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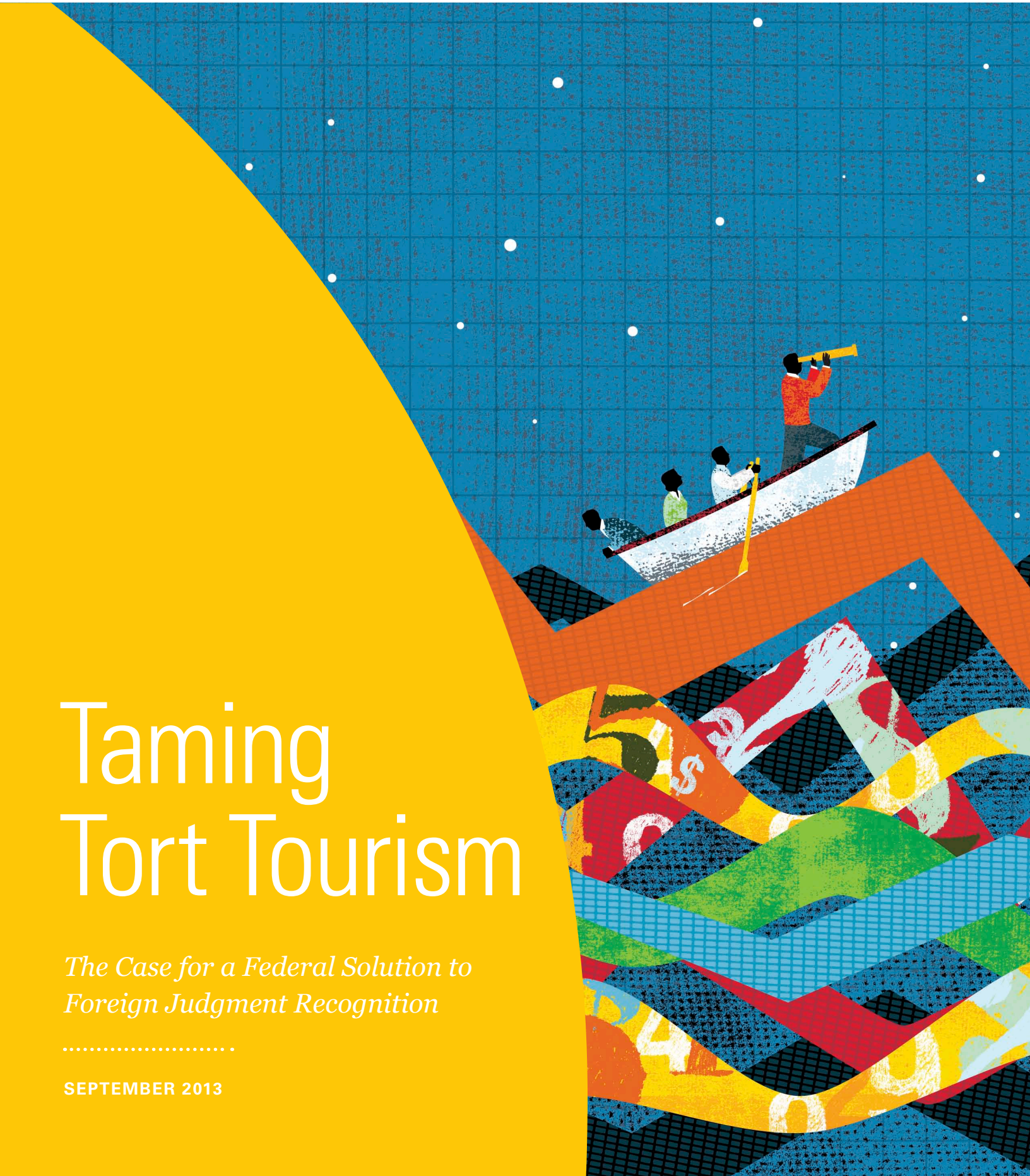

Taming Tort Tourism

The Case for a Federal Solution to Foreign Judgment Recognition

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Taming Tort Tourism: The Case for a Federal Solution to Foreign Judgment Recognition

When is a multi-million dollar foreign-country judgment not worth the paper it's printed on? Surprisingly, the answer depends in large part on where the judgment is enforced in the United States.

The current law on recognition and enforcement of foreign judgments in this country is governed by a patchwork of state statutes and common law principles. Despite the clear federal interest in regulating how U.S. courts treat judgments issued outside the United States, no federal law or treaty governs the conditions under which U.S. courts should—and should not—give full effect to foreign judgments, outside of the narrow category of foreign defamation judgments.[1]

The time has come to rethink our country's fractured approach to foreign judgment recognition. In an increasingly globalized world where billions of dollars of foreign investment flow across borders daily, individuals and multinational businesses deserve consistency and predictability under a unified and modernized federal law. The past few decades have seen a significant increase in the number of actions seeking recognition and enforcement of foreign judgments in the United States.[2] As explained in this paper, the present patchwork of state laws creates unnecessary challenges for U.S. citizens and businesses seeking recognition of foreign judgments and facing litigation abroad,

1 The federal SPEECH Act, passed by Congress in 2010, is the notable exception to the state-law recognition regime. *See* Pub. L. 111-223 (Aug. 10, 2010), codified at 28 U.S.C. §§ 4101-05. The SPEECH Act provides that "[n]otwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that" the foreign country "provided at least as much protection for freedom of speech and press … as would be provided by the first amendment to the Constitution of the United States" or that the judgment debtor "would have been found liable for defamation by a domestic court applying the first amendment." 28 U.S.C. § 4102(a)(1). The SPEECH Act, discussed *infra*, applies only to foreign defamation judgments.

2 William E. Thomson & Perlette Michèle Jura, U.S. Chamber of Commerce Inst. for Legal Reform, Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments 6 (Oct. 2011).

including a real risk of forum shopping among states and an inability to contest abusive foreign judgments before they are automatically recognized in the United States. Legal uncertainty also harms judgment creditors, who deserve prompt and dependable recognition of their legitimate foreign judgments. Those who have secured appropriate foreign judgments should be able to enforce those judgments promptly in the United States under federal law. But individuals and businesses that have been subjected to fraudulent or legally suspect judgments abroad should be able to contest enforcement vigorously under federal law.

Foreign plaintiffs and their counsel have begun to exploit the current system of foreign judgment recognition to circumvent legal limitations that would otherwise preclude recovery under U.S. law. Plaintiffs' lawyers have devised an explicit strategy to pursue tort lawsuits abroad in weak or corruptible foreign courts in order to secure large awards against defendant companies. They then seek to collect those judgments in countries with liberal rules favoring

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recognition of foreign judgments—"effectively launder[ing] a foreign judgment by … enforcing it in another state that would have rejected it in the first place."[3] This form of "tort tourism" makes the lack of uniformity among state laws even more problematic and underscores the need for prompt congressional action.[4] For decades, numerous legal scholars, joined by the respected American Law Institute ("ALI"), have called for a federal law to govern foreign judgment recognition.[5] The time has come for Congress to act on these recommendations. This paper explains why a federal statute to govern recognition of foreign judgments is needed and outlines potential elements of a new federal law.

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3 Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 Harv. Int'l L.J. 459, 459 (2013).

4 Thomas J. Donohue, *U.S. Firms Prone to 'Tort Tourism' in Foreign Courts*, Investors Bus. Daily, July 11, 2012, http://news.investors.com/ibd-editorials-viewpoint/071112-617811-us-firms-prone-to-legal-extortion-overseas.htm.

5 *See, e.g.*, Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. Priv. Int'l L. 287, 309 (2006); Violeta I. Balan, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. Marshall L. Rev. 229, 253-54 (2003); Brian Richard Paige, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 Seattle U. L. Rev. 591, 606 (2003) ("[A]bsent a single national process … , the American scheme cannot hope to be either uniform or efficient."); Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 Ind. L.J. 635 (2000); Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 Colum. J. Transnat'l L. 121 (1998); William C. Honey & Marc Hall, *Bases for Recognition of Foreign*

The Patchwork

The United States has long been among the most receptive countries in the world to recognizing and enforcing foreign judgments. In general, a money judgment obtained in a foreign court will be recognized and enforced in state or federal courts of the United States if the judgment was rendered by a tribunal with competent jurisdiction and if the proceedings and system rendering the judgment were fundamentally fair. This solicitous attitude contrasts with the law and practice in other countries, many of which do not recognize certain kinds of judgments by U.S. courts.[6]

To be sure, recognition and respect for foreign judgments serves our own national interests, as well. When U.S. citizens prevail in litigation abroad, recognition and enforcement helps to ensure that they do not have to waste resources re-litigating their claim to obtain relief in this country. Moreover, when our courts recognize and enforce foreign judgments, foreign courts are more likely to recognize and enforce U.S. judgments out of reciprocity. We cannot reasonably expect the courts of other countries to recognize and enforce the judgments of U.S. courts if our courts do not recognize and enforce the judgments of foreign courts. Recognition and enforcement of foreign judgments thus helps to resolve transnational legal disputes efficiently, which serves the interests of plaintiffs, defendants, and taxpayers alike.

