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BRAND NAME REPLICAS AND BANK SECRECY: EXPLORING ATTITUDES AND ANXIETIES TOWARDS CHINESE BANKS IN THE *TIFFANY* AND *GUCCI* CASES

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INTRODUCTION

Three back-to-back cases decided within ten months, between July 2011 and May 2012, addressed the issue of whether Chinese banks could be compelled under U.S. federal civil procedure rules to disclose information about account holders who were alleged to have engaged in manufacturing and selling counterfeit goods. Although each of the cases was decided in the Second Circuit and shared nearly identical facts, their holdings spanned a wide spectrum. In *Tiffany (NJ) LLC v. Qi Andrew*,[1] Judge Henry Pitman held that plaintiffs should seek production of the relevant documents through the Hague Convention rather than compelling production pursuant to a federal subpoena under Rule 45 of the Federal Rules of Civil Procedure (FRCP 45).[2] Decided less than one month later, however, *Gucci America, Inc. v. Li* held the reverse.[3] In *Gucci*, Judge Richard J. Sullivan ordered the Chinese bank to turn over the documents sought by plaintiffs pursuant to FRCP 45, finding that a request made to the Chinese government through the Hague Convention would not be a "viable alternative."[4] In *Tiffany (NJ) LLC v. Forbse*, Judge Naomi Buchwald split her ruling—deciding that one defendant (the Bank of China) would be required to produce documents pursuant to the federal subpoena, whereas the other defendants (the

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

2. *Id.* 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 entered into force 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. (Jan. 29, 2013), http://www.hcch.net/index_en.php?act=conventions.status&cid=17.

3. Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974, 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011).

4. *Id.* at *8–9.

Industrial and Commercial Bank of China and China Merchants Bank) could be queried through a Hague Convention request.[5]

What is interesting is that the disparate holdings resulted from the same five-factor comity analysis—a balancing test applied pursuant to section 442(1)(c) of the Restatement (Third) of Foreign Relations Law when a conflict of laws issue arises. Looking at which factors Judges Pitman, Sullivan, and Buchwald disagreed upon reveals subtle Western attitudes towards both China's willingness to comply with international discovery procedures and the legitimacy (or lack thereof) of China's interest in its bank secrecy laws.

This Article first discusses the background of all three cases. Part II presents the issues and arguments asserted in each case. Part III explores the courts' comity analyses and concludes, in Part IV, with a discussion of the attitudes and anxieties toward China that these cases unveil.

I. BACKGROUND OF THE CASES

A. *TIFFANY (NJ) LLC V. QI ANDREW*

In December 2010, the plaintiffs Tiffany (NJ) LLC and Tiffany and Company (together, Tiffany & Co.), a high-end jewelry designer and manufacturer, brought suit in the U.S. District Court for the Southern District of New York (S.D.N.Y.) against alleged online sellers of counterfeit goods whose websites were hosted in the United States.[6] The defendants' websites included Tiffanystores.org, which sold knockoffs of Tiffany & Co.'s signature silver pendants (retailing at $345) for a mere $24, among other Tiffany & Co. jewelry.[7]

Tiffany & Co. claimed that the defendants' customers made payments through PayPal in U.S. dollars and that the profits were transferred to the Bank of China (BOC), the Industrial and Commercial Bank of China (ICBC), and China Merchants Bank (CMB) (collectively, the Banks).[8] Defendants did not respond to the complaint filed by Tiffany & Co. nor did they respond to a court order requiring the production of documents related to their alleged counterfeiting operation;[9] thus, Tiffany & Co. sought, inter alia, production of all records in the Banks' "possession, custody, or control . . . concerning the assets and financial transactions of Defendants . . .

5. Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976, 2012 WL 1918866, at *1 (S.D.N.Y. May 23, 2012).

6. Complaint at 2–5, Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143 (S.D.N.Y. 2011) (No. 10 Civ. 9471), 2010 WL 5172567.

7. Emily Flitter, *Insight: Gucci, Tiffany Target Chinese Banks*, REUTERS (Oct. 4, 2011, 5:00 PM), http://www.reuters.com/article/2011/10/04/us-china-usa-banks-fakes-idUSTRE7931ND20111004.

8. *See Tiffany v. Qi*, 276 F.R.D. at 145.

9. *Id*.

including [bank] accounts."[10] Plaintiffs' request was granted in a preliminary injunction order by a U.S. district judge.[11] Shortly thereafter, plaintiffs served the preliminary injunction on the Banks, along with subpoenas pursuant to FRCP 45, seeking those documents specified in the preliminary injunction in the Banks' possession, custody, or control.[12]

B. *GUCCI AMERICA, INC. V. WEIXING LI*

In June 2010, Gucci America, Inc. (a subsidiary of Gucci North American Holdings, Inc., itself a subsidiary of Gucci Group N.V.) and certain of its affiliates brought a trademark infringement claim under the Lanham Act, the primary U.S. federal trademark statute, in the S.D.N.Y. against owners and operators of a Chinese website selling counterfeit goods.[13] The original complaint named the defendant's website, Myluxurybags.com, which, while it had been operating, had described itself to its online customers as offering "an extensive selection of authentic Gucci, Prada, and Fendi accessories . . . and other leather accessories for today's designer fashion at discount prices." A classic Gucci handbag with interlocking G's, made of Gucci's signature fabric, was listed at $420 on Myluxurybags.com compared to its $880 retail price.[14]

