CODIFYING COMITY: THE CASE FOR U.S. RATIFICATION OF THE 2019 HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

L. HUNTER MAUDE*

* L. Hunter Maude is a third-year student at the University of Wisconsin Law School. He would like to thank Professor Jason Yackee for introducing him to the Judgments Project, as well as the Senior Editorial Board and staff members of the *Wisconsin International Law Journal* for their support. Hunter would like to dedicate this article to his parents, who met in law school.

INTRODUCTION: THE NEW CONVENTION SEEKS TO CREATE A COMPREHENSIVE LEGAL FRAMEWORK GOVERNING TRANSNATIONAL LITIGATION

Over the last thirty years, transactions between parties from different states have become exponentially more frequent with the technologization of the global economy. Following this trend, international trade disputes have become a common and expensive facet of international business. Among these international disputes, a recurring issue has created uncertainty for transnational litigants: will foreign courts enforce judgments against their own citizens? Surprisingly, the international community has struggled to adopt a unified and coherent answer to the questions surrounding recognition and enforcement of private litigation judgments.

After twenty-seven years of careful deliberation, the Hague Conference on Private International Law adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters on July 2, 2019. This new multilateral treaty seeks to "promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation."[1] The Convention creates a broad rule with enumerated

[1] Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 [https://perma.cc/X4EQ-6XHN] [hereinafter The 2019 Convention].

exceptions whereby the courts of member-states are compelled to recognize and enforce foreign judgments.

Although Uruguay immediately signed onto the Convention, today it remains the only state to do so. Thus, this Convention is still unenforceable, as Article 5 of the Convention requires member states to consent to the Convention's jurisdiction in order to be bound by its mandate.[2] In this article, I will argue that prominent states must take initiative and ratify this Convention sooner rather than later to prevent it from fading into obscurity.[3] Further, a broad ratification of this Convention will benefit states by "reduc[ing] costs, promot[ing] access to justice, facilitat[ing] multi-lateral trade and promot[ing] the better management of transaction and litigation risk."[4] This article will primarily analyze the positives and negatives of the Convention from the perspective of the United States and ultimately argue that the U.S. should ratify this Convention as a first step to influence other states to follow suit.

In Part I of this note, I will discuss the emerging need for homogenous international rules governing recognition and enforcement and explain how this international project evolved over the last twenty-seven years. In Part II, I will analyze the language of the Convention itself and discuss the protections the Convention provides to its signatory states. Then in Part III, I will confront the Due Process and jurisdictional concerns the Convention raises in connection to American domestic law. To conclude, I will call on the United States and the international community to adopt this Convention in order to minimize litigation risk in cross-border transactions.

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[2] *Id.* art. 5(e).

[3] *Compare* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3 (1958) [hereinafter The New York Convention] *with* Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, which only retained the EU, Mexico, Montenegro, and Singapore as its signatories, thus reducing its impact on the international community.

[4] Karen Birch, *New Hague Convention on Enforcement of Foreign Judgments – a "Gamechanger" in International Dispute Resolution?*, ALLEN & OVERY LLP (2009), https://www.allenovery.com/en-gb/global/news-and-insights/publications/new-hague-convention-on-enforcement-of-foreign-judgments [https://perma.cc/8FGE-JDDX].

I. BACKGROUND: THE 2019 HAGUE CONVENTION EMERGES OUT OF A DECADES-LONG STRUGGLE TO ENACT UNIVERSAL RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

A. STATES' VARYING APPROACHES TO RECOGNITION AND ENFORCEMENT CREATE A NEED FOR UNIFORMITY

Historically, states have been hesitant to subject their citizens to binding judgments from foreign courts, largely out of concern that these potentially expensive judgments would adversely impact key domestic industries.[5] However, as transnational trade increased, various state economies recognized the need for predictability in foreign litigation, as well as responsiveness from other states to enforce judgments upon private actors.[6] The need for cooperation among the states in private litigation resulted in the creation of the Hague Conference on International Private Law in 1893 (hereinafter "the Hague Conference").[7] This neutral body offered "a forum to the emerging international community to deepen its understanding of the diversity of civil and commercial legal systems and to develop coordination to resolve these cross-border legal issues."[8] With the creation of the Hague Conference, the international community began to establish consensus as to how transnational commercial interactions should be governed.[9]

The Hague Conference tribunal's most difficult task has been facilitating international commercial transactions among states whose laws on recognition and enforcement are vastly different, varying from enforcement-friendly to more isolationist judicial schemes. One example of the enforcement-friendly view is that of the United States, which has long held that foreign judgments are binding on its citizens so long as the

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[5] *See generally* Samuel P. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 N.Y.U. J. INT'L L. & POL. 965 (2013).

[6] Ilja Rumenov, *Implications of the New 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments on the National Legal Systems of Countries in South Eastern Europe*, 3 EU COMPAR. L. ISSUES & CHALLENGES 385, 386 (2019).

[7] Justyna Regan, *Recognition and Enforcement of Foreign Judgments – A Second Attempt in the Hague*, 14 RICH. J. GLOBAL L. & BUS. 63 (2015).