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Nation Money Judgments in the U.S. and Need for Federal Intervention, 16 Suffolk Transnat'l L. Rev. 405, 415-16 (1993); Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 Notre Dame L. Rev. 253, 300 (1991); Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 Iowa L. Rev. 53, 79 (1984).

6 *See* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 Geo. Wash. Int'l L. Rev. 173, 173 (2008) (concluding that "on average, U.S. judgments face more obstacles in Europe than do European judgments in the United States"). Germany, Japan, and Italy have refused to enforce U.S. judgments for large punitive damages. *See* Madeleine Tolani, *U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public*, XVII Annual Survey of Int'l & Comp. L. 185 (2011). Switzerland, England, and France are very reluctant to enforce U.S. judgments against their respective citizens where those citizens did not voluntarily submit to U.S. jurisdiction. Baumgartner, *supra*, at 189-90. And the Nordic countries and the Netherlands generally do not recognize a foreign judgment absent a recognition treaty between the "rendering" and the "recognizing" jurisdictions. *Id.* at 184.

The historical foundation of the U.S. approach to recognizing foreign judgments dates to the Supreme Court's decision in *Hilton v. Guyot*, 159 U.S. 113 (1895), which involved a French judgment rendered against an American citizen. Relying on principles of international comity—"the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation"[7]—and due process, the Court held that federal courts generally should recognize and enforce foreign judgments as a matter of federal common law. The Court explained that a foreign court's judgment should be recognized as "conclusive upon the merits" if:

- "the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties";
- the foreign proceedings rested upon "due allegations and proofs";
- the judgment debtor had an "opportunity to defend against" the allegations;
- the foreign proceedings were conducted "according to the course of a civilized jurisprudence";
- the foreign proceedings were "stated in a clear and formal record";
- the foreign judgment was not "affected by fraud or prejudice"; and
- recognition of the foreign judgment is consistent with comity and "the principles of international law," e.g., reciprocity in recognition.[8]

Applying these factors, the Court in *Hilton* refused to recognize the French judgment on reciprocity grounds because the Court determined that a French court would not recognize a similar U.S. judgment without first re-examining the evidence.[9] Nevertheless, the *Hilton* decision's lasting influence lies in its strong rhetorical stance in favor of validating foreign judgments.

The national uniformity established by the federal standard in *Hilton*, however, was short-lived. State courts soon began to apply their own laws when deciding whether to recognize and enforce foreign

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7 *Hilton*, 159 U.S. at 164.

8 *Id.* at 205-06; *see also id.* at 202-03 ("[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh … .").

9 *Id.* at 210-11, 227-28. In a second foreign judgments case decided the same day as *Hilton*, the Court held in *Ritchie v. McMullen*, 159 U.S. 235 (1895), that an Ontario judgment was conclusive on the merits because English courts (and by extension Canadian courts) would reciprocally enforce a comparable U.S. judgment.

judgments.[10] Then, in 1938, the Supreme Court in *Erie Railroad Co. v. Tompkins* abolished federal general common law (and arguably with it, *Hilton*).[11] Thus, for the last 75 years, federal courts exercising diversity jurisdiction have looked to state law on questions regarding the recognition or enforcement of a foreign judgment.[12] Although state decisions generally continued to rely on the *Hilton* factors (with the exception that nearly all state and federal courts have abandoned *Hilton*'s requirement of reciprocity), the U.S. system became a patchwork of state common law.[13]

Over the last 50 years, the Uniform Law Commission ("ULC") has attempted to codify and harmonize the various state law decisions governing recognition and has achieved partial success. In 1962, the ULC proposed the Uniform Foreign Money-Judgments Recognition Act (the "1962 Act"), which remains in effect in 15

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10 *See, e.g.*, *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381 (1926) (relying on New York common law, which preceded *Hilton*, to give preclusive and final effect to a French judgment involving the international transport of goods). The New York Court of Appeals (the state's highest court) observed, "It is argued with some force that questions of international relations and the comity of nations are to be determined by the Supreme Court of the United States; that there is no such thing as comity of nations between the State of New York and the Republic of France and that the decision in *Hilton v. Guyot* is controlling as a statement of the law." *Id.* at 386-87. The New York court concluded, however, that "the question is one of private rather than public international law, of private right rather than public relations and our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights." *Id.* at 387. Accordingly, the court held that state courts are "not bound to follow the *Hilton* case," but rather may decide questions of foreign judgment recognition based on state law. *Id.*

11 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

12 *E.g., Svenska Handelsbanken v. Carlson*, 258 F. Supp. 448, 451 (D. Mass. 1966) (relying on Erie to conclude that "Massachusetts rather than federal law" governed effort to recover on Swedish judgment entered against defendant). Whether *Hilton* survives *Erie* in cases arising under federal question jurisdiction is less clear. The Restatement (Second) of Conflict of Laws raises (but does not answer) this question in recognizing the need for a unifying federal standard for foreign judgment recognition in cases affecting foreign relations. *See* Restatement (Second) of Conflict of Laws § 98 cmt. c ("The Supreme Court of the United States has never passed upon the question whether federal or State law governs the recognition of foreign nation judgments. The consensus among the State courts and lower federal courts that have passed upon the question is that, apart from federal question cases, such recognition is governed by State law and that the federal courts will apply the law of the State in which they sit. It can be anticipated, however, that in due course some exceptions will be engrafted upon the general principle. So it seems probable that federal law would be applied to prevent application of a State rule on the recognition of foreign nation judgments if such application would result in the disruption or embarrassment of the foreign relations of the United States. *Cf. Zschernig v. Miller*, 389 U.S. 429 (1968)."). The uncertainty on this point further supports the need for a federal statute on foreign judgment recognition.

13 Restatement (Third) of Foreign Relations Law § 481 cmt. d, Reporter's Note 1 (1987).

states and the U.S. Virgin Islands.[14] Largely based on *Hilton*, the 1962 Act starts from a general presumption that foreign judgments should be conclusive, and it includes a limited set of mandatory and discretionary exceptions to recognition. Under the 1962 Act, a judgment *must not* be recognized if:

- the foreign judgment was rendered under a system that does not provide "impartial tribunals or procedures that are compatible with the requirements of due process";[15]
- the foreign court "did not have personal jurisdiction over the defendant";[16] or
- the foreign court did not have subject matter jurisdiction.[17]

The 1962 Act also provides that a foreign judgment *need not* be recognized if:

- the defendant did not receive notice of the proceedings "in sufficient time to enable him to defend";[18]
- the judgment was obtained by fraud;[19]
- the cause of action is "repugnant to the public policy of this state";[20]
- the judgment "conflicts with another final and conclusive judgment";[21]
- the parties had agreed to resolve disputes in a forum inconsistent with the judgment;[22] or
- if jurisdiction was based on personal service, the foreign court "was a seriously inconvenient forum" to litigate the dispute.[23]

If the foreign judgment does not meet any of these invalidating criteria, the U.S. court must recognize and domesticate the judgment, which becomes an enforceable U.S. judgment.

In order to clarify and update the 1962 Act, the ULC proposed a revised version in 2005 called the Uniform Foreign-Country Money Judgments Recognition Act (the "2005 Act"), which now is applied in 18 states

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14 Some form of the 1962 Act remains in effect in Alaska, Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, the U.S. Virgin Islands, and Virginia. *See* Uniform Law Commission, "Foreign Money Judgments Recognition Act," http://uniformlaws.org/Act.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act.

15 1962 Act § 4(a)(1).

16 *Id.* § 4(a)(2).

17 *Id.* § 4(a)(3)

18 *Id.* § 4(b)(1).

19 *Id.* § 4(b)(2).

20 *Id.* § 4(b)(3).

21 *Id.* § 4(b)(4).

22 *Id.* § 4(b)(5).

23 *Id.* § 4(b)(6). Mirroring the post-*Hilton* trend, the 1962 Act does not consider reciprocity to be relevant to recognition of foreign judgments.

and the District of Columbia.[24] The 2005 Act maintained the general structure of the 1962 Act, but adds two discretionary grounds for non-recognition. First, a U.S. court need not enforce a judgment "rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment."[25] Second, a U.S. court need not enforce a judgment when the specific proceeding in the foreign court was not compatible with due process of law.[26] In addition, the 2005 Act requires judgment creditors to seek recognition in the context of a formal civil action.[27] This requirement precludes the practice in some states that have allowed the recognition of foreign judgments simply be registering the foreign decision with a court clerk—a troubling procedure discussed in detail below. The 2005 Act also expands the scope of the public policy exception by providing that recognition may be denied if either the cause of action or the judgment itself violates public policy "of this state or of the United States."[28]

Despite the ULC's efforts to achieve uniformity among state laws, the landscape remains anything but uniform. Variances between the 1962 and 2005 Acts result in the application of different procedural requirements and substantive standards in different states. Even those states that have adopted the same uniform Act have not done so uniformly, modifying requirements to suit local interests.[29] And, of course, many states have enacted neither Act. Presently, about one-third of the states are governed by the 1962 Act, another one-third are governed by the 2005 Act, and the remaining one-third rely on a body of substantive common law precedent.