Plaintiffs had evidence indicating that the profits from defendant's allegedly illicit operation were wired to specific accounts at the Chinese headquarters of the BOC.[15] The court granted plaintiffs a preliminary injunction and, following the terms of the injunction, plaintiffs served BOC with a subpoena pursuant to FRCP 45 that directed it to turn over documents in its possession related to accounts that plaintiffs alleged were "critical to their investigation of defendants' alleged counterfeiting operations."[16]

C. *TIFFANY (NJ) LLC V. FORBSE*

In July 2011, Tiffany & Co. filed suit in the S.D.N.Y. against the defendants for selling counterfeit Tiffany items through a number of websites, including Tiffany-Collections.com, Tiffany-Gifts.com, Tiffany-Jewelries.us, Tiffanyinsidesales.com, UK-Tiffany-Gifts.com,

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10. *Id.*
11. *Id.*
12. *Id.* at 146.
13. Complaint, Gucci Am., Inc. v. Weixing Li, No 10 Civ. 4974, 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011), 2010 WL 2719026.
14. *See MyLuxuryBags.com Screenshot History*, *Screenshot Taken May 28, 2009*, SCREENSHOTS, http://www.screenshots.com/myluxurybags.com/2009-05-28 (last visited June 5, 2013).
15. *See Gucci*, 2011 WL 6156936, at *1.
16. *Id.* at *1, *2.

Best10brands.com, and Trusted-Seller.eu.[17] As in *Tiffany v. Qi* and *Gucci*, plaintiffs sought from non-party financial institutions—here, CMB, BOC, and ICBC—financial records associated with the defendants.[18] As in *Gucci*, the court issued a temporary restraining order at that time, which became a preliminary injunction in August 2011, requiring the third party financial institutions to restrain defendants' assets, including three accounts at CMB, one account at ICBC, and one account at BOC, that PayPal records indicated were being used by one of the defendants.[19] Additionally, the preliminary injunction ordered the Banks to provide plaintiffs with "all records in their possession, custody, or control, regardless of whether such records are maintained in the United States or abroad, concerning the assets and financial transactions of Defendants or any other entities acting in concert or participation with Defendants."[20]

II. THE ISSUE PRESENTED AND THE ARGUMENTS ASSERTED

Upon being served with subpoenas, the Chinese banks implicated in *Tiffany v. Qi*, *Tiffany v. Forbse*, and *Gucci* responded with almost identical arguments in their respective proceedings. In both of the *Tiffany* cases, each of the Banks' New York branches that received the actual physical process of the subpoenas conducted a search of its database and found none of the information that Tiffany & Co. had requested; they stated that the information was located in the database of their Chinese headquarters to which they had no access.[21] In *Tiffany v. Qi*, two of the Banks—the New York branches of BOC and ICBC—also offered to assist in submitting a discovery request to Chinese authorities pursuant to the Hague Convention, a proposition that was rejected by the plaintiffs.[22] Ultimately, the Banks asserted two arguments against the subpoena: (1) The New York branches of the Banks "had no access to or control over any customer accounts or . . . information located outside the United States," and (2) complying with the subpoena would cause the Banks to be in violation of Chinese law.[23]

In *Gucci*, BOC (the only Chinese bank that was implicated in the case) produced documents located in its New York branch that fell within the category of documents requested by the plaintiffs but did not produce any

17. Complaint at 3, 4–5, Tiffany (NJ) LLC v. Forbse, No 11 Civ. 4976, 2012 WL 1918866 (S.D.N.Y. May 23, 2012), 2011 WL 2883566 at *1–2.

18. *Tiffany v. Forbse*, 2012 WL 1918866, at *1.

19. *Id.* at *1–2.

20. *Id.* at *1 (internal quotation marks omitted).

21. *See id.* at *2, *3; Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 148, 152 (S.D.N.Y. 2011).

22. *Tiffany v. Qi*, 276 F.R.D. at 146.

23. *Id.* at 146, 151 (internal quotations omitted); *see also Tiffany v. Forbse*, 2012 WL 1918866, at *2.

documents located in its Chinese headquarters.[24] Like the Banks in both of the *Tiffany* cases, BOC asserted that (1) it did not have "possession, custody, or control" over the documents located in China, and (2) compliance with the subpoena would violate Chinese law, and thus any request must be made under the Hague Convention.[25]

Thus, two legal issues are raised in all three cases: (1) whether the New York branches of Chinese banks have "possession, custody, or control" of the documents located in China from a legal standpoint, and (2) more importantly (and controversially) for the purposes of this paper, whether a request for the production of documents should be made under the Hague Convention because production under the subpoena would contravene Chinese law.

