risk, which awakens the relatedness inquiry.

B. Reasonableness

As previously explained, the first different factor for the reasonableness inquiry is the second factor—the nonparty's interest in not being involved with the plaintiff's lawsuit. In the present case, because Gucci's alleged cause of action is not within BOC's foreseeable zone-of-risk, BOC, as a nonparty, has a different set of expectations than if it were the defendant in the initial litigation. As a defendant, BOC would have expected invasive discovery; as a nonparty, the subpoenas came unexpectedly. Hence, the district court should give due concern to BOC's interest in not being involved with the Gucci lawsuit, and weigh this factor in BOC's favor.

The second different factor is the sixth factor—other nations' procedural and substantive interests in a court's assertion of jurisdiction over an alien nonparty. Although BOC failed to provide cases to support its assertion that China's bank secrecy laws are rigidly enforced, it is inappropriate for a U.S. court to second guess China's laws by saying "China's bank secrecy laws merely confer an individual privilege on customers rather than reflect a national policy . . . ."[164] Such a conclusion is especially imprudent considering the various Chinese Regulators' letters to the court stressing the significance of Chinese bank secrecy laws to its national policy.[165] Understandably, a U.S. court might not want to concede that China's interest in protecting its bank account holders' information is more significant than the U.S.'s trademark enforcement interests. The court should rule that, on balance, this factor does not tilt the balance in favor of either Gucci or BOC.

Last but not least, the seventh factor—the Federal Government's interest in deciding its foreign relations policies—should tip the scale decidedly towards BOC.[166] The expansive assertion of specific jurisdiction over foreign nonparty BOC could be dangerous to U.S. companies engaging in international commerce: retaliatory laws could empower foreign courts to exercise judicial jurisdiction over U.S. companies simply because a U.S. court exercised jurisdiction over companies from those nations.[167] An expansive exercise of judicial jurisdiction would also result in unpredictability and thus deter cross-border investment.[168] Finally, U.S. courts' expansive views of personal jurisdiction have previously impeded negotiations to form international agreements to ensure the reciprocal recognition

164. *Gucci III*, 135 F. Supp. 3d at 98.
165. *Letters from Chinese Regulators*, *supra* note 125, at 4–5.
166. *See* discussion *infra* Section V.
167. *See infra* notes 174–80 and accompanying text.
168. *See infra* notes 181–83 and accompanying text.

and enforcement of judgments.[169]

V. The Butterfly Effect

The district court's reasoning behind its decision to exercise specific personal jurisdiction over foreign nonparty BOC was broad. The fact that the district court reached this conclusion by reasoning that BOC purposefully availed itself of the forum could be applied to most financial institutions in New York City: an institution has significant operations, employees, and physical locations in New York, actively solicits business and customers in New York, and provides extensive services to its clients in New York.[170] The district court's order is significant: a U.S. court can exercise jurisdiction over a foreign nonparty to produce documents located outside of the U.S., with the possibility that the nonparty would be subject to sanctions in its home country. After all, "[j]urisdiction is power to declare the law."[171] Exercising personal jurisdiction over a foreign nonparty could be quite intrusive, especially when subjecting the nonparty to the forum's jurisdiction might result in sanctions from the nonparty's home state.

A. Potential Retaliatory Actions from Other Nations

Foreign states have expressed objections to the United States' expansive assertion of judicial jurisdiction.[172] The Supreme Court has recognized that perceived affronts to sovereign interests will predictably "invite retaliatory action from other nations."[173] As the dissenters in *Daimler* noted, sweeping notions of jurisdiction by imputation threaten United States companies with retaliatory assertions of judicial jurisdiction by foreign courts—"several countries have enacted 'retaliatory jurisdiction laws.'"[174] Under these retaliatory laws, these countries' courts may exercise jurisdiction over foreign persons "in circumstances where the courts of the foreigner's home state would have asserted jurisdiction."[175]

The risks of retaliatory jurisdiction are more than hypothetical. In fact, even the United States' close trading partners have engaged in similar retaliations. The United Kingdom, for instance, enacted the Protection of