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24 Alabama, California, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, and Washington. *See* Uniform Law Commission, "Foreign-Country Money Judgments Recognition Act," http://uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%2Recognition%20Act.

25 *Id.* § 4(c)(7).

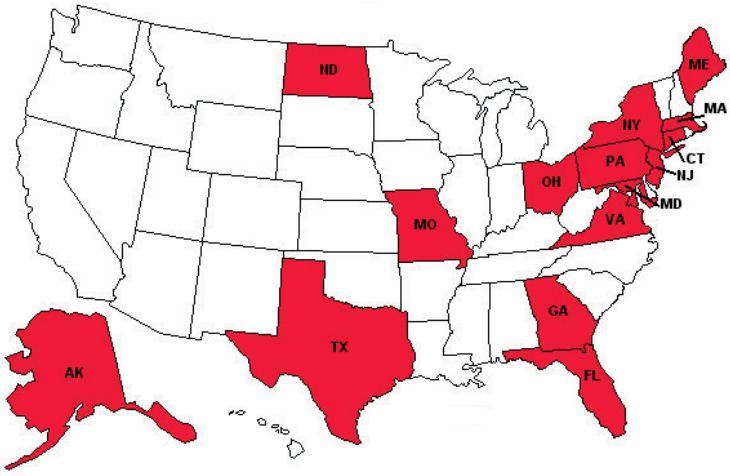
26 *Id.* § 4(c)(8).

27 *Id.* § 6.

28 *Id.* § 4(c)(3).

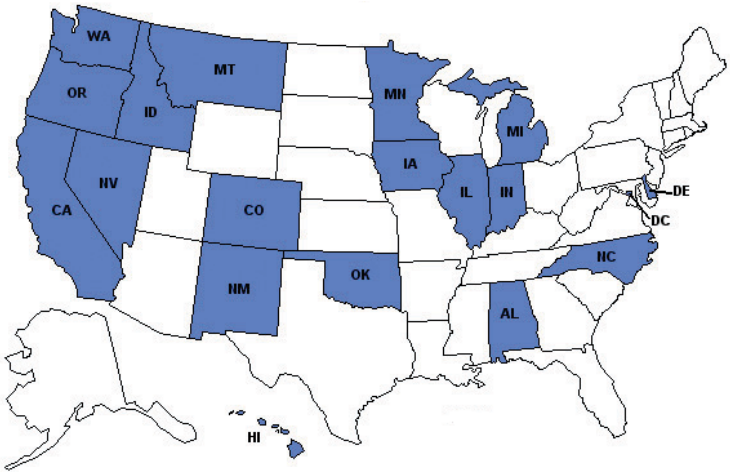
29 For example, New York's codification of the 1962 Act, known as "Article 53," generally tracks the 1962 Act, but includes some material differences. Article 53 does not permit judgment creditors to register foreign money judgments. *See generally* N.Y. CPLR §§ 5301-5309. Under Article 53, foreign judgments can only be recognized by filing a traditional lawsuit, summary lawsuit, or by raising the issue as a defendant in pending litigation. *Id.* § 5303 (providing that foreign money judgments are "enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense"); *see also id.* § 3213 (permitting judgment creditor to serve summons with motion papers for summary judgment). Article 53 also deviates from the 1962 Act by providing that a foreign court's lack of subject matter jurisdiction is only a discretionary, not a mandatory, basis for denying recognition. *Compare id.* § 5304(b)(1) ("A foreign country judgment *need not be recognized if* … the foreign court did not have jurisdiction over the subject matter" (emphasis added)), *with* 1962 Recognition Act § 4(a)(3) ("A foreign judgment is *not conclusive* if … the foreign court did not have jurisdiction over the subject matter." (emphasis added)).

"Despite the ULC's efforts to achieve uniformity among state laws, the landscape remains anything but uniform."



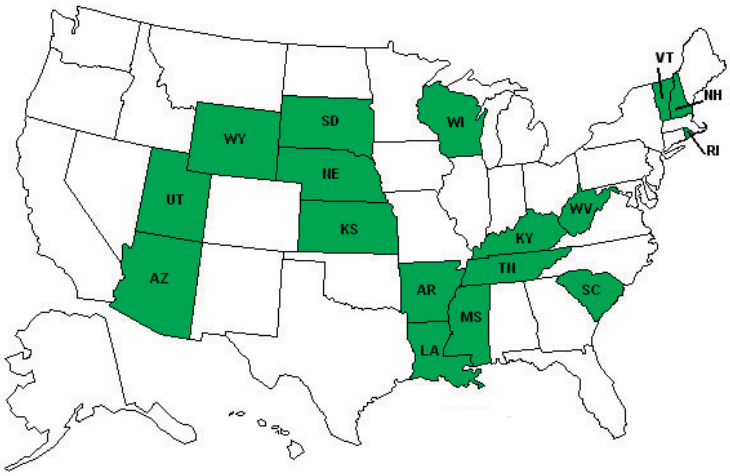
1962 Recognition Act

15 States and the U.S. Virgin Islands



2005 Recognition Act

18 States and the District of Columbia



No Uniform Act

17 States

The Patchwork Problem

This patchwork of state laws creates problems for the U.S. business community by jeopardizing the procedural rights of judgment debtors, encouraging forum shopping both here and abroad, and enabling plaintiffs to circumvent legal limitations that would otherwise preclude recovery under U.S. law. These legal problems fall into three categories: procedural, substantive, and structural.

Procedurally, some state and federal courts have permitted judgment creditors to enforce automatically a foreign-country money judgment by simply "registering" the foreign judgment with a court clerk, without filing a civil action in a U.S. court. In those cases, the defendant is not provided an opportunity to be heard in a U.S. court prior to recognition and enforcement. This problem stems from a misinterpretation of the interaction between the 1962 Act and the Uniform Enforcement of Foreign Judgments Act (the "Enforcement Act"), enacted by 47 states.[30] By its terms, the Enforcement Act was intended to facilitate swift enforcement of judgments by sister states of the United States under the Full Faith and Credit Clause,[31] not foreign-country judgments,[32] but some courts nevertheless have erred in holding that it applies to foreign-country judgments.[33]

In states governed by the 1962 Act and the Enforcement Act, a judgment creditor may be able to attach or otherwise encumber a judgment debtor's assets to satisfy a foreign judgment before the judgment debtor has an opportunity to argue in court that the judgment should not be recognized. The 1962 Act did not include any procedures for applying the specified grounds for non-recognition. Rather, the 1962 Act simply provides that foreign judgments are enforceable generally in the same manner as sister-state judgments. And under the Enforcement Act, a judgment creditor need only file an authenticated copy of a sister-state

30 Sensing that state court dockets were becoming congested by routine lawsuits seeking to give full faith and credit to sister-state judgments, the ULC proposed the Enforcement Act in 1948 (amended in 1964) to streamline the recognition of judgments between U.S. states. The Enforcement Act facilitates speedy and economical resolution of recognition cases governed by the Full Faith and Credit Clause of the U.S. Constitution by permitting judgment creditors to domesticate a sister-state judgment by filing a certified copy of the judgment with a court clerk in the receiving state, rather than instituting a second civil action. Only California, Massachusetts, and Vermont have not enacted the Enforcement Act.

31 U.S. Const. art. IV, § 1.

32 Enforcement Act § 1 ("In this Act 'foreign judgment' means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.").

33 *See Society of Lloyd's v. Ashenden*, 233 F.3d 473, 481 (7th Cir. 2000) (interpreting Illinois law). Since this decision, Illinois has enacted the 2005 Recognition Act, which explicitly eliminates the Enforcement Act's application to foreign-country judgments. *See infra* note 38.

judgment with the clerk of an appropriate court in order to make that judgment enforceable in the same manner as a judgment of a local court.[34] As the Seventh Circuit has explained, "[t]he clerk does not investigate to see whether the judgment is truly enforceable. The issue of the judgment's enforceability is raised by way of defense to compliance with, not commencement of, the [enforcement] proceeding… ."[35] The debtor's only opportunity for a hearing is limited to arguments for "reopening, vacating, or staying" the now-enforceable judgment.[36]

Accordingly, in states that are governed by the 1962 Act, there is a risk that a judgment creditor can obtain "instant recognition" of a foreign-country judgment simply by presenting it to the clerk of the court, and then can enforce the recognized judgment through seizure of assets—all before the judgment debtor has an opportunity to assert any defenses to recognition. In our opinion, "instant recognition" is not only bad policy, it also is constitutionally suspect.[37] Indeed, this procedure was not the intent of the drafters of the 1962 Act, and the 2005 revision was proposed in part to prevent such instantaneous recognition and enforcement.[38] However, only 18 states and the District of Columbia have enacted the 2005 Act, leaving roughly a dozen jurisdictions in which this procedure may remain viable.