Each court in the two *Tiffany* cases and in the *Gucci* case quickly dispensed with the first legal issue, finding that the banks' assertions—(1) that the New York branches of the banks had separate databases from their Chinese headquarters, and (2) that the bank personnel in the New York branches could not compel the bank personnel in China to produce the documents sought—were irrelevant. All three courts reasoned that the subpoenas were directed at the banks as a whole, not solely the New York branches of the banks, which were not considered separate entities from their offices in China.[26] Thus, all three courts held that the Chinese banks, including their New York branches, had "possession," "custody," and "control" over the documents requested notwithstanding the documents' location abroad.[27]

The agreement between the courts, however, came to an end in addressing the second legal issue—whether a request for documents should be made under the Hague Convention rather than U.S. federal discovery rules due to a conflict of laws.

III. THE COMITY ANALYSIS: SAME TEST, DIFFERENT RESULTS

In both *Tiffany* cases and the *Gucci* case, the assertion that there is a conflict of laws between U.S. discovery rules and Chinese banking laws

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24. Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974, 2011 WL 6156936, at *2 (S.D.N.Y. Aug. 23, 2011).

25. *Id*.

26. *See id.* at *4 n.6; *Tiffany v. Qi*, 276 F.R.D. at 149–50; *Tiffany v. Forbse*, 2012 WL 1918866, at *3 (reasoning that "the Banks' New York branches are not subsidiaries of a foreign parent company, but rather are 'branches of the same corporate entities as their counterparts in China.' . . . '[T]here is a presumption that a corporation is in the possession and control of its own books and records.'" (quoting *Tiffany v. Qi*, 276 F.R.D. at 147 n.1) (also quoting First Nat'l City Bank of N.Y. v. IRS, 271 F.2d 616, 618 (2d Cir. 1959)).

27. *Tiffany v. Forbse*, 2012 WL 1918866, at *3; *Tiffany v. Qi, 276 F.R.D. at 149–50; see Gucci*, 2011 WL 6156936, at *4 n.6.

was uncontested and accepted. Various Chinese banking laws allegedly conflicted with U.S. laws in both cases, including, inter alia:

- 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";[28]
- Article 24 of the Corporate Deposit Regulation, stating that "a financial institution shall keep secret the deposits of corporate depositors";[29]
- 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;[30]
- Various damages provisions, providing for fines of up to RMB 500,000 Yuan, civil liability, and disciplinary punishment for personnel by the institution itself;[31] and
- 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.[32]

After acknowledging the clear existence of a conflict of laws, the courts performed a comity analysis pursuant to Restatement (Third) of Foreign Relations Law section 442(1)(c) to determine whether the Chinese banks must comply with the subpoena, notwithstanding a potential conflict with Chinese law.[33] Section 442(1)(c) requires the consideration of five factors: (1) "the importance of the documents or information requested to the litigation"; (2) "the degree of specificity of the request"; (3) "whether the information originated in the United States"; (4) "the availability of alternative means of retrieving the information"; and (5) "the extent to which noncompliance with the request would undermine important interests

28. *Tiffany v. Qi*, 276 F.R.D. at 150.

29. *Id.*

30. *Id.* (internal quotation marks omitted).

31. *Id.* (referring to Article 73 of the Commercial Bank Law with regard to monetary fines and civil liability and Article 78 of the Commercial Bank Law with regard to disciplinary punishment by the institution itself).

32. *Id.*

33. Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976, 2012 WL 1918866, at *4–11 (S.D.N.Y. May 23, 2012); *Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974, 2011 WL 6156936, at *5–12 (S.D.N.Y. Aug. 23, 2011); Tiffany v. Qi*, 276 F.R.D. at 151–60.

of the United States, or compliance with the request would undermine the important interests of the state where the information is located."[34]

The courts found for the plaintiffs on factors one and two[35] and for the Chinese banks on factor three regarding the origin of the documents sought.[36] However, the courts differed in their analyses of factors four and five.

A. *TIFFANY (NJ) LLC V. QI ANDREW*

In *Tiffany v. Qi*, Judge Pitman found that, under the fourth comity factor, a request under the Hague Convention was an alternative means for the plaintiffs to obtain the documents they sought.[37] Tiffany & Co. argued that the Hague Convention in China was futile, citing *Milliken & Co v. Bank of China*.[38] The Banks argued that *Milliken* had been based in part on language from the U.S. State Department's website, which had *previously* stated:

> While it is possible to request compulsion of evidence in China pursuant to a letter rogatory or letter of request (Hague Evidence Convention), such requests have not been particularly successful in the past. . . . It is not unusual for no reply to be received or after a considerable time has elapsed, for Chinese authorities to request clarification from the American court with no indication that the request will eventually be executed.[39]

The *Tiffany v. Qi* court agreed with the Banks that the removal of this critical language from the State Department's website "implie[d] that the conditions described by the omitted language no longer exist."[40] The court did not consider the expert witness testimony presented on behalf of either side regarding China's propensity to comply with a Hague Convention request, since it found that the experts had come to divergent conclusions based on the same empirical data.[41]

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34. *Tiffany v. Qi*, 276 F.R.D. at 151.