[8] *Id.*

[9] See *About HCCH*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/about [https://perma.cc/G9KQ-YHUJ] (last accessed Oct. 6, 2019), for a more detailed discussion of the Hague Conference's role in the modern international legal community.

foreign adjudication comports with constitutional due process.[10] This doctrine of "comity" was adopted by the U.S. Supreme Court in *Hilton v. Guyot* pursuant to the Full Faith and Credit Clause of the U.S. Constitution,[11] which requires U.S. states to recognize and apply the laws of their sister states.[12] The Supreme Court in *Hilton* extended the Full Faith and Credit Clause's recognition principles to international states, thus creating a presumption in favor of enforcing foreign judgments.[13] The U.S.'s comity approach to recognition and enforcement reflects a relatively generous view of transnational legal relations.

In contrast, other states have traditionally refused to honor foreign judgments in the absence of a treaty, such as Norway, whose anti-enforcement policy remains good law to this day.[14] Norway's stance represents the principle of "reciprocity," the idea that Norway will only recognize a foreign court's judgment if the foreign state agrees to recognize Norwegian judgments.[15] This *quid-pro-quo* approach to recognition and enforcement is an expression of state sovereignty; states are not keen to hand out huge awards to foreign entities unless the foreign state will reciprocate in its own courts.[16]

Both comity and reciprocity are principles of politeness and good will rather than duty.[17] States that have adopted these doctrines are not strictly bound to honor foreign judgments, but rather, they honor them as

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[10] *See* Hilton v. Guyot, 159 U.S. 113, 202–03 (1895); Peter Nygh, *Towards a Global Judgments Convention: The Proposed New Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 1997 AUSTL. INT'L L.J. 96 (1997).

[11] *See Hilton*, 159 U.S. at 181–82.

[12] *See* U.S. CONST. art. IV § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial proceedings of every other State.").

[13] *See Hilton*, 159 U.S. at 163–64 ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other… [I]t is the recognition which one national allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens. . .").

[14] *See* Baumgartner, *supra* note 5, at 970.

[15] *See* Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, *in* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., 2 (2009), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship [https://perma.cc/2B6N-AQTY] ("[R]eciprocity [is] the idea that States will and should grant others recognition of judicial decisions only if, and to the extent that, their own decisions would be recognized.").

[16] *See* Susan L. Stevens, Note, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 116–19 (2002).

[17] *See* Michaels, *supra* note 15.

a matter of political prudence.[18] Thus, states have sought to strengthen their transnational legal relations through bilateral and multilateral treaties that require reciprocal recognition and enforcement.[19] However, these reciprocal treaties have largely been limited to states' trading partners or states in close geographic proximity.[20]

This web of interstate treaties expanded throughout the early twentieth century, but the international community was ill-prepared for the boom in transnational commercial activity following World War II into the 1960s.[21] States looked to the Hague Conference to help organize this new international commercial legal order. In 1971, the Hague Conference introduced the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (hereinafter "the 1971 Convention").[22] Although this Convention is technically still in force (having been ratified by the Netherlands, Portugal, and Cyprus) the rest of the world neglected to sign on.[23] It is likely that this Convention failed to gain more signatories due to European states' preference for the provisions of the Brussels Convention, which provided for uniform recognition and enforcement of judgments—but only among European states.[24] Regardless, the rest of the world's silence regarding the 1971 Convention left the Hague Conference's first attempt at universal recognition and enforcement of foreign judgments functionally irrelevant. Due to that convention's failure, the international community embraced a more flexible, yet incomplete approach to universal commercial cooperation: arbitration and choice-of-court agreements.

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[18] *Id.*

[19] *See* Baumgartner, *supra* note 5, at 970.

[20] *See id.*

[21] *See* Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 L. & CONTEMP. PROBS. 271, 275 (1994).

[22] *See* Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, https://www.hcch.net/en/instruments/conventions/full-text/?cid=78 [https://perma.cc/4CKC-RZNC].

[23] *See* Nygh, *supra* note 10, at 96.

[24] Von Mehren, *supra* note 21, at 275.

B. INTERNATIONAL PREFERENCE FOR FLEXIBLE ARBITRATION AND CHOICE-OF-LAW PROVISIONS PROVIDES A PATH TO A NEW CONVENTION RECOGNIZING FOREIGN JUDGMENTS IN TRANSNATIONAL LITIGATION

In 1958, the Hague Conference introduced the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "the New York Convention").[25] Arbitration became a popular alternative to litigation because it circumvented the possibility of unfavorable treatment in a court of foreign jurisdiction.[26] The New York Convention provided a very simple and streamlined approach to enforcement of foreign arbitral awards: parties seeking enforcement merely had to present a certified copy of the arbitral award to a court in the foreign state along with the original arbitration agreement.[27] Further, arbitration agreements were seen as providing greater freedom for private parties to negotiate the terms of their transactions while simultaneously avoiding the high costs and procedural barriers of foreign commercial litigation.[28] Importantly, arbitration agreements allow the parties to choose which state's substantive law will apply to the arbitration proceedings, thus providing greater predictability should a dispute arise.[29] The New York Convention is considered to be one of the most successful multilateral treaties in world history, as it was ratified by essentially every state in the international community.[30]

It is safe to say that the New York Convention offered a positive example for international cooperation in commercial matters, and indeed, the success of that Convention may have galvanized the international community to resume talks regarding a uniform convention on recognition and enforcement of foreign judgments.[31] This is because, despite its success, the New York Convention highlighted the gaping absence of any

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[25] New York Convention, *supra* note 3, at 2519.