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34 Enforcement Act § 2 ("A copy of any [authenticated] foreign judgment … may be filed in the office of the Clerk of any [District Court of any city or county] of this state… . A judgment so filed has the same effect … as a judgment of a [District Court of any city or county] of this state and may be enforced or satisfied in like manner." (alternation in original)).

35 *Ashenden*, 233 F.3d at 481.

36 Enforcement Act § 2 ("A judgment so filed … is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a [District Court of any city or county] of this state … ."). The ULC deemed the 1948 Enforcement Act's summary process provisions "superfluous" in light of the subsequent widespread adoption of federal and state judicial rules for general summary judgment procedures. *See id.*, Prefatory Note. In an effort to "relieve[] creditors and debtors of the additional cost and harassment of further litigation which would otherwise be incident to the enforcement of the foreign judgment," the ULC sought to mirror the newer federal practice under 28 U.S.C. § 1963, which permitted one district court's judgment to be registered and enforced in another district court, with the same effect as any other judgment of that second court. *Id.* In some states, the foreign judgment could become enforceable immediately upon registration. *See, e.g.*, 42 Pa. Cons. Stat. § 4306(b) (a judgment filed with the clerk of court constitutes "a lien as of the date of filing").

37 Courts do not appear to have addressed the extent to which *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), constrains the registration process of foreign-country judgments under the Uniform Enforcement Act. In *Mullane*, the Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. Registration, which affords notice and an opportunity to be heard only after-the-fact, raises serious questions under *Mullane* and the Due Process Clause.

38 *See* 2005 Act § 6(a) ("If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment."). The official comment to Section 6 clarifies that this provision was added to expressly

> *If a defendant does not know where a judgment may be enforced, the decision whether to defend on the merits is that much more difficult.*

The existing patchwork of state laws also raises a host of substantive concerns, including issues of personal jurisdiction, reciprocity, and federal public policy, which are discussed below. Additional substantive concerns are addressed in the discussion of federal law elements at the end of this paper.

Personal Jurisdiction

In states governed by either uniform recognition act, a defendant that contests the merits of a lawsuit abroad may not challenge recognition of a subsequent judgment on the ground that the rendering court lacked personal jurisdiction over the defendant.[39] Thus, whenever a defendant in a foreign suit believes that the foreign court is asserting jurisdiction improperly, U.S. state laws place the defendant in a dilemma. If the defendant mounts a defense on the merits, he waives his ability to contest jurisdiction as a defense to recognition and enforcement. But if the defendant chooses instead to preserve his jurisdictional defense, he risks a large default judgment abroad, which can create bad press, negative market reactions (in the case of a corporate defendant), and greater liability if the judgment is later recognized and enforced in the United States. This problem is exacerbated by differing laws across states regarding the right to contest personal jurisdiction. If a defendant does not know where a judgment may be enforced, the decision whether to defend on the merits is that much more difficult.[40]

"reject[] decisions under the 1962 Act holding that the registration procedure found in the Uniform Enforcement of Foreign Judgments Act could be utilized with regard to recognition of a foreign-country judgment." *Id.* cmt. 1 (citing the Seventh Circuit's decision in *Ashenden*). The ULC explains that "differences between sister-state judgments and foreign-country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign-country judgment in all cases in which that issue is raised. Although the threshold for establishing that a foreign-country judgment is not entitled to recognition under [the 2005 Act] is high, there is a sufficiently greater likelihood that significant recognition issues will be raised so as to require a judicial proceeding." *Id.*

39 *See* 1962 Act § 5(a)(2) ("The foreign judgment shall not be refused recognition for lack of personal jurisdiction if … the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him."); *accord* 2005 Act § 5(a)(2).

40 This jurisdictional dilemma is further complicated by the fact that some foreign courts may reserve jurisdictional determinations until *after* resolution of the merits. In those cases, a defendant in a foreign court cannot make a limited appearance to contest jurisdiction only and then make a strategic determination thereafter on whether to defend the merits of the claim.

Reciprocity

Most states, but not all, agree to recognize foreign judgments regardless of whether the foreign country would recognize a comparable U.S. judgment.[41] Many experts believe that our current state laws are overly generous to other nations; without the leverage of a uniform reciprocity requirement in state law, it has been difficult not only for individual and corporate judgment creditors to gain recognition of their judgments in foreign countries but also for the State Department to secure international cooperation in the negotiation of a treaty to govern recognition of foreign judgments.[42] Between 1992 and 2005, the United States tried to persuade other countries to agree to a broad multilateral treaty on recognition of judgments, but those efforts were unsuccessful in large part because the United States did not have the bargaining chip of withholding recognition of foreign judgments.[43] Most other countries prefer the status quo, in which they know our state courts will treat foreign judgments generously, while foreign courts can reserve decision on how generously to treat U.S. judgments depending upon the circumstances.

Federal Interests and Public Policy

The current state law system ignores important and uniquely federal interests. As a threshold matter, it is indisputable that the recognition *vel non* of a foreign country's judgment in the United States is an aspect of the foreign relations between nations and part of the foreign policy of the United States. The Supreme Court has explained, in the context of recognizing official acts of foreign sovereigns, that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated *exclusively as an aspect of federal law*."[44] Both practically and strategically, then, it makes considerable sense for the federal government to control this aspect of foreign relations. Yet the patchwork of state laws allows judges in

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41 Neither the 1962 Act nor the 2005 Act includes a reciprocity requirement, but six states—Florida, Georgia, Massachusetts, Maine, Ohio, and Texas—have deviated from the uniform acts and included reciprocity as a relevant consideration. *See* Fla. Stat. § 55.605(2); Ga. Code Ann. § 9-12-114; Mass. Gen. Laws ch. 235, § 23A; Me. Rev. Stat. Tit. 14, § 8505(2); Ohio Rev. Code § 2329.92(B); Tex. Civ. Prac. & Rem. Code § 36.005(B).

42 *See* Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 Law & Contemp. Probs. 103, 138-39 (1994) ("The problem with unilateral generosity is that it may weaken U.S. bargaining power when, other countries having chosen not to follow our example, it attempts to work out mutually acceptable agreements. That looms as a difficulty for the United States in pursuing a multilateral convention on the recognition and enforcement of foreign judgments."); Samuel P. Baumgartner, The Proposed Hague Convention on Jurisdiction and Foreign Judgments 6-9 (2003).

43 Burbank, *Federalism and Private Int'l Law, supra* note 5, at 288 ("The effort to conclude a global jurisdiction and judgments convention foundered, in part, on the lack of a credible *quid pro quo*. Negotiators from the rest of the world perceived that they had little to gain in the area of judgment recognition and enforcement as a result of unilateral American generosity.").

44 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (emphasis added).

> *"This unbridled latitude to make foreign policy 'findings' has sometimes led courts to reach conflicting conclusions about the judicial systems of the same foreign country."*

different states to determine—without any consultation with the federal government or reference to federal standards—whether foreign judicial systems or specific judicial proceedings are corrupt or lacking in due process. This unbridled latitude to make foreign policy "findings" has sometimes led courts to reach conflicting conclusions about the judicial systems of the same foreign country.[45]

State laws also fail to account for a unified federal public policy. Under general principles of international law, any nation may deny recognition and enforcement of a foreign judgment in circumstances where recognition would be contrary to that nation's public policy. Some nations apply this exception broadly, but courts in the United States construe it narrowly, applying it only to violations of "fundamental principle[s] of justice."[46] The Uniform Acts do not define the term "public policy,"[47] and federal and state courts have adopted interpretations of public policy that vary from state to state rather than according to any national interest.

The narrowness of the public policy exception as interpreted by U.S. courts constrains the ability of U.S. courts to reject judgments based on foreign suits that would not prevail if brought originally in the United States, that raise U.S. constitutional concerns, or that undermine U.S. national interests. For example, a defendant entitled

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45 *Compare Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (denying recognition to foreign judgment on the grounds that the Nicaraguan judicial system was not fundamentally fair), with *Callasso v. Morton & Co.*, 324 F. Supp. 2d 1320 (S.D. Fla. 2004) (dismissing case on forum non conveniens grounds because the parties could get a fundamentally fair trial in Nicaragua). Federal guidance would be especially welcome to judges already skeptical of their role in such foreign policy determinations. *See, e.g., Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1992) ("it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation"); *Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823, 832 (C.D. Cal. 2008) (similar); *Warter v. Boston Sec., S.A.*, 380 F. Supp. 2d 1299, 1310-11 (S.D. Fla. 2004) (court would not sit "in judgment upon the integrity of the entire Argentine judiciary" (internal quotation marks and citations omitted)).