169. *See infra* notes 184–87 and accompanying text.
170. Gucci Am., Inc. v. Weixing Li (*Gucci III*), No. 10 Civ. 4974 (RJS), 135 F. Supp. 3d 87, 98 (S.D.N.Y. Sept. 29, 2015).
171. Ex parte McCardle, 74 U.S. 506, 514 (1868); *see also* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786–87 (2011) (plurality).
172. Brief of Economiesuisse & the Swiss bankers Association et al. as Amici Curiae in Support of Petitioner at 8, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965) [hereinafter Brief of Economiesuisse & the Swiss bankers Association et al.].
173. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963).
174. Bauman v. Daimler Chrysler Corp., 676 F.3d 774, 779 (2011) (O'Scannlian, J., dissenting from denial of rehearing en banc).
175. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 15 (1987).

Trading Interests Act 1980 ("the Protection Act")[176] to authorize the Secretary of State to prohibit UK firms from complying with foreign laws and/or complying with any requirement to submit information to any foreign authority beyond the territorial jurisdiction of the foreign authority.[177] The Protection Act's Section 6 also provides a "clawback" provision entitling UK citizens to recover any noncompensatory damages paid to a victorious plaintiff in a foreign court.[178] In the discovery context, some nations have passed legislation that punishes compliance with U.S. courts' discovery orders.[179] Similarly, Italian courts "will exercise jurisdiction over actions by Italian nationals against foreigners, provided that the foreigner's courts would entertain claims against Italians in like circumstances."[180] More precisely, applied to the rule announced in *Gucci III*, these laws would allow foreign courts to assert jurisdiction over U.S. companies, and only U.S. companies, to produce documents located in the United States, based simply on the availability of jurisdiction over their overseas offices. As a result, the likelihood of U.S. companies being subject to other nations' jurisdictions would undermine the export of the U.S. products and undercut the foreign commercial interests of the United States.[181] The U.S. government, including the judiciary could prevent such retaliation from happening simply by limiting the unnecessary expansive jurisdiction of the courts.

B. Deterrence to Cross-Border Transactions

For rules governing judicial jurisdiction, "predictability is valuable to corporations making business and investment decisions."[182] The same analysis in *Gucci III* might have been correct if BOC was the defendant in the underlying lawsuit. In that scenario, BOC as the alleged wrongdoer, would have reasonably foreseen the potential litigation and could have proactively structured its primary conduct by having some assurance as to the places where it could be subject to liability. Conversely, as a nonparty to the underlying lawsuit, the nonparty has to deal with the litigation passively, given the nonparty's difficulty in foreseeing the time and the reason why it could be involved in a lawsuit.

As a 2007 report commissioned by Mayor Bloomberg and Senator Schumer suggested, a key hindrance to U.S. competitiveness is "American's general propensity for litigation" and "the increasing extraterritorial reach

176. Protection of Trading Interests Act 1980, c. 11 (Eng.).

177. *Id.* §§ 1-3.

178. *Id.* § 6.

179. Brief of the Chamber of Commerce of the United States of America & the National Foreign Trade Council et al. as Amici Curiae Supporting the Petitioner at 17, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965) [hereinafter Brief of the Chamber of Commerce & the National Foreign Trade Council et al.].

180. Brief of Economiesuisse & the Swiss Bankers Association et al., *supra* note 172.

181. Brief of the Chamber of Commerce & the National Foreign Trade Council et al., *supra* note 179.

182. Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010).

of U.S. law."[183] Similarly, a Department of Commerce report tied concerns about the U.S. legal system to foreign direct investment—"[t]here is an international perception that the pervasive nature of litigation in the United States and other related aspects of the legal system increase the costs of doing business and add uncertainty."[184]

C. Potential Frustrations of the United States' Efforts to Complete Treaties

American courts' expansive exercise of personal jurisdiction over foreign financial institutions impinges upon foreign nations' sovereignty and might frustrate the United States' continued efforts to complete treaties with other nations regarding the enforcement of judgments and related issues.[185] In its letter addressed to the Department of State, the Embassy of the People's Republic of China asserted that