[26] Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 175 (1996).

[27] *Id.* at 188–89.

[28] *See id.* at 175, 189.

[29] DONALD E. CHILDRESS III ET AL., TRANSNATIONAL LAW AND PRACTICE, 552 (1st ed. 2015).

[30] Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 115 (2018); *see* Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 188 (1995).

[31] Regan, *supra* note 7, at 65 ("The U.S. took initiative in the early 1990s to start working on an international instrument that could repeat the success of the New York Convention. . .").

similar global multilateral system governing foreign judgments in international commercial litigation.[32]

While many private entities may prefer arbitration, there are still countless other individuals and entities that seek the advantages of litigation. One such advantage is the fact that litigation preserves the possibility to appeal a judgment.[33] Additionally, parties may prefer to preserve the right to join third parties to the litigation.[34] Further, an "all-or-nothing" resolution to a judicial proceeding may be preferable to a compromise as a result of an arbitration proceeding.[35] Parties may also prefer the settlement process in a litigation proceeding because the recommendations of the court could provide a crucial bargaining chip to induce a favorable settlement.[36] The consensus among states was that parties should not lose all the advantages of litigation simply because the Hague Conference had been unable to come up with a suitable convention governing the subject.[37] Thus, the U.S. and Europe resumed discussions to draft a sequel to the 1971 Convention and to pick up where the New York Convention left off.[38]

C. CLOSING THE GAP: THE 2005 CONVENTION ON CHOICE OF COURT AGREEMENTS

The Hague Conference took a major step towards governing recognition and enforcement of foreign judgments by passing the 2005 Hague Convention on Choice of Court Agreements (hereinafter "the

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[32] *Id.* at 66. (Among the international community, there was considered to be "a lack of any multilateral instrument available on a global scale for the recognition and enforcement of judicial decisions in a world where various economic regions were becoming more interdependent every day and where more international conventions were in place every year.").

[33] CHILDRESS ET AL., *supra* note 29, at 554.

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See* Regan, *supra* note 7, at 67 (quoting THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 1, Annotated Checklist of Issues to be Discussed at the Meeting of the Special Commission on Jurisdiction and Enforcement of Judgments 4 (1994)) ("[I]n the long-term the net result of this policy of burying one's head in the sand will be that foreign courts will be tempted to exercise less self-restraint in assuming jurisdiction in international circumstances and be less willing to recognize and enforce judgments from one's own country, or a combination of both.").

[38] *See id*.

Choice of Court Convention").[39] Like the New York Convention, the Choice of Court Convention sought to create rules governing recognition and enforcement while still providing freedom and flexibility in commercial dealings.[40] The Choice of Court Convention's general rule on recognition and enforcement provided that a judgment entered by a court in one contracting state pursuant to a choice of court agreement must be recognized and enforced in other contracting states.[41]

Courts have discretion to decide whether an exception applies that precludes recognition of a judgment made pursuant to a choice of court agreement.[42] Under Article 9 of the Convention, courts may refuse recognition of judgments where the agreement was

> "null and void" under the law of the chosen State, unless the chosen court has determined that the agreement is valid; the defendant did not receive proper notice; the judgment was obtained through fraud or is inconsistent with another judgment; or where recognition and enforcement would be "manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State."[43]

This provision largely reflects the U.S.'s doctrine of comity, that is, that the only grounds for nonrecognition are considerations of fairness and due process.[44] Thus, the Choice of Court Convention is designed to give effect to the intentions of the contracting parties while ensuring that the judicial proceedings are compatible with the public policies of member states.

This Convention does not require a foreign court to accept and enforce a money judgment that is in excess of costs incurred to the plaintiff, including punitive damages.[45] This is an important precedent leading up to the passage of the 2019 Convention because, as I will discuss in the following section, foreign states whose judicial systems do not include the concept of punitive damages are materially opposed to

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[39] *See* Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter Choice of Court Convention].

[40] *See id.*

[41] Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. PA. J. INT'L L. 1013, 1036 (2010).

[42] *Id.*

[43] *Id.* at 1037 (quoting Choice of Court Convention, *supra* note 39, art. 9).

[44] *See* Rumenov, *supra* note 6, at 394, 397.

[45] Choice of Court Convention, *supra* note 39, art. 11.

enforcing U.S. judgments with high punitive damage awards against their own citizens.[46] Therefore, the Choice of Court Convention is extremely important to consider in discussing the impact of the passage of the 2019 Convention on the international legal system.