46 In the United States, under both state statutes and common law, courts generally will uphold a foreign judgment unless to do so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

47 The 2005 Act expanded the public policy exception in two ways. Whereas the 1962 Act allows a court to deny recognition if the cause of action is repugnant to the public policy of the receiving state, the 2005 Act permits non-recognition if the cause of action *or the judgment* is incompatible with the public policy of the receiving state *or of the United States*. *See* 2005 Act § 4(c)(3).

to immunity under U.S. law (e.g., under the government contractor defense[48]) might not enjoy that status under foreign laws. Thus, a plaintiff could circumvent U.S. law simply by bringing the suit abroad, and the judgment debtor might not be entitled to raise its immunity defense in a subsequent recognition proceeding in the United States.

Finally, variation in state laws invites structural problems, including forum shopping among states. A judgment creditor can choose to seek recognition and enforcement in the jurisdiction where the law is most favorable to its interests—usually the state with the narrowest grounds for non-recognition. Then, with a recognized U.S. judgment in hand, the creditor can enforce it nationwide pursuant to the Enforcement Act as a "sister-state" judgment under the Full Faith and Credit Clause. Practically, this means that the most permissive state-law recognition regime *de facto* governs the whole country.[49] Judgment recognition at present is, therefore, a race to the bottom.

> *"Practically, this means that the most permissive state-law recognition regime* de facto *governs the whole country."*

48 *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

49 *See generally* Shill, *supra* note 3, at 459 (positing that the "system's structural problems are even more serious than its critics have charged"). A confidential memo detailing an international strategy to enforce a multi-billion dollar Ecuadorian judgment against Chevron, which is described in more detail below, recognized that "[i]f an Ecuadoran judgment is converted to a domestic judgment by one U.S. Court, that judgment may be enforced throughout the country. Thus, Plaintiffs' Team will not look to enforce the judgment in the jurisdiction housing the most Chevron assets, but rather, will bring an enforcement proceeding in a suitable jurisdiction that offers the strongest chance for recognition of the judgment." Invictus Memo, *infra* note 66, at 13.

The Rise of Tort Tourism

These problems show that although the U.S. system of foreign judgment recognition is not necessarily broken, it does have cracks that can be exploited through transnational forum shopping.[50] In recent years, plaintiffs in several high-profile cases have secured questionable high-dollar judgments against U.S. companies in foreign jurisdictions with favorable laws (sometimes written with assistance from foreign plaintiffs' lawyers) and then have attempted or threatened to enforce the foreign judgments in the United States under liberal U.S. recognition laws. In the most egregious cases of tort tourism, transnational plaintiffs find a jurisdiction in which corruption or political dysfunction virtually guarantees a favorable verdict. Plaintiffs then bring recognition and enforcement actions where corporate assets are located—typically in the United States—without having to overcome the barriers to judgment in a merits-based U.S. litigation.[51]

Two recent cases illustrate this trend. In Nicaragua, thousands of banana plantation workers sued several U.S. companies, including Dole Food Company, The Dow Chemical Company, and Shell Oil, for alleged exposure to the pesticide dibromochloropropane ("DBCP"). The basis for the suit was Nicaragua's "Special Law 364," which reportedly was drafted in part by U.S. plaintiffs' lawyers in 2000 to create an irrefutable presumption of causation and to impose minimum damages far in excess of existing law for specific foreign companies facing litigation in Nicaragua.[52] Among its more onerous provisions, Special Law 364 requires a defendant to deposit approximately $15 million simply to appear and defend itself, mandates a special summary proceeding that totals 14 days from complaint to judgment, and retroactively strips protections afforded to

> *"In all, more than **10,000** Nicaraguan plaintiffs obtained over $2 billion in judgments against U.S. companies under this law, which they then sought to enforce in the United States."*

50 *See* Br. of Geoffrey C. Hazard, Jr. & Michael Traynor as *Amici Curiae* at 13, *Tropp v. Corp. of Lloyd's*, 131 S. Ct. 3064 (2011) (describing how the deficiencies in U.S. recognition laws are "amplified by the increasing globalization of litigation and aggressive assertion in some countries of subject matter and personal jurisdiction over U.S. defendants").

51 "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State *where the defendant has property*, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter." *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977) (emphasis added).

52 *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1312, 1314-15 (S.D. Fla. 2009).

defendants by applicable statutes of limitations. In all, more than 10,000 Nicaraguan plaintiffs obtained over $2 billion in judgments against U.S. companies under this law, which they then sought to enforce in the United States.[53] U.S. plaintiffs' lawyers argued that U.S. courts were obligated to recognize the foreign judgments, and that U.S. courts could not consider whether defendants were deprived "of any meaningful opportunity to contest the essential allegation against them," because, they asserted, doing so would offend principles of "comity."[54]

Every U.S. court that has considered the Nicaraguan judgments has acknowledged the unfair and abusive processes underlying the judgments.[55] In *Franco v. Dow Chemical Co.*, Nicaraguan plaintiffs sought recognition of a $489 million Nicaraguan judgment predicated on a "suspect" notary affidavit from Nicaragua, which was later proven to be falsified.[56] The court dismissed the case, finding that two of the defendants were not parties to the judgment in Nicaragua, and that the Nicaragua court lacked personal jurisdiction over the third defendant.[57] In *Osorio v. Dole Food Co.*, a Florida court refused to enforce another Nicaraguan judgment, concluding that enforcement would "undermine public confidence in the tribunals of this state, in the rule of law, in the administration of justice, and in the security of individuals' rights to a fair judicial process."[58] The court warned that "a judicial safety valve is needed for cases such as [*Osorio*], in which a foreign judgment violates international due process, 'works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens.'"[59]

> *"Every U.S. court that has considered the Nicaraguan judgments has acknowledged the unfair and abusive processes underlying the judgments."*

Given the pro-recognition posture of U.S. law, the decisions to deny recognition to the Nicaraguan judgments were not foregone conclusions. Although the court in *Osorio* ultimately refused to recognize the Nicaraguan award because, among other reasons, the Nicaraguan "system" did not provide adequate due process to the

53 *See* Abusive Foreign Judgments, *supra* note 2, at 3.

54 *Osorio*, 665 F. Supp. 2d at 1332.

55 *See, e.g., id.* at 1352 ("This Court holds that the Defendants have established multiple, independent grounds under the Florida Recognition Act that the compel non-recognition," including lack of impartial tribunals and due process of law and finding that enforcement of the judgment would be repugnant to public policy.).

56 *Franco v. Dow Chemical Co.*, No. 03-cv-5094, 2003 WL 24288299, at *2-4 (C.D. Cal. Oct. 20, 2003).

57 *Id.* at *7-8.

58 *Osorio*, 665 F. Supp. 2d at 1347.

59 Order on Motion for Reconsideration at 7, *Osorio*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (No. 07-22693).

defendants,[60] a different court might applying a different state's law have taken a broader conception of the appropriate "system" and reached a contrary conclusion, so as not to impugn the entire judiciary of another country.[61] In contrast, if the court were directed to look not just at the foreign judicial "system," but more directly at the specific legal proceeding leading to the *Osorio* judgment, it is hard to imagine that any U.S. court would have recognized the judgment given the egregiousness of the discriminatory proceeding against the U.S. companies.[62] However, under current laws, many states do not allow a court to refuse recognition of a foreign judgment on the basis that the defendant was denied due process in the specific foreign proceeding leading to the judgment. When the stakes are high, as in *Osorio*, these minor differences can matter significantly.

A second example of tort tourism is the ongoing public legal battle between Chevron Corporation and a group of Ecuadorian farmers. In 2003, inhabitants of the Ecuadoran rainforest village of Lago Agrio sued Chevron in Ecuador for environmental damage allegedly caused by Texaco's oil operations a decade earlier, even though Texaco—which Chevron acquired in 2001—had ceased operations in Ecuador in 1992 and had settled any outstanding claims for environmental cleanup with the Ecuadorian government in 1994.[63] Nevertheless, in February 2011, an Ecuadorian judge ordered Chevron to pay $8.6 billion in damages.[64] The judge increased that amount to $18.6 billion because the company refused to publicly apologize within 15 days of the judgment.[65] It is the largest award ever by a foreign court against an American company.