35. Both courts found that (1) the documents requested were critical to revealing the identity of other individuals involved in defendants' alleged counterfeiting operation, and (2) the request was sufficiently specific. *See Tiffany v. Forbse*, 2012 WL 1918866, at *5; *Gucci*, 2011 WL 6156936, at *5–6; *Tiffany v. Qi*, 276 F.R.D. at 151–52.

36. *Tiffany v. Forbse*, 2012 WL 1918866, at *5–6; *Gucci*, 2011 WL 6156936, at *6; *Tiffany v. Qi*, 276 F.R.D. at 152.

37. *Tiffany v. Qi*, 276 F.R.D. at 152–53.

38. *Id.* at 154 (citing Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238 (S.D.N.Y. 2010)) (rejecting the proposition that documents could be easily obtained in China through the Hague Convention).

39. *Id.* (citing former language from U.S. State Department's website).

40. *Id.*

41. *Id.* at 154–55.

Finally, the court disagreed with the plaintiff's argument that China's Article 23 Reservation under the Convention—specifying that only requests for documents that are clearly enumerated and direct or close to the subject matter of litigation would be executed—constituted persuasive evidence that China would not execute the request.[42]

In its examination of the fifth comity factor—the extent to which noncompliance with the request for documents undermines important U.S. or Chinese interests—the court balanced the competing state interests and concluded that the Chinese interest in protecting its account holders' confidentiality was "more significant" than the U.S. interest in enforcing and protecting the rights of trademark holders.[43] The court relied most heavily on two facts: (1) the severity of the Chinese banking laws, which had "few exceptions and . . . harsh consequences for violations,"[44] and (2) the Banks' non-party status.[45] The court distinguished a prior case, *Gucci America, Inc. v. Curveal Fashion* (*Curveal*),[46] which had concluded that the U.S. interest trumped Malaysia's interest in bank secrecy, finding that Chinese banking laws had more regulations and fewer exceptions than the Malaysian banking laws.[47]

B. *GUCCI AMERICA, INC. V. WEIXING LI*

In *Gucci*, Judge Sullivan expressly disagreed with Judge Pitman regarding factor four—whether a Hague Convention request to China was an "alternative means" for plaintiffs to obtain the documents sought. The *Gucci* court addressed Judge Pitman's reasoning head-on:

> [W]hile the Court agrees with Judge Pitman that "there is a dearth of information as to the current efficiency" of Hague Convention requests in China, the Court is reluctant to discount Plaintiffs' evidence and the case law cited above solely because of an unexplained revision to the State Department's website. Without concrete evidence suggesting that China's compliance with Hague Convention requests has, in fact, dramatically improved, the Court is inclined to defer to the authorities cited above that have found that Hague Convention requests in circumstances similar to

42. First, the court noted that thirty-six other Hague Convention signatories had also adopted the Article 23 reservation (including the United Kingdom and Switzerland); and, second, the court reasoned that the documents would meet the requirements of the Article 23 reservation. *See id.* at 155–56.

43. *Id.* at 158.

44. *Id.*

45. *Id.* at 158, 160.

46. Gucci Am., Inc. v. Curveal Fashion (*Curveal*), No. 09 Civ. 8458, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010).

47. *See Tiffany v. Qi*, 276 F.R.D. at 157.

> those presented here are not a viable alternative method of securing the information Plaintiffs seek.[48]

Judge Sullivan also disagreed with Judge Pitman's reasoning that because a request under the Convention would not be "futile," it fell within factor four as a "viable alternative."[49] The *Gucci* 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 will prove *effective*."[50] Thus, the court here seemed to require a higher probability that the Convention request would be honored in China as compared to the *Tiffany v. Qi* court.

In balancing the states' interests under the fifth factor, Judge Sullivan again came to a different conclusion than Judge Pitman, finding that the U.S. interest in enforcing the Lanham Act outweighed China's "limited" interest in enforcing Chinese bank secrecy laws.[51] In particular, the *Gucci* court reasoned that the fact that 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") suggested that these laws "merely confer an individual privilege on customers rather than reflect a national policy entitled to substantial deference."[52]

C. *TIFFANY (NJ) LLC V. FORBSE*

When it came to assessing the alternative means of securing the requested information under factor four of the comity analysis, Judge Buchwald in *Tiffany v. Forbse*, like Judge Pitman in *Tiffany v. Qi*, found for the Banks. Tiffany & Co. argued before Buchwald that despite the fact that Judge Pitman had entered a Hague Convention request in November 2011, no response had been forthcoming from the Banks in the six intervening months.[53] The Banks replied that China had executed thirty-seven requests for evidence in the first half of 2010.[54] Despite the six-month delay in answering the Hague Convention request entered into following the decision in *Tiffany v. Qi*, Judge Buchwald concluded that it would be prudent to wait before jumping to conclusions that any such Hague

48. Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974, 2011 WL 6156936, at *9 (S.D.N.Y. Aug. 23, 2011).
49. *Id*. at *7–9, *11 n.8.
50. *Id.* at *7 (emphasis added).
51. *Id.* at *11.
52. *Id.* at *10.
53. Tiffany (NJ) LLC v. Forbse, 11 Civ. 4976, 2012 WL 1918866, at *7 (S.D.N.Y. May 23, 2012).
54. *Id.*