D. THE INTERPLAY BETWEEN U.S. COURTS AND FOREIGN JUDGMENTS IN THE LEAD-UP TO THE 2019 CONVENTION

Because this analysis will ultimately propose that the United States should ratify the 2019 Convention, I will now discuss the disparate treatment that U.S. parties receive in the international legal community, as well as the hesitancy of other states to enforce American judgments (particularly when large punitive damages are on the table).[47]

Today, U.S. litigants bear the brunt of the international community's failure to pass comprehensive rules governing recognition and enforcement of foreign judgments in two ways. First, foreign courts may be less likely to enforce U.S. judgments.[48] Second, the U.S. typically recognizes foreign judgments in its courts despite this lack of reciprocity in other state jurisdictions (with exceptions).[49]

International reluctance to enforce U.S. judgments abroad is due in part to the tendency of U.S. courts to award excessive punitive damages in favor of their own citizens.[50] This is seen as especially problematic from the viewpoint of the United Kingdom, for example, where punishment and deterrence are considered to be sanctions reserved solely for criminal matters—not civil proceedings.[51] It is for this reason that talks between the U.S. and U.K. regarding a possible bilateral treaty on recognition and enforcement of foreign judgments fell through.[52] Further, international courts may be reluctant to enforce U.S. judgments on jurisdictional grounds. For instance, where personal jurisdiction is asserted based on the defendant's doing business in the forum state or based on serving process upon the defendant in the foreign state, international states that do not

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[46] *See* Baumgartner, *supra* note 5, at 994.

[47] *See generally* Baumgartner, *supra* note 5.

[48] *Id.* at 967, 971 ("[T]here are jurisdictions that liberally recognize and enforce U.S. judgments coming their way, at least as a general matter… at the other end of the spectrum, there are a number of countries where U.S. judgments are for the most part given no effect.").

[49] CHILDRESS ET AL., *supra* note 29, at 613.

[50] Stevens, *supra* note 16, at 128.

[51] *Id.*

[52] *Id.*

recognize these jurisdictional bases may refuse to recognize judgments based upon such assertions of jurisdiction.[53] The Choice of Court Convention provides some limited answers to these issues, as it allows foreign courts the discretion to refuse enforcement of punitive damages, and because the parties covered under that Convention would have already consented to an assertion of jurisdiction in their choice of court agreement.[54] However, in the absence of a choice of court agreement, U.S. litigants have limited recourse to enforce their judgments abroad.

While the U.S. and its citizens experience difficulties with foreign courts—especially compared to European states, which have various treaties allowing for reciprocal recognition and enforcement—the U.S. has notable exceptions to its enforcement-friendly approach, which inform the provisions of the 2019 Convention.

The primary exception among U.S. courts is the procedural fairness exception, which requires courts to dismiss the enforcement of foreign judgments made under circumstances of procedural unfairness.[55] The second exception has been discussed less frequently in this Comment: the public policy exception.[56] Under this exception, U.S. courts will preclude recognition of a judgment when recognition would be repugnant to public policy (typically in instances where U.S. litigants' constitutional rights are at stake).[57] This exception is to be construed narrowly so as to protect the rights of litigants while also granting deference to the courts of other nations under principles of comity.[58] These public policy concerns reflect considerations of state sovereignty, as states strive to protect their citizens from rules of law that appear contrary to their own domestic legal principles.[59]

Armed with these doctrinal principles regarding nonrecognition, the international community had the judicial tools to assuage states' concerns that a universal recognition and enforcement instrument would

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[53] Baumgartner, *supra* note 5, at 996–997.

[54] Heiser, *supra* note 41.

[55] *See* CHILDRESS ET AL., *supra* note 29, at 614. *See also* Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 287-88 (S.D.N.Y. 1999) (granting summary judgment to defendant Citibank because the Liberian plaintiffs seeking enforcement won their judgment in a corrupt court during the Liberian civil war).

[56] CHILDRESS ET AL., *supra* note 29, at 631.

[57] *Id.* at 631, 636–37.

[58] *Id.* at 636.

[59] *See e.g.*, Addis v Gramophone Co. Ltd [1909] AC 488 (UK) (stating that punitive damages are never permitted for breach of contract).

infringe on state sovereignty. Thus, the path to the 2019 Convention was clearer than ever. First, states saw that the success of the New York Convention meant that a universal multilateral enforcement instrument was possible.[60] Second, there was sufficient precedent under the Choice of Courts Convention (along with the New York Convention) to guide the drafting of a new instrument.[61] Third, states had greater need than ever to traverse the milieu of recognition and enforcement law among the states in the international community.[62] The time was ripe to finally introduce the uniform recognition and enforcement convention the international community had desired for decades.

II. THE NEW CONVENTION GRANTS SUBSTANTIAL PROTECTIONS TO FOREIGN STATES WHERE ENFORCEMENT IS SOUGHT, WHILE STILL PROVIDING A PATH TO COMPENSATION FOR INJURED PLAINTIFFS

A. THE CONVENTION IS MADE PALATABLE TO STATES BY LIMITING THE SCOPE OF DEFENDANTS' LIABILITY

The scope of the 2019 Convention is limited so as not to disrupt other existing treaties governing commercial dealings. The Convention begins by clarifying that its provisions are "complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*."[63] Further, Article 2, Clause 3 states that "[t]his Convention shall not apply to arbitration and related proceedings."[64] Thus, these provisions in the 2019 Convention seek to facilitate reliance on the Choice of Courts Convention by drafting "complementary" provisions.[65] Yet at the same time, the drafters of the 2019 Convention were careful not to infringe on the

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[60] Regan, *supra* note 7.

[61] *Id.* at 68–69.

[62] See *The Future of Trade: How Digital Technologies are Transforming Global Commerce*, WORLD TRADE REPORT 2018, https://www.wto.org/english/res_e/publications_e/world_trade_report18_e_under_embargo.pdf [https://perma.cc/JF6E-CBFP], for a discussion of the exponential magnitude of global trade (and therefore increased volume of transnational legal disputes) in the current era of technologized interconnectivity.