Chevron has negligible assets in Ecuador, so the plaintiffs' lawyers devised a plan to collect the judgment wherever Chevron or its subsidiaries had assets. The plaintiffs' lawyers drafted a confidential memo, titled

"A second example of tort tourism is the ongoing public legal battle between Chevron Corporation and a group of Ecuadorian farmers."

60 *Id.*

61 *See* Petition for a Writ of Certiorari at 25, *Tropp v. Corp. of Lloyd's*, 131 S. Ct. 3064 (2011) ("state recognition statutes have been interpreted to examine the *substantive* compatibility of a foreign judgment with U.S. law at such a high level of generality as to afford essentially no protection at all in a great many cases").

62 *Id.* at 24 ("Due process is an individual right to actually receive basic procedural protections, not simply the right to a system that *usually* affords the basic requirements of procedural fairness.").

63 *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 598 (S.D.N.Y. 2011) *vacated sub nom. Chevron Corp. v. Naranjo*, No. 11-1150, 2011 WL 4375022 (2d Cir. Sept. 19, 2011) and *rev'd and remanded sub nom. Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

64 *Id.* at 620-21.

65 *Id.* at 621.

> *"…'[o]btaining recognition of an Ecuadorian judgment in the United States is undoubtedly the most desirable outcome.'"*

"Invictus," detailing how to leverage the Ecuadorian judgment through worldwide enforcement actions. The memo, which became public in subsequent court filings, detailed a plan to engage "specialized firms" to investigate Chevron's and its subsidiaries' assets in 27 countries around the world and then to select "jurisdictions that offer the path of least resistance to enforcement."[66] In a section of the memo titled "International Enforcement Plan," the lawyers identified the Philippines, Singapore, Australia, Angola, Canada and several other countries where Chevron has significant assets as potential targets,[67] but stated that "[o]btaining recognition of an Ecuadorian judgment in the United States is undoubtedly the most desirable outcome."[68] The strategy highlighted the use of multiple enforcement proceedings and asset seizures as a means of quickly achieving a favorable settlement.[69] The memo also included a significant discussion of the U.S. recognition and enforcement framework, including an analysis of "plaintiff-friendly jurisdictions"[70] and the U.S. states most favorable to pre-judgment attachment *prior* to the recognition of a judgment.[71] The Ecuadorean plaintiffs have since initiated enforcement actions in Canada, Argentina, and Brazil.

In anticipation of this plan, Chevron sought an injunction in New York federal court that would have, among other things, prevented collection of the judgment in the United States.[72] Chevron argued that the Ecuadorian legal system lacked impartial tribunals required for due process of law and that the Ecuadorian judgment had been procured by fraud. In granting the injunction against enforcement, the New York federal court cited evidence that the plaintiffs used pressure tactics and political influence to obtain a favorable judgment and that the Ecuadorian courts were notoriously corrupt, concluding that a fair trial in Ecuador was "impossible."[73] The court found "ample evidence of fraud in the Ecuadorian proceedings" and "abundant evidence

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66 Invictus: Path Forward: Securing and Enforcing Judgment and Reaching Settlement, p. 12, 22-23, *available at* http://www.earthrights.org/sites/default/files/documents/Invictus-memo.pdf.

67 *Id.* at 19-20.

68 *Id.* at 12.

69 *Id.* at 12, 14, 15.

70 *Id.* at 13-14 (Alabama, California, Louisiana, Mississippi, Nevada, and New Mexico were identified as "especially attractive for enforcement … [d]ependent upon the peculiarities of the foreign judgment recognition law in these jurisdictions … .").

71 *Id.* at 14 (identifying Iowa, New York, and Connecticut).

72 *Donziger*, 768 F. Supp. 2d at 594.

73 *Id.* at 607-620. In a motion for summary judgment filed in the District Court in late January 2013, Chevron introduced further evidence that undermined the legitimacy of the Ecuadorian judgment. A one-time presiding judge on the Ecuadorean case, Alberto Guerra, submitted a declaration detailing his

before the Court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law, at least in the time period relevant here, especially in cases such as this."[74] The court chided the plaintiffs' lawyers for their "global plan of attack" to extract a settlement from Chevron.[75] However, the injunction was overturned by the Second Circuit, which ruled that New York's version of the 1962 Act bars judgment debtors from bringing an affirmative lawsuit to contest the recognition of abusive foreign judgments.[76] The Ecuadorian plaintiffs have not yet sought to enforce their judgment in the United States.

Although U.S. courts have so far refused to recognize both the Nicaraguan and Ecuadorian awards, the cases have been closely watched by the U.S. business community. The transaction costs alone are staggering; news outlets have speculated that Chevron is paying around $400 million annually in legal fees to defend against enforcement of the Ecuadorian judgment.[77] The Invictus memo proves that plaintiffs' lawyers are probing for weaknesses to exploit in the U.S. system of foreign judgment recognition. If the "tort tourism" techniques employed by plaintiffs' lawyers are successful in one instance, the strategy is likely to become a roadmap for future abuse. Such a result would spawn an increase in the number of foreign proceedings against businesses and foreign judgments sought to be enforced in the United States in the coming years—particularly an increase in the number of high-dollar foreign judgments. As judgment enforcement efforts increase in frequency and value, plaintiffs can be expected to exploit any available risk factors that create an environment for recognition of abusive foreign judgments.

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role in a $500,000 bribe from the plaintiffs' lawyers to the Ecuadorian judge who ruled against Chevron. Guerra claimed that the plaintiffs actually drafted the 2011 judgment and that he, as a behind-the-scenes ghostwriter, worked with plaintiffs' lawyers to make it seem more like a court ruling. According to his declaration, Guerra had previously received regular payments from the plaintiffs in the Chevron case to ghostwrite other rulings subsequently issued by the presiding judge. *See* Chevron Corp.'s Memo. of Law in Support of Motion for Partial Summary Judgment at 12-17, *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (No. 745).

74 *Donziger*, 768 F. Supp. 2d at 633, 636.

75 *Id.* at 624.

76 *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

77 Michael D. Goldhaber, *A Costly Battle*, The American Lawyer (May 1, 2013).

The Case for a Federal Law

> *"A federal law would immediately provide uniformity and predictability for recognition of foreign judgments across the United States and would prevent judgment creditors from forum-shopping among the states."*

A uniform federal law makes considerable sense in light of these challenges. Congress has the clear constitutional authority to enact a federal statute under its powers to regulate foreign commerce and its shared powers with the Executive Branch to manage foreign relations. A federal law would immediately provide uniformity and predictability for recognition of foreign judgments across the United States and would prevent judgment creditors from forum-shopping among the states. Moreover, a federal statute could rectify deficiencies in the current law, including provisions to uphold important national policies. The Supreme Court has declined opportunities in recent years to provide uniformity on this subject and to protect minimal constitutional guarantees implicated in foreign judgment recognition.[78] The Supreme Court's utter silence on the issue since *Hilton* has appropriately been described as "remarkable."[79]

The fact that foreign judgment recognition has been governed by state law for decades is an insufficient justification for maintaining the status quo. Opponents of federalizing foreign judgment recognition do not dispute its federal dimensions. Rather, they defend the status quo on the grounds that the current state-law regime is working well, and that a federal law would upset the current federal-state balance.[80] But the current federal-state balance is a coincidence of legal history, not a conscious decision by the federal government to cede an indisputable aspect of foreign relations to the states. In contrast to the unique federal

78 *See, e.g., Chevron Corp. v. Naranjo*, 133 S. Ct. 423 (2012) (denying certiorari to resolve whether a judgment debtor can bring an anticipatory Declaratory Judgment Act suit for non-recognition of a foreign judgment); *Tropp v. Corp. of Lloyd's*, 131 S. Ct. 3064 (2011) (denying certiorari to resolve whether the Uniform Recognition Acts comport with requirements of the Due Process Clause). *See also* Richard H. M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get A Chance, Please Look at* Hilton v. Guyot; *We Think It Needs Repairing*, 5 J. Int'l Legal Stud. 1 (1999).

79 Lowenfeld, *Nationalizing International Law, supra* note 5, at 127.

80 *See, e.g.*, Testimony of H. Kathleen Patchel Before the Subcommittee of Courts, Commercial and Administrative Law of the U.S. House of Representatives, Committee on the Judiciary, "Recognition and Enforcement of Foreign Judgments" (Nov. 15, 2011), *available at* http://judiciary.house.gov/hearings/pdf/Patchel%2011152011.pdf.

interests and policies at stake when a U.S. court evaluates a foreign country's judgment, there does not appear to be any significant state interest implicated, as there would be in traditional areas of state concern like the police power or family law. And "[e]ven if enforcement of judgments should be determined to be an area otherwise reserved to the states, when the process threatens to impinge on foreign relations, the issue is solely a federal matter to which state law will not apply."[81] As for the sufficiency of current state laws, the discussion above demonstrates that there is room for improvement and coordination.