Convention requests would be ignored until Chinese authorities had demonstrated concretely that they would fail to comply with similar requests after having a sufficient opportunity to comply.[55]

However, when balancing the competing national interests under factor five, Judge Buchwald departed from Judge Pitman's conclusion in *Tiffany v. Qi*. Judge Pitman had indicated in his decision that the Chinese interest in protecting its account holders' secrecy was more significant than U.S. trademark enforcement interests.[56] Instead, while Judge Buchwald acknowledged the letter submitted by the People's Bank of China (PBOC) and the China Banking Regulatory Commission (CBRC) to four judges of the S.D.N.Y. with similar cases pending, urging that they follow Judge Pitman's approach in seeking evidence under the Hague Convention, Judge Buchwald questioned the extent of the Chinese government's interests by pointing out that numerous Chinese government organizations have been endowed with the ability to override confidentiality provisions which "only underscores the notion that secrecy laws were not designed to protect Chinese citizens who engage in unlawful behavior."[57] Unlike Judge Sullivan's conclusion in *Gucci*, however, Judge Buchwald ruled that, on balance, factor five did not tilt the balance in favor of either Tiffany & Co. or the defendants.[58]

Furthermore, Judge Buchwald noted that BOC continued to act as the acquiring bank for TiffanyOutletStore.com after it was notified of the preliminary injunction.[59] BOC's defense was that it would be an "enormous burden" to investigate all merchants globally to ascertain whether or not these merchants were associated with the defendant.[60] Judge Buchwald rejected this contention, pointing out that the word "Tiffany" was in the name of the counterfeiting site, which a simple database search could have easily unveiled.[61] Consequently, Judge Buchwald concluded that BOC was acting in bad faith and must comply with the federal subpoena, whereas the other two banks, ICBC and CMB, could be queried through a Hague Convention request.[62]

IV. ATTITUDES AND ANXIETIES UNVEILED: A SWISS BANK COMPARISON AND MEDIA PORTRAYALS

The U.S. State Department's retraction of negative language from its website concerning the unlikelihood of successfully obtaining information

55. *Id.*
56. Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 156–58 (S.D.N.Y. 2011).
57. *Tiffany v. Forbse*, 2012 WL 1918866, at *8.
58. *Id.* at *9.
59. *Id.* at *10.
60. *Id.*
61. *Id.*
62. *Id.*

pursuant to a Hague Convention request in China[63] was critical to Judge Pitman's finding in *Tiffany v. Qi* that the "availability of alternative means of retrieving the information" under factor four of the comity analysis favored the Banks. Judge Pitman reasoned that a Hague Convention request was not an "avenue [that] is futile,"[64] and noted that "it appears that the Chinese courts have increased the execution of [Hague] requests over time . . . albeit at a rate that is likely not ideal for plaintiffs."[65] By contrast, Judge Sullivan in *Gucci* disagreed; the fact that an avenue was not "futile" was not sufficient to find in favor of BOC on factor four.[66] The *Gucci* court was not persuaded by BOC's argument that the empirical data presented by the plaintiffs were based in part on stale language from the Department of State's website, and thus, should be discounted. While Judge Sullivan agreed with the *Tiffany v. Qi* court that "there is a dearth of information as to the current efficiency" of Hague Convention requests in China, he required affirmative evidence that China's compliance with Hague Convention requests had "dramatically improved," and gave little weight to the revision to the State Department's website.[67] Ultimately, the *Gucci* court found that factor four favored the plaintiffs, reasoning that a Hague Convention request was not a "*viable* alternative method."[68]

Judge Sullivan seemed to read a likelihood of success qualification into factor four—that the "availability of alternative means" needed to be alternative means that were actually "viable" or likely to succeed. Judge Sullivan's more stringent definition of what constituted "alternative means" under factor four was necessarily informed and influenced by his determination that factor five, the balance of national interests, weighed in favor of U.S. interests. In other words, because Judge Sullivan thought that China's interest in banking secrecy was "limited," it was apparently easier for him to require a stronger showing of China's likelihood of compliance with a Hague Convention request. Such an approach, in these authors' opinions, underestimates China's sovereignty and interest in protecting its banks' confidential information.

By contrast, because Judge Pitman found in *Tiffany v. Qi* that China's interest was "significant,"[69] he was less willing to encroach on Chinese sovereignty by requiring the Banks to comply with U.S. law (and thus, violate Chinese law) unless alternative means of obtaining the desired information through a Hague Convention request were futile. Furthermore, in balancing the competing state interests, the *Gucci* court never recognized

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63. *See supra* text accompanying note 39.

64. Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 151, 156 (S.D.N.Y. 2011).

65. *Id.* at 156.

66. Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974, 2011 WL 6156936, at *8 (S.D.N.Y. Aug. 23, 2011).

67. *Id.* at *9.