[63] The 2019 Convention, *supra* note 1.

[64] *See id.* art. 2, cl. 3.

[65] Mayela Celis, *HCCH Revised Draft Explanatory Report (version of December 2018) on the Judgments Convention is available on the HCCH website*, (Jan. 20, 2019), http://conflictoflaws.net/2019/hcch-revised-draft-explanatory-report-version-of-december-2018-on-the-judgments-convention-isavailable-on-the-hcch-website/ [https://perma.cc/49EZ-PFZR].

provisions of the New York Convention, which would disturb the international community's unanimous reliance upon it as an instrument governing arbitration.[66] Thus, these provisions reflect the drafters' intent to maintain international judicial balance by preserving reliance on other existing Hague Conventions.

The limitations on the Convention's scope are further enumerated in Article 2, Clause 1, which insulates states' crucial domestic interests from liability. These provisions can be seen as protecting interests of state sovereignty, no doubt in an attempt to induce state ratification by mitigating any potential negative consequences of ratification for important areas of state conduct.[67] Article 2 states that:

> This Convention Shall not apply to the following matters–
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> (a) the status and legal capacity of natural persons . . .
>
> (g) transboundary marine pollution . . .
>
> (h) liability for nuclear damage . . .
>
> (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties . . .
>
> (o) law enforcement activities . . .
>
> (q) sovereign debt restructuring through unilateral State measures.[68]

Thus, the Convention carefully avoids infringement on state control of areas that are crucial to its sovereign interests: immigration and citizenship, military and law enforcement, and important financial affairs (including financially costly environmental damage).[69] By shielding states from liability for conduct related to these key state interests, Article 2 assuages the common concern of states that ratifying the Convention will impede state autonomy.[70] Rather, the Convention grants states substantial wiggle room to avoid paying the costs related to these types of government

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[66] *See* Choi, *supra* note 30.

[67] *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG., No. 3, 427, 436 (Summer 1988) (analyzing how states are induced to join international agreements as long as those agreements do not infringe on key domestic interests).

[68] The 2019 Convention, *supra* note 1, art. 2, cl. 1.

[69] *See* Putnam, *supra* note 67.

[70] *See* Oona A. Hathaway, *International Delegation and State Sovereignty,* 71 L. & CONTEMP. PROBS., 1, 115 (a recurring impediment to state ratification of international agreements stems from state concern that these agreements will impede state autonomy).

activities.[71] However, that is not to say that the Convention completely shields government actors from incurring liability. Article 2, Clause 4 specifically states that "[a] judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency, or any person acting for a State, was a party to the proceedings."[72] Therefore, while the drafters attempted to provide some protections for state sovereignty, those protections are not absolute.

In addition to the Convention's binding effect on government agencies, its impact on private parties is a key consideration for states in deciding whether to ratify.[73] While the Convention is limited to "civil or commercial matters," this somewhat broad and vague description of the Convention's scope does not communicate the circumstances in which private parties will be bound with much specificity.[74] Thus, the language of Article 2, Clause 1, clarifies which legal matters are *not* "civil or commercial."[75]

The limiting provisions of Clause 1 remove certain foreseeable sources of litigation from the Convention's scope: lawsuits concerning trusts and estates, bankruptcy, intellectual property, anti-trust,[76] defamation, and privacy.[77] It appears somewhat strange to exclude the aforementioned areas of law from the Convention, as legal disputes in these areas will almost certainly arise in the course of commercial dealings. The drafters' only explanation for these exclusions is either:

> (i) that those matters are already governed by other international instruments, in particular other Hague Conventions, and it was deemed preferable that these instruments operate without any interference by the draft Convention, or

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[71] Putnam, *supra* note 67.

[72] The 2019 Convention, *supra* note 1, art. 2, cl. 4.

[73] *See* Putnam, *supra* note 67 (international agreements are often tailored to reflect the interests of key domestic industrial actors; states are hesitant to ratify agreements that pose a threat to these domestic industries).

[74] The 2019 Convention, *supra* note 1.

[75] The 2019 Convention, *supra* note 1, art. 2, cl. 1.

[76] The 2019 Convention, *supra* note 1, art. 2, cl. 1. *But see id.* (the Convention may require enforcement of judgments arising out of certain torts for unfair business practices, such as "an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce. . .").

[77] *Id.*

> (ii) that they are matters of particular sensitivity for many States and it would be difficult to reach broad acceptance on how the draft Convention should deal with them.[78]

In practice, the Convention will most likely compel recognition of judgments for standard personal injuries or contract disputes, since those are not excluded under Article 2. Further, the drafters clarified that the Convention "applies to employment and consumer contracts, personal injuries, damage to tangible property, rights in rem and tenancies over immovable property anti-trust / competition or intellectual property."[79]

Importantly, the Convention *does* cover intellectual property (IP) litigation, which was a serious source of contention for the drafters.[80] Including IP disputes in the scope of the Convention has had substantial implications for foreign relations, as differing conceptions of IP law have led to serious intergovernmental disputes among developed states, such as the United States' current trade war with China.[81] Given President Trump's recent rhetoric denouncing foreign business treaties,[82] it appears that U.S. ratification may depend on the extent to which the government views the Convention's coverage of intellectual property as favorable to U.S. foreign policy goals.