Accordingly, numerous experts on the subject of foreign judgments have recognized the need for a federal law. For over twenty years, Professor Ronald Brand of Pittsburgh Law School has led the charge advocating for the federalization of foreign judgment recognition. Concerned with the lack of uniformity and clarity in the law governing foreign judgment recognition, Brand called on Congress in 1991 to exercise its "authority to regulate foreign commerce" and for the President to "negotiate in the area of foreign affairs" in order "to further the goals of uniformity among states and within our federal system."[82] Brand determined that the prospect of uniformity was "not promising" if left to state legislatures.[83] A federal statute, Brand concluded, would eliminate "the enigma of determining the source of [the rule of recognition] and the vagaries of its application."[84] "[I]t is the existence of the uncertainty that compels change."[85]

Others have since jumped on the Brand-wagon. NYU law professor and former Deputy Legal Adviser of the State Department Andreas Lowenfeld explained the "oddity" of treating foreign judgment recognition as "a subject of international law yet not … a matter of national law within the United States," analogizing foreign judgment recognition to the recognition afforded to foreign acts of state.[86] Lowenfeld noted that "when foreign parties deal with the United States or its citizens, they think of a single country," from which they accordingly (and reasonably) expect "a single national posture in international litigation"—"one foreign policy, one legal system, and one place in the international legal order."[87] Professor Linda Silberman of NYU Law School agreed and commented that "a number of important substantive differences remain" among state laws, notwithstanding the ULC's extensive efforts at unification.[88] Silberman explained that federal legislation was the only realistic means to achieve

81 Brand, *supra* note 5, at 299 (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

82 *Id.* at 257.

83 *Id.*

84 *Id.* at 264-65.

85 *Id.* at 284.

86 Lowenfeld, *Nationalizing International Law, supra* note 5, at 122.

87 *Id.* at 132, 141.

88 Silberman & Lowenfeld, *A Different Challenge for the ALI, supra* note 5, at 636.

national uniformity because, for example, "even among states of the United States that have adopted the Uniform Act, the jurisdictional grounds on which a foreign judgment will be accepted may well differ."[89] In 2011, Silberman testified at a House Subcommittee hearing that the problem of recognition and enforcement of foreign judgments remains unresolved and urged the adoption of a federal law.[90]

In 2006, the ALI proposed a draft federal statute that would harmonize the recognition and enforcement of foreign judgments in all U.S. courts.[91] The ALI undertook the project in 1999 to complement the efforts of the Hague Conference during negotiations of a multilateral treaty on foreign judgment recognition. When treaty negotiations faltered, the ALI determined that "a coherent federal statute is the best solution" to what had become "a national problem."[92] Among other advantages, the ALI determined that a federal statute would allow the United States to speak with one voice in its foreign relations, it would allow greater leverage for the United States to negotiated reciprocal recognition of U.S. judgments abroad, and a modernized statute "would be consistent with the needs of a legal and commercial community ever more engaged in international transactions and their inevitable concomitant, international litigation."[93] Unfortunately, there was never a concerted legislative push to advance the ALI's model statute at the national level, and Congress never acted on it.[94]

Nevertheless, there is recent precedent for a federal law on foreign judgment recognition. In 2010, Congress addressed another form of global forum shopping known as "libel tourism"—defamation judgments against U.S. authors rendered by foreign courts. Congress unanimously passed the federal SPEECH Act to allow American defendants to block enforcement of foreign libel judgments that do not comply with the free speech requirements of the First Amendment.[95] The SPEECH Act establishes a good blueprint for Congress to apply to tort tourism, as well.

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89 *Id.* at 637.

90 Statement of Professor Linda J. Silberman, Subcommittee of Courts, Commercial and Administrative Law of the U.S. House of Representatives, Committee on the Judiciary, "Recognition and Enforcement of Foreign Judgments" (Nov. 15, 2011), *available at* http://judiciary.house.gov/hearings/pdf/Silberman%2011152011.pdf.

91 American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).

92 *Id.* at 6.

93 *Id.*

94 White not achieving legislative traction at the federal level, the ALI's proposal had the collateral benefit of precipitating the ULC's 2005 Act, which was largely developed to respond to ALI's criticisms of state law.

95 Pub. L. 111-223 (Aug. 10, 2010), codified at 28 U.S.C. §§ 4101-05.

In endorsing the adoption of a new federal statute, we are careful not to discard the baby with the bathwater. The ALI's model statute and the ULC's 2005 Act provide the general framework and substantive parameters that have governed foreign judgments recognition for over a century. The proposal outlined in the following pages thus borrows those aspects from the ALI and ULC that need no reform. At the same time, some of the following elements are specifically designed to correct deficiencies in the current law that do not adequately address the threat of tort tourism and related challenges in modern transnational litigation—most of which have arisen in the decade since the ALI first proposed its model legislation. With those considerations in mind, this paper recommends that Congress and the President enact a new federal law with the following elements.

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The Elements

> *"Federal legislation should preserve the right of a judgment debtor to contest recognition based on the fact that the rendering court lacked personal jurisdiction over the defendant, regardless of the procedural history of the foreign suit."*

Recognition Procedure

Federal legislation should clarify that recognition and enforcement of a foreign judgment must be sought through a civil action and that the judgment must not be given effect until an affirmative determination by a judge after the judgment debtor has had an opportunity to be heard. This provision would eliminate the procedure available in some states governed by the 1962 Act permitting judgment creditors to domesticate foreign judgments simply by "registering" a foreign judgment with a court clerk, precipitating instantaneous recognition and nationwide enforcement of foreign judgments.

Right to Contest Personal Jurisdiction

In the 35 states and territories that have adopted the 1962 or 2005 Acts, a judgment debtor that defends the merits of a lawsuit abroad may not contest personal jurisdiction of the foreign court in a subsequent recognition proceeding in the United States. Federal legislation should preserve the right of a judgment debtor to contest recognition based on the fact that the rendering court lacked personal jurisdiction over the defendant, regardless of the procedural history of the foreign suit. Preserving the defendant's due process right to contest personal jurisdiction in a U.S. court eliminates the dilemma described earlier in this paper: If the defendant mounts a defense on the merits, it waives its ability to contest jurisdiction as a defense to recognition. But if the defendant chooses instead to preserve its jurisdictional defense, it risks a large default judgment abroad, which can result in substantial exposure to liability if the judgment is later recognized and enforced.[96]

Public Policy Exception

Under both state statutes and common law, U.S. courts will uphold a foreign judgment unless to do so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[97] This narrow construction of the public policy exception constrains U.S. courts' authority to reject judgments based on foreign suits that would not prevail if

96 *See* J. Chad Mitchell, *A Personal Jurisdiction Dilemma: Collateral Attacks on Foreign Judgments in U.S. Recognition Proceedings*, 4 BYU Int'l L. & Mgmt. Rev. 123 (2008).

97 *Loucks*, 120 N.E. at 202.

brought in the United States, that raise U.S. constitutional concerns, or that undermine U.S. national interests. Congress should identify specific claims or judgments for which enforcement would undermine U.S. national interests and declare that recognition of such judgments would violate U.S. public policy.[98] Alternatively, Congress could delegate to the Attorney General the responsibility to identify specific categories of claims or judgments that would be subject to presumptive non-recognition in the United States.[99]

Public Policy Scope

Federal legislation should deny recognition when either the claim or judgment at issue violates the public policy of the United States or of the particular state in which recognition is sought. Currently, some states apply the public policy exception only to "claims" that violate public policy, while other states more broadly apply the exception to "claims" and "judgments" that violate public policy.

Non-Recognition Suits

In the Chevron litigation, the Second Circuit held that judgment debtors were precluded under New York law from bringing a declaratory judgment action to block recognition of a foreign judgment.[100] As a consequence, judgment debtors can be forced to wait under the specter of a multi-billion dollar foreign judgment for years until the creditor decides to collect. The Second Circuit's holding inexplicably places judgment debtors and judgment creditors on unequal footing. The appropriate focus of a recognition law should be on the judgment itself, rather than the status of the parties. Federal legislation should provide explicitly that a lawsuit filed under this statute may be brought by a judgment creditor seeking recognition *and* by a judgment debtor defensively seeking a declaration of non-recognition. Judgment debtors should have the right to contest, preemptively, the recognition of a foreign judgment, subject to the ordinary constitutional requirement of ripeness.[101]

Reciprocity

The reciprocity requirement has been hotly debated since the Supreme Court introduced the factor in *Hilton*. On the one hand, recognition of foreign judgments primarily rests on comity principles, or respect for foreign courts. A reciprocity requirement is in tension with comity because our courts' respect for foreign judgments should not be contingent on foreign courts' respect for our laws. Thus, the ULC has not included a reciprocity requirement in its model acts. On the other hand, advocates of a reciprocity requirement

98 Other countries have codified particular legal issues or judgments that will not be recognized or enforced as a matter of law. For example, British Columbia specifically blocks enforcement of foreign judgments relating to asbestos exposure. British Columbia Court Order Enforcement Act, ch. 78, § 40 (1996).