> [i]n recent years, the Chinese side has repeatedly expressed concerns over the issue. The two sides have had several discussions about it under the framework of China-U.S. Strategic & Economic Dialogue (S&ED) and reached important consensus at the 5th S&ED: "Both sides commit to improve cooperation on issues related to evidence taking, the provision of notice to interested parties and enforcement of a U.S. restraint, seizure, or forfeiture judgment or order in China involving financial institutions located in China through the application of the relevant international agreements and other bilateral, multilateral[,] or international cooperation mechanisms.
>
> The Chinese side noticed that the channel of judicial assistance between the two countries has been open, thus the U.S. side is fully capable of having legitimate needs met through [a] legitimate channel. The above-mentioned measures against BOC, taken by the [U.S.] side unilaterally in spite of China's repeated objections, violates the consensus reached by the two sides at S&ED.[186]

The U.S. government also observed that foreign governments' objections to U.S. courts' expansive views of personal jurisdiction have "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[187] Such excessive assertion of judicial jurisdiction "potentially threatens particular harm to the United States' foreign trade and diplomatic interests."[188]

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183. OFFICE OF THE MAYOR N.Y. & U.S.S., SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 73 (2007), http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

184. CHARLES G. SCHOTT, U.S. DEP'T OF COM., THE U.S. LITIGATION ENVIRONMENT AND FOREIGN DIRECT INVESTMENT: SUPPORTING U.S. COMPETITIVENESS BY REDUCING LEGAL COSTS AND UNCERTAINTY 1 (Oct. 2008), http://trade.gov/investamerica/Litigation_FDI.pdf.

185. Brief of the Alliance of Automobile Manufacturers, Inc. & the Ass'n of Global Automakers as Amici Curiae Supporting Petitioner at 35, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965).

186. Letter to Department of Justice at 1-2, Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974 (RJS), ECF No. 181.

187. Brief for the United States as Amici Curiae Supporting Petitioners at 33-34, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76).

188. *Id.* at 12.

It is worth noting that under the proposed scheme, foreign banks would not be completely immune from nonparty involvement. The concept of aiding and abetting will still support a court's assertion of jurisdiction over a foreign nonparty bank. For instance, the Eastern District of Pennsylvania explicitly held that a Liberian nonparty "may be considered an aider and abettor" to be properly before the court.[189] Similarly, if the underlying claims against defendants were criminal, the reasonableness' balancing test under the proposed scheme would heavily weigh in favor of asserting jurisdiction over the foreign nonparty bank.

Conclusion

Considering the increasing commercial interaction between the United States and the rest of the world,[190] litigation between states is reasonably expected to increase. Therefore, courts need clear guiding principles to successfully deal with the increasing number of commercial litigations. One solution could be that the U.S. government works together with its trading partners or counterparties, to develop a bilateral or multilateral judicial resolution, including issues on jurisdiction, discovery, choice of law, and judgment enforcement. Before such resolutions fully develop, however, this Note provides a viable solution of the issues presented in the *Gucci* cases—BOC's in-forum activities meet the requirement of minimum contacts, nevertheless, traditional notions of fair play and substantial justice together with international comity require a court to postpone exercising personal jurisdiction over a foreign nonparty. Therefore, a court should provide a foreign nonparty a chance to solve the problem through a viable alternative: a request under the Hague Convention in the context of the *Gucci* cases, before resorting to the Federal Rules.

Such a resolution is ideal because on the one hand, a U.S. court will still retain its power to exercise jurisdiction over foreign nonparties. Such reservation of power is like the sword of Damocles over the foreign nonparties so that they would have to satisfy plaintiff's demands within a reasonable time or be subject to U.S. courts' sanctions. On the other hand, a foreign country would not compromise its sovereignty by satisfying plaintiffs' request through a viable alternative.

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189. *See* Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Ins. Co., No. 91-6785, 2009 WL 80293, at *2 (E.D. Pa. Jan. 12, 2009), *vacated and remanded on different grounds*, 391 Fed. Appx. 173 (3d Cir. 2010).

190. U.S. Chamber of Com., The Benefits of International Trade, https://www.uschamber.com/international/international-policy/benefits-international-trade-0.