While the scope of the Convention appears on its face to be greatly limited, the Convention still provides a path for plaintiffs to enforce judgments regarding torts and contract disputes in foreign courts. Thus, whether this limiting function succeeds in inducing ratification, and whether this Convention actually meets the needs of foreign plaintiffs, remains to be seen.

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[78] *Draft Explanatory Report (version of December 2018)*, HCCH DRAFT CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS, 10 (July 2, 2019), https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf [https://perma.cc/6DT3-LUUG].

[79] *Id.*

[80] *Id.* at 5.

[81] *See* Jane Cai, *Trade War: Why U.S. and China Remain so Far Apart on Intellectual Property Rights*, S. CHINA MORNING POST (Sept. 30, 2018, 1:00 AM), https://www.scmp.com/news/china/diplomacy/article/2166315/trade-war-why-us-and-china-remain-so-far-apart-intellectual [https://perma.cc/YB2Q-KC56].

[82] James Wagner & Kevin L. Morrow, *Foreign Judgments: Solving the Mystery of International Recognition and Enforcement*, FAEGRE DRINKER (Dec. 8, 2016), https://www.faegrebd.com/en/insights/publications/2016/12/foreign-judgments-solving-the-mystery-of-international-recognition-and-enforcement [https://perma.cc/EFW2-MYRA].

B. THE MECHANISMS OF RECOGNITION AND ENFORCEMENT ARE SET OUT IN ARTICLES 4 AND 7, AND ARE SUBJECT TO THE JURISDICTIONAL FILTERS IN ARTICLE 5

The Convention sets out the positive provisions for recognition and enforcement in Article 4, while the grounds for refusal are found in Article 7.[83] Just as Article 2 prevents re-litigating a damages award,[84] Article 4, Clause 2 prohibits the requested state from re-litigating the substantive merits of a plaintiff's claim: "2. There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention."[85]

The provisions of Article 4 alone are quite broad, requiring the requested state to simply submit the judgment rendered in the state of origin if the judgment is "final."[86] Thus, the requested state's only leverage for refusal is found in Article 7, which allows the requested state to refuse recognition of a judgment that was made in violation of universally recognized principles of due process.[87] Specifically, due process violations occur if the defendant did not receive proper notice of the litigation, if the judgment was obtained by fraud, or if the judgment was procured by such substantial procedural unfairness that "recognition or enforcement would be manifestly incompatible with the public policy of the requested State."[88] On its face, the Convention appears to essentially codify the doctrine of comity on the international plane by making judgments presumptively recognizable and enforceable in the requested state subject to due process considerations.[89] While this proposed legal obligation is somewhat uncontroversial, states may have reservations to the broad grant of jurisdiction articulated in the Convention.

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[83] The Convention, *supra* note 1, arts. 4, 7.

[84] *Infra* note 108.

[85] The Convention, *supra* note 1, art. 4, cl. 2.

[86] *Id. See also* Restatement (Third) of Foreign Relations Law § 481 cmt. e (A.L.I. 1987) (defining a "final judgment" as one that is not subject to additional proceedings in the rendering court–such as an appeal–except for execution).

[87] The Convention, *supra* note 1, art. 7, cl. 1. See S.I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, 112 PENN ST. L. REV. 347 (Winter 2018), for a discussion of the due process principles that are considered to be so fundamental to international systems of justice that they have become ingrained into customary international law.

[88] The Convention, *supra* note 1, art. 7, cl. 1(a)-(c). *See also Enforcement of Judgments*, U.S. DEP'T STATE BUREAU CONSULAR AFFS., https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html [https://perma.cc/R9C9-A7SV].

[89] *See Hilton*, 159 U.S. at 163–66.

The Convention's jurisdictional requirements are set out in Article 5. Under Article 5, a judgment falls within the Convention's jurisdiction when the judgment was rendered in one of thirteen enumerated circumstances.[90] If any one of these "jurisdictional filters"[91] are satisfied, the terms of the Convention will apply when a litigant seeks to enforce that judgment.[92] The jurisdictional requirements are quite broad and inclusive, casting a wide jurisdictional net. For instance, Article 5, Clause 1, Section (d), confers jurisdiction upon a judgment where

> the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment[.][93]

Under this provision, it appears that virtually any foreign entity maintaining even a single branch in the state of origin may be subject to the Convention's jurisdiction, thus creating a potential explosion of liability for multinational corporations with branches spanning the globe.[94]

While this broad grant of jurisdiction led to disputes among the drafters of the Convention,[95] proponents of Article 5's jurisdictional provisions laud its benefits. This jurisdictional framework "provide[s] an exhaustive list of available indirect bases of jurisdiction, creates predictability in international litigation by having the list available when a case is initiated, and conforms (in part) to the predominant legal system model–continental European civil law."[96] These benefits are particularly relevant considering the drafters' proposed alternative jurisdictional framework, which would have reduced the jurisdictional provisions down

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[90] *See* The Convention, *supra* note 1, art. 5.

[91] Ronald A. Brand, *The Circulation of Judgments Under the Draft Hague Judgments Convention*, UNIV. PITT. LEGAL STUD. RSCH. PAPER NO. 2019-02, 4 (Feb. 14, 2019), https://blogs.law.nyu.edu/transnational/wp-content/uploads/2019/02/Circulation-of-Judgments-under-the-Draft-Hague-Convention-by-Brand.pdf [https://perma.cc/65JC-8K3G].

[92] *Id*. The Convention, *supra* note 1, art. 5, cl. 1 ("A judgment is eligible for recognition and enforcement if one of the following requirements is met. . .").

[93] The Convention, *supra* note 1, art. 5, cl. 1(d). *See Brand, supra* note 91.

[94] *See, e.g.*, S.G. Britton, *International Tourism and Multinational Corporations in the Pacific: The Case of Fiji*, CROOM HELM LTD. (1982) (discussing the proliferation of multinational corporations in developing countries as a result of tourism, and how this foreign corporate presence creates liability all around the world).

[95] *See generally* Brand, *supra* note 89.

[96] *Id.* at 6.

to as few as four vague rules, providing plenty of legal wiggle room to entities whose presence in a given area is minute.[97]

The ambiguous jurisdictional approach was favored largely by developed states in the drafting stage,[98] but the Convention's ultimate goal—to establish comity among nations—could not be achieved if defendants could easily maneuver out of the Convention's reach. Thus, proponents of the Convention will likely maintain that the jurisdictional grant in Article 5 is crucial to its effectiveness. Fortunately for developed states, the state in which enforcement is sought is given deference to decide whether jurisdiction was proper in the state of origin, which gives them some maneuverability in determining whether jurisdiction can be properly exercised over a particular judgment.[99] Therefore, critics may question the efficacy of Article 5's jurisdictional framework insofar as it gives the requested state the ultimate power to decide whether it is bound by the Convention's jurisdiction. Can a plaintiff really be optimistic about obtaining enforcement in a foreign court if that court is free to dismiss on jurisdictional grounds?[100]

C. ARTICLE 10 RESOLVES THE PUNITIVE DAMAGES ISSUE

As discussed in Section II, states that do not recognize the doctrine of punitive damages are often wary of enforcing judgments with high punitive damages against their own citizens.[101] This wariness stems from the states' sovereign interests in protecting their citizens from burdensome financial penalties imposed by foreign courts that they would not otherwise be subject to under domestic law.[102] To account for this, Article 10 of the Convention expressly provides that punitive damages need not

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[97] *See id.* at 1. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102 (1987) (deciding that entities with minimal contacts in the state of origin will be more likely to evade the court's jurisdiction in that forum).

[98] Francisco Garcimartín & Geneviève Saumier, *Judgments Convention: Revised Draft Explanatory Report*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, TWENTY-SECOND SESSION: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, 6 (Dec. 2018), https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf [https://perma.cc/G5GS-S8UV].

[99] *Id.*

[100] *See infra* Section III(b), which further discusses how the jurisdictional issue will affect American law of general personal jurisdiction.

[101] Baumgartner, *supra* note 5.

[102] *Id.*

be enforced in the defendants' home states.[103] This concession reflects the authors' intent to incentivize ratification by states with solely compensatory schemes. However, it presents a potential problem of reciprocity for U.S. litigants.[104] Article 10 reads:

> 1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
>
> 2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.[105]

The Article's use of the phrase "if, and to the extent that" creates an important limitation upon states' refusal to enforce punitive damages. This phrase presents two conditions for refusal of punitive damages: first, "if" the judgment contains punitive or exemplary damages, then second, these damages may only be refused "to the extent" that they do not compensate the victim.[106] Therefore, this phrase signifies that states may refuse to enforce punitive damages, yet the mere inclusion of punitive damages in the judgment does not grant permission to refuse recognition of the judgment entirely. Instead, the state is still required to enforce compensatory damages upon their citizens. This concession represents a compromise between comity[107] and sovereignty[108] by respecting the foreign sovereign's right to refuse punitive damages as incongruent with its domestic legal policy, while still providing foreign plaintiffs a path to compensation in these courts. However, this presents a problem: if victims cannot receive enforcement of punitive damages, does that limit their ability to obtain full compensation for the injuries given the high cost of seeking enforcement in another country? The solution is found in Article 10, Clause 2.

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[103] The Convention, *supra* note 1, art. 10.

[104] *See infra* Section III.

[105] Baumgartner, *supra* note 5.

[106] The Convention, *supra* note 1, art. 10. *See Extent*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/extent [https://perma.cc/YR9K-78MP] (last visited Oct. 12, 2020 at 10:30 pm) ("[T]he point, limit, or degree to which something extends").

[107] *See* Michaels, *supra* note 15.

[108] *See* Susan L. Stevens, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 116–19 (2002).

Clause 2 of Article 10 grants foreign courts the discretion to determine the extent to which the damages provided in the judgment "cover costs and expenses relating to the proceedings."[109] Thus, Article 10 envisions some compensation not only for the procedural expenses litigants may incur in trying to obtain a judgment in the first place, but also for the potentially high costs of enforcing that judgment in a foreign jurisdiction.[110] Importantly, this provision only includes language covering "costs" arising out of "the proceedings;" it contains no language regarding the foreign court's discretion to measure the costs of *the underlying injury*.[111] This language functions to prevent foreign courts from relitigating the amount of compensatory damages in favor of its own citizens.

The drafters of the Convention did note that "it could be argued that damages intended to cover the costs of proceedings were not compensating for the actual loss," and thus should not be included when enforcing the judgment in the requested state.[112] Nevertheless, the drafters left this issue open to the discretion of the court in the state of origin, noting that "this reference [to costs of proceedings] does not contain a hard rule; the fact that damages are intended to cover costs and expenses is only to be taken into account."[113] Therefore, the final decision as to whether the plaintiff can be reimbursed for the costs incurred in seeking enforcement abroad, and the extent of that reimbursement, is left to the foreign court.

By providing that (1) plaintiffs can recover their courtroom costs and (2) foreign courts are prohibited from altering the judgment's compensatory damages award, Article 10, Clause 2, lowers the overall expense for plaintiffs seeking enforcement in a foreign jurisdiction. Ultimately, Article 10 creates a framework that allows foreign states to refuse punitive damages, while still offering an avenue that protects plaintiffs seeking to enforce judgments abroad.

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[109] The Convention, *supra* note 1, art. 10, cl. 2.

[110] See *Procedures for Recognition and Enforcement of Foreign Judgments in the United Kingdom*, HERBERT SMITH FREEHILLS LLP (Jan. 24, 2019), https://www.lexology.com/library/detail.aspx?g=84d985a4-2672-4a37-ada7-32bc6297ac7a [https://perma.cc/4VUQ-GVPN], for a discussion of the procedural costs of seeking enforcement in a foreign jurisdiction at various stages of the process.

[111] The Convention, *supra* note 1, art. 10, cl. 1-2.

[112] Garcimartín & Saumier, *supra* note 96, at 75.

[113] *Id*.

III. DEVELOPED STATES—STARTING WITH THE UNITED STATES—MUST RATIFY THE CONVENTION IN ORDER TO COMPLETE THE INTERNATIONAL PROJECT OF A UNIVERSAL RECOGNITION AND ENFORCEMENT FRAMEWORK

The Convention enters into force as soon as another state joins Uruguay in acceding to the treaty.[114] Thus, if the United States were to become the second signatory to the Convention, it would become binding on all future signatories.[115] Ratification by the United States would go a long way towards legitimizing the Convention, as states which frequently trade with the U.S. would likely follow suit, seizing the opportunity to generate greater judicial cohesion with the financial superpower.[116] However, despite its traditional support for the judgments project,[117] the U.S. has remained hesitant to ratify the Convention, perhaps reflecting a foreign policy shift towards isolationism in the Trump White House.

Trump's isolationist stance towards international financial cooperation is evidenced by his criticism of trade deals like NAFTA[118] and his aggressive China tariffs.[119] Given Trump's reluctance to participate in international trade deals, it may come as no surprise that the United States has not signed or ratified the Convention.[120] However, with the approaching Biden administration promising a "return to normalcy,"[121]

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[114] The Convention, *supra* note 1, art. 28.

[115] *Id.*

[116] *See* Masato Dogauchi, *Jurisdiction over Foreign Infringement from a Japanese Perspective in Consideration of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters as of June 2001*, 44 JAPANESE ANN. INT'L L. 35, 38 (2001) ("[S]ome countries, including Japan… thought that ratification by the United States in the final stage would be important in order for this convention to play its role effectively in the international field as a legal infrastructure for civil and commercial litigations.").

[117] *See The Originating Proposal (1992)*, THE HAGUE CONF. PRIV. INT'L L. (HCCH), https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments/the-originating-proposal-1992- [https://perma.cc/U484-W99Z] (stating in 1992, the U.S. State Department proposed to resume efforts towards the judgments project).

[118] Glenn Thrush, *Trump Says He Plans to Withdraw from Nafta,* N.Y. TIMES (Dec. 2, 2018), https://www.nytimes.com/2018/12/02/us/politics/trump-withdraw-nafta.html?auth=link-dismiss-google1tap [https://perma.cc/3SME-XE9Z].

[119] John Brinkley, *What Trump Calls Nationalism Looks More Like Isolationism*, FORBES (Mar. 21, 2018), https://www.forbes.com/sites/johnbrinkley/2018/03/21/what-trump-calls-nationalism-looks-more-like-isolationism/#4c3c873628f1 [https://perma.cc/S4G5-2SK5].

[120] Wagner & Morrow, *supra* note 80.

[121] *See generally* Chris Cilliza, *Biden's Promise of Returning Things to Normal May Not Even Be Possible,* CNN (Nov. 5, 2020), https://www.cnn.com/2020/11/05/politics/joe-biden-donald-trump-2020-normal/index.html (Nov. 5, 2020) [https://perma.cc/D3ZD-YRSD].

observers may be optimistic that U.S. ratification will occur in the next four years. But for the time being, the debate as to the efficacy of U.S. ratification continues to rage, particularly in regard to the punitive damages issue,[122] concerns over due process, and the consequences for personal jurisdiction jurisprudence.

A. Ratification Would Likely Invite Revision of International Due Process Standards to Mirror the New York Convention's Due Process Requirements

As discussed in Section II(b), Article 7 permits a court to refuse to recognize a judgment rendered by judicial proceedings that were "incompatible with fundamental principles of procedural fairness of that State."[123] While the international community has some agreed-upon standards of due process, U.S. ratification