99 *See, e.g.*, Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29, s. 8 (Can.) (authorizing the Attorney General of Canada to declare treble damage awards made in foreign antitrust actions unenforceable in Canada).

100 *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

101 *See Shell Oil Co. v. Franco*, No. 03-cv-8846, 2005 WL 6184247 (C.D. Cal. Nov. 10, 2005) (issuing declaratory judgment regarding non-recognition).

argue that including such a provision will spur foreign countries to lessen their hostility to U.S. judgments in order to have their own judgments recognized here. For this reason, the ALI included a reciprocity requirement in its draft federal statute.

On balance, this paper recommends inclusion of a reciprocity requirement in federal legislation specifying that U.S. courts only will recognize judgments rendered in foreign countries that recognize similar U.S. judgments. This provision will enhance the United States' bargaining position to encourage other countries to become more receptive to U.S. judgments.

Case-Specific Due Process

Under the 2005 Act (but not under the 1962 Act), a court may decline to recognize any judgment wherein "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[102] This inquiry is separate from whether the "judicial system" as a whole of the rendering country does not provide due process, which is a ground for non-recognition in the 1962 and 2005 Acts and the ALI model statute.

The 2005 Act got it right. Federal legislation should include a provision that denies recognition to a foreign judgment where the specific proceeding leading to the judgment was not compatible with due process of law. Recent cases, including the *Osorio* litigation described above, highlight the need for a case-by-case due process inquiry.[103]

"Federal legislation should include a provision that denies recognition to a foreign judgment where the specific proceeding leading to the judgment was not compatible with due process of law."

Due Process Requirements

Currently, foreign judgments may be denied recognition where the foreign judicial system does not provide "due process of law," but the parameters of that requirement remain unclear. U.S. courts have held that foreign courts need not apply procedures strictly compatible with U.S. conceptions of "due process."[104] Less is required for the recognition of foreign judgments. But "how much less" remains open to judicial interpretation.

Federal legislation should codify a non-exhaustive list of "due process" requirements necessary for recognition of a foreign judgment. That list should include, at a minimum: judicial independence and impartiality, a right to the assistance of

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102 2005 Act § 4(c)(8).

103 *See also* Br. of Geoffrey C. Hazard, Jr. & Michael Traynor as *Amici Curiae* at 2, *Tropp v. Corp. of Lloyd's,* 131 S. Ct. 3064 (2011) ("a foreign court's 'system fairness' is insufficient Due Process protection of a specific 'person,' which is the requirement of the Fifth and Fourteenth Amendments"); Douglass Cassel, *Response to Ted Folkman*, Letters Blogatory (June 4, 2012), http://lettersblogatory.com/2012/06/04/response-to-ted-folkman/ (similar).

104 *See Ashenden*, 233 F.3d at 477-79.

counsel of the party's choice, due notice and a right to be heard, and a fair opportunity and adequate time to present contentions and evidence.[105] Laws specifically designed to burden or prejudice particular litigation or foreign parties might also violate international conceptions of due process.[106]

Foreign Default Judgments

Foreign default judgments presently receive the same scrutiny from U.S. courts as suits fully contested abroad. In contrast to the 1962 and 2005 Acts, which generally place the burden on the judgment debtor to prove grounds for non-recognition, the ALI model statute provides that, for foreign default judgments, the judgment creditor has the burden to prove that the foreign court had personal jurisdiction over the judgment debtor and that the judgment debtor received adequate notice of the suit. This provision reflects that the judgment debtor likely did not have an opportunity to raise these defenses in the foreign proceeding.

Federal legislation should include provisions requiring greater scrutiny of foreign default judgments. At a minimum, courts should place the burden on the judgment creditor to prove that the defendant had adequate notice of the foreign proceeding and that the foreign tribunal had personal jurisdiction over the defendant, as the ALI recommends.

Statute of Limitations

The statute of limitations for seeking recognition of a foreign judgment varies among states and sometimes depends on knotty questions of foreign law. The 1962 Act did not contain a statute of limitations, leaving the issue open to each state's general laws. The 2005 Act added a fifteen-year statute of limitations running from the effective date of the foreign judgment. The ALI recommended a ten-year window.

Federal legislation should include a definite limitations period; the specific number of years is less consequential than the definitiveness itself. A uniform limitations provision would give both judgment debtors and judgment creditors assurance about the applicable statute of limitations.

Statutory Scope

The Uniform Recognition Acts are expressly limited in scope to foreign judgments "granting or denying a sum of money," excluding judgments for taxes, fines, or penalties, and judgments rendered in connection with domestic relations (maintenance, support, etc.). The ALI statute expands the scope of potential recognition to any final judgment or final order of a foreign court "determining a legal controversy," subject to a few exceptions. The ALI proposal thus greatly exceeds the breadth of the Uniform Acts.

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105 These elements generally track what some scholars consider to be the minimum international standards of due process. *See generally ALI/UNIDROIT Principles of Transnational Civil Procedure*, 9 Unif. L. Rev. 758 (2004).

106 *See Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995).

On this point, the ALI may have been too ambitious, at least politically. Federal legislation that regulates only foreign-country money judgments maintains the status quo adopted by the majority of states and may be more palatable to federalist opponents. In addition, adopting a modest scope in federal legislation now allows the United States to consider offering broader recognition of foreign judgments in bilateral treaty negotiations on a country-specific basis.

Choice-of-Court Agreements

Under state law, contracting parties have limited ability to require compliance with a negotiated forum-selection clause that specifies where a dispute will be heard. The 1962 and 2005 Acts provide that a court "may" decline to recognize a judgment when the proceeding in a foreign court was contrary to an agreement between the parties to resolve the dispute in a different forum, but the Acts do not compel that result. Oftentimes, this means that the parties' agreed-upon choice of how to litigate their dispute is not respected.

The 2005 Hague Convention on Choice of Court Agreements ("COCA") honors parties' rights to negotiate and enforce a forum selection clause in an international commercial contract.[107] The Convention sets out three basic rules: (1) the court chosen by the parties in an exclusive choice-of-court agreement has jurisdiction; (2) a court not chosen by the parties does not have jurisdiction and must decline to hear the case; and (3) a judgment resulting from a court selected by the parties must be recognized and enforced in other countries that are parties to the Convention. The COCA is not designed to displace the ability of parties to choose alternative dispute resolutions such as arbitration in lieu of litigation. Rather, the Convention's sole purpose is to give parties greater ability to *enforce* agreements to litigate disputes in a particular forum. A federal statute on foreign judgment recognition should include this important protection for international business dealings by incorporating federal implementing legislation for the treaty.

Federal Jurisdiction

Currently, federal courts can entertain recognition and enforcement suits only when jurisdiction is premised on diversity of citizenship, pendent jurisdiction, or a similar statutory grant. A federal statute would automatically vest federal courts with jurisdiction under 28 U.S.C. § 1331 and would provide judgment debtors the right to remove state-court actions to federal court under 28 U.S.C. § 1441. That jurisdiction should vest concurrently with state courts, especially since recognition of foreign judgments historically has been the province of state courts. No overriding federal interest justifies the creation of exclusive federal jurisdiction over such suits.

107 44 I.L.M. 1294 (June 30, 2005). The COCA was signed on behalf of the United States by the lead author of this article in January 2009, but federal implementing legislation has been stalled by the ULC's objections to federalizing foreign judgment recognition. *See* Peter D. Trooboff, *Proposed Principles for United States Implementation of the New Hague Convention on Choice of Court Agreements*, 42 Int'l L. & Politics 237 (2009).

Conclusion

After nearly a century of foreign judgment recognition dictated by state laws, Congress and the President should work together to enact federal legislation to govern recognition and non-recognition of foreign judgments, as they did with the SPEECH Act. The treatment of foreign judgments undoubtedly implicates unique federal interests, and litigants seeking to enforce or challenge foreign judgments in this country should not have to navigate 50 different state laws, especially where no state interest is at stake. The current patchwork of state laws has puzzled scholars and frustrated practitioners for decades. But the present need for legislative attention is spurred by the fact that existing state laws are increasingly ill-equipped to deal with the challenges presented by tort tourism. While U.S. courts should continue to respect and enforce the decisions of foreign courts in appropriate cases, Congress also must ensure that judges have the necessary tools to protect American interests. As the Supreme Court explained in *Hilton*, "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations and the principles of public and national law in the administration of justice."[108] In upholding our end of the international bargain, the United States should speak with one voice.

108 *Hilton*, 159 U.S. at 191 (quoting *Bradstreet v. Neptune Ins. Co.*, 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839)).

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