68. *Id.*

69. *Tiffany v. Qi*, 276 F.R.D. at 156, 160.

that BOC was not actually a party to the litigation—a fact that the *Tiffany v. Qi* court found strengthened China's interest in enforcing banking laws that protect its banks' account holders' confidentiality.[70]

While only so much can be extrapolated from comparing *Gucci* and both of the *Tiffany* cases, a survey of the U.S. case law addressing other countries' conflicting bank secrecy laws reveals more. In an article on the publicized 2009 *United States v. UBS AG* case,[71] in which the U.S. government went after Swiss bank accounts being used to evade federal taxes, the author describes the case's result as an "attack on Swiss banking sovereignty."[72] In *UBS*, the parties ultimately arrived at a settlement agreement in which UBS, a Swiss bank governed by Swiss bank secrecy laws, would reveal account information concerning certain U.S. account holders.[73] The agreement departed from UBS's initial position, which was backed by the Swiss government, to withhold the names of U.S. account holders who were UBS customers that had failed to meet federal tax obligations.[74] Even though *UBS* is distinguishable on several levels,[75] the characterization of the U.S. legal system's disregard for Swiss banking laws as an "attack" on Swiss sovereignty can be instructive in thinking about the *Gucci* court's willingness to sidestep Chinese banking law in favor of U.S. discovery rules.

Because Chinese bank secrecy laws would be violated by enforcing U.S. discovery rules in *Tiffany v. Qi* and *Gucci*, at first glance, the outcome of each of these cases seems to necessarily prioritize the laws of one sovereign to the detriment of the other's legal system—in other words, by finding in favor of the Banks, the *Tiffany v. Qi* court deferred to Chinese sovereignty over U.S. sovereignty, while *Gucci's* deference to U.S. discovery rules infringed China's sovereign interests in protecting its depositors' confidential information. However, comparing the degree of harm to Chinese sovereignty in *Gucci* versus U.S. sovereignty in *Tiffany v. Qi* reveals an important difference in the extent to which each sovereign's

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70. *See id.* at 158, 160.

71. United States v. UBS AG, No. 09 Civ. 20423, 2009 WL 2241122 (S.D. Fla. July 7, 2009).

72. Beckett G. Cantley, *The UBS Case: The U.S. Attack on Swiss Banking Sovereignty*, 7 INT'L L. & MGMT. REV. 1, 23–24 (2010–2011), *available at* http://www.cantleylaw.com/index.php?option=com_content&view=article&id=25:the-ubs-case-the-us-attack-on-swiss-banking-sovereignty&catid=2:tax-articles.

73. *Id.*

74. *Id.*

75. Importantly, in *UBS*, the SEC sought Swiss bank accounts held by U.S. citizens, and under an applicable U.S.-Swiss treaty, Switzerland has some obligations to disclose information related to these accounts. *See* Press Release, U.S Dep't of the Treas., Mutual Agreement of January 23, 2003, Regarding the Administration of Article 26 (Exchange of Information) of the Swiss-U.S. Income Tax Convention of October 2, 1996 (Jan. 23, 2003), *available at* http://www.treasury.gov/press-center/press-releases/Pages/mutual.aspx. Nevertheless, the treaty does *not* protect the Swiss banks from their own laws; thus, a U.S. citizen could potentially bring a suit in a Swiss court under Swiss laws against UBS for disclosing information. *See* Cantley, *supra* note 72, at 25. This is the same problem that confronts the Chinese banks in the *Tiffany* cases and *Gucci*.

interests are protected. Ultimately, the *Tiffany v. Qi* court did not preclude the asserted U.S. interest in protecting and enforcing trademarks by finding in favor of the Banks; rather, the court forced plaintiffs to use an intermediary body—the Hague Convention—to obtain the information sought in a way that would not contravene Chinese law. By contrast, the *Gucci* opinion directly contravened China's interest in protecting its bank secrecy laws, and consequently, its interest in increasing consumer confidence in its fledgling banking system. In other words, complying with the U.S. subpoenas in each case means violating Chinese law, whereas using the Hague Convention, to which the U.S. is a willing party, as an alternative means to obtain information does not violate U.S. or Chinese law while still advancing the United States' sovereign interest in protecting U.S. trademarks.

While one can reasonably question the certainty of successfully obtaining documents under the Hague Convention in China, this uncertainty should be insufficient to eschew China's interest in its bank secrecy laws. The *Tiffany* cases and the *Gucci* case portray this unfairness because, in these cases, the banks themselves were not parties to the litigation and were not alleged to have violated any U.S. laws.

As discussed above, the *UBS* case is only instructive insofar as it illuminates a potential political rationale for the *Gucci* court's decision to order BOC to comply with U.S. federal discovery rules. Indeed, using the *UBS* case as a frame of reference for how U.S. courts deal with non-party foreign banks in discovery is unhelpful, since the facts of *UBS* are dramatically different than those of both of the *Tiffany* cases and the *Gucci* case. However, jurisprudence exists that allows one to identify differences in how the courts evaluate cases with similar sets of facts, but involve banks from Western countries.

In *SEC v. Stanford International Bank Ltd*,[76] where a Swiss unit of Paris-based bank Société Générale SA ("SG Suisse") was a non-party recipient of a discovery request under the FRCP, the Northern District of Texas held that discovery should first proceed under the Hague Convention "in the interest of comity."[77] Like the Chinese banks in the *Tiffany* cases and the *Gucci* case, SG Suisse argued for utilizing discovery procedures under the Hague Convention because compliance with the discovery request under the FRCP would subject the bank and its employees to penalties under Swiss law.[78] While the *Stanford International* court aligned with the *Gucci* court in assessing most of the comity factors, the discourse

76. SEC v. Stanford Int'l Bank Ltd, 776 F. Supp. 2d 323 (N.D. Tex. 2011).

77. *Id.* at 342.

78. *See* Nolan Godberg, *Third Party Discovery of Foreign Bank Records Should First Proceed Under the Hague Convention*, PROSKAUER (May 26, 2011), http://privacylaw.proskauer.com/2011/05/articles/miscellaneous/third-party-discovery-of-foreign-bank-records-should-first-proceed-under-the-hague-convention/ (citing *Stanford Int'l*, 776 F. Supp. 2d 323).

surrounding factors four and five—assessing alternative means of obtaining the information and balancing competing national interests—differed significantly.

In *Stanford International*, the court limited its discussion of factor four to whether the documents sought could be *geographically* obtained elsewhere, as opposed to whether the documents could be obtained through other means (i.e., through a Hague Convention request as analyzed in each of the *Tiffany* cases and the *Gucci* case).[79] The court did not even mention the Hague Convention until it addressed factor five.

The court found comity factor five neutral, stating that "the [Hague] Convention inherently, and adequately, balances the competing sovereign interests here because its use will benefit U.S. interests by providing the needed evidence, and protect Swiss interests by avoiding intrusions upon Swiss sovereignty."[80] The court first acknowledged the "compelling interests at stake" of both the United States and Switzerland.[81] Regarding the Swiss banking laws, the court focused on Switzerland's "long-standing . . . tradition that places great value on the sovereign independence of the nation . . . [which] is embodied in . . . bank secrecy statues that have the *legitimate purpose of protecting commercial privacy* inside and outside Switzerland."[82] However, the court refrained from balancing the competing national interests at stake, which it saw as an "inherently political" inquiry, and opined that courts "generally are not the proper bodies to weigh which sovereign's interests are more meritorious."[83] Ultimately, the court determined that the Hague Convention itself embodied the legislative decisions of both countries that had agreed to become signatories to the Convention, and thus, necessarily struck the right balance and allowed both U.S. and Swiss interests to be served.[84]

Although *Stanford International* was decided in the Fifth Circuit, it predated both of the *Tiffany* cases and *Gucci*; yet, neither of the *Tiffany* cases nor the *Gucci* case adopted, let alone addressed, *Stanford International's* language or analysis about the Hague Convention itself striking a balance between competing national interests in factor five of the comity analysis. Furthermore, the Chinese bank cases' extensive discussion of whether a Hague Convention request would be successful in Switzerland was completely absent in *Stanford International*. Additionally, the court in *Stanford International* found that Swiss banking laws had the "legitimate purpose of protecting commercial privacy," without mentioning and in spite

79. *Stanford Int'l*, 776 F. Supp. 2d at 334–37.
80. *Id.* at 337 (internal quotations omitted).
81. *Id.* at 336.
82. *Id.* (internal quotations omitted).
83. *Id.* at 336–37.
84. *Id.* at 337.

of the prior impropriety by Swiss bank UBS in *United States v. UBS AG*,[85] which would otherwise suggest an illegitimate underside to Swiss banking laws.

Both of the *Tiffany* cases and the *Gucci* case focus critically on whether the Chinese government would respect a request for documents made under the Hague Convention in determining factor four of the comity analysis—i.e., in determining whether there are other means available for obtaining the information requested. This inquiry is entirely absent from the discussion of factor four in *Stanford International*, presumably because that court found it unthinkable that the Swiss government would not comply with the Hague Convention. Even in *Tiffany v. Qi*, where Judge Pitman ultimately held that a Hague Convention request is an available alternative means, the court reached this result only after an extensive analysis of China's history of noncompliance.[86] Judge Sullivan's determination in *Gucci* that a Hague Convention request would not be "effective" in China, however, produced more dramatic effects. Judge Sullivan, in relying on scholarship based on the U.S. State Department's retracted language about China's noncompliance, memorializes distrust of the Chinese government in enforcing international treaties, a fact that may no longer be true. Furthermore, in ignoring the bank's non-party status, Judge Sullivan seemed to project some culpability on the bank—as if it were partly to blame for the counterfeiter's profiting. The *Gucci* opinion reinforces the notion of a counterfeiting culture in China and a government that is too lax towards infringement of intellectual property rights. Finally, the opinion suggests that Chinese interests and U.S. interests do not share common ground[87]—unlike Swiss interests, which can be harmonized with U.S. interests when the "right balance" is struck.[88]

Though the precedential effect of both *Tiffany* decisions and the *Gucci* decision is unclear—as they may be cabined to Second Circuit jurisprudence or simply to their individual facts—they reveal some prevailing attitudes and anxieties about China as a member of today's increasingly global marketplace, and specifically, the Chinese government's role in adhering to international standards that are largely dictated by Western countries in that marketplace. For example, in January 2012, *This American Life*[89] broadcasted an excerpt of Mike Daisey's one-man monologue, *The Agony and the Ecstasy of Steve Jobs*. The episode, titled *Mr. Daisey and the Apple Factory*, alleged that there were unethical labor

85. *Id.* at 336.

86. Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 153–54 (S.D.N.Y. 2011).

87. *See* Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974, 2011 WL 6156936, at *9–10 (S.D.N.Y. Aug. 23, 2011).

88. *Stanford Int'l*, 776 F. Supp. 2d at 337.

89. *This American Life* is a journalistic enterprise and weekly public radio show with about 1.8 million listeners nationwide. *See About Us*, THIS AM. LIFE, http://www.thisamericanlife.org/about (last visited Mar. 5, 2013).

practices at Apple's Foxconn factory in China, including the employment of underage workers and unsafe working conditions.[90] As a result of the allegations, the *New York Times* ran an incendiary piece titled *The iEconomy; In China, the Human Costs that are Built into an iPod* that painted Foxconn, which happens to be the largest private-sector employer in China, as willfully blind to its unethical labor practices.[91] On March 16, 2012, however, *This American Life* retracted *Mr. Daisey and the Apple Factory* because its producers discovered that Daisey had lied during the fact-checking process and the show could no longer "vouch for [the story's] truth."[92] Although the initial story was retracted, the damage to Foxconn's reputation had already been done.[93]

The Apple-Foxconn controversy shows the media's readiness to accept allegations of impropriety in Chinese business practices and the underlying assumption that the Chinese government turns a blind eye to such practices. The media's characterization of the Apple-Foxconn controversy mirrors the *Gucci* court's unfavorable opinion in its attitude towards big business (or, more specifically, banks) in China.

An article published by *The Atlantic* suggests why, with particular regard to U.S.-China relations, media and law can easily shape one another.

> There are vast differences in political systems and institutions, social norms, [and] historical and cultural legacies . . . [between the U.S. and China]. Mutual perceptions can get easily skewed, with real repercussions for policy. . . . which can be reinforced and perpetuated over time through, for example[], domestic media . . . .[94]

As China continues to increase its presence in the global marketplace, these mutual perceptions come to surface through public discourse, such as media and judicial opinions. Because the two *Tiffany* cases and the *Gucci* case form part of this discourse, a closer look at the language and rationale of these cases reveals the Western attitudes that exist towards, inter alia, China's willingness to cooperate in the investigation of

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90. Ira Glass, *Retracting "Mr. Daisey and the Apple Factory*," THIS AM. LIFE BLOG (Mar. 16, 2012), http://www.thisamericanlife.org/blog/2012/03/retracting-mr-daisey-and-the-apple-factory/.

91. David Barboza & Charles Duhigg, *The iEconomy; In China, the Human Costs that are Built into an iPad*, N.Y. TIMES, Jan. 26, 2012, http://query.nytimes.com/gst/fullpage.html?res=9C02E2D71438F935A15752C0A9649D8B63&pagewanted=all.

92. *See* Glass, *supra* note 90.

93. Because of the media frenzy that ensued after the *American Life* episode, Apple enlisted the U.S. Fair Labor Association (FLA) to conduct an investigation into the working conditions at the factory, and while Daisey's allegations were not confirmed, the FLA found that workers were working significantly longer hours than the legal limit in China. Juliette Garside, *Apple's Factories in China are Breaking Employment Laws, Audit Finds*, GUARDIAN, Mar. 30, 2012, http://www.guardian.co.uk/technology/2012/mar/30/apple-factories-china-foxconn-audit.

94. Damien Ma, *Friend/Foe: The Contradictions in How Americans and Chinese See Each Other*, THE ATLANTIC (Jul. 13, 2012, 3:52 PM), http://www.theatlantic.com/international/archive/2012/07/friend-foe-the-contradictions-in-how-americans-and-chinese-see-each-other/259710/.

intellectual property infringement and the validity of China's interest in its bank secrecy laws.

CONCLUSION

By validating expert testimony suggesting that the Chinese government drags its feet when presented with a Hague Convention request, the *Gucci* court gives this skeptical impression the imprimatur of fact, in spite of evidence that the Chinese government is changing its noncompliant ways. The *Tiffany v. Qi* court, on the other hand, while engaging with the same analytical questions as the *Gucci* court, presents a forward-thinking vision for China's role as a member of the global community. By ordering a request through the Hague Convention rather than forcing strict compliance with U.S. discovery rules in violation of Chinese law, the court challenges the view that the Chinese government refuses to enforce international business standards and acknowledges that times are changing, with China taking its role as a Hague Convention signatory more seriously. The *Tiffany v. Forbse* court perhaps presents the most impartial view to date: by refusing to assume that a Hague Convention request would prove unfruitful until concrete evidence is provided after a suitable time period of non-compliance by Chinese banks, this court shows cautious optimism as to China's improving participation as a member of the international community while not entirely ignoring China's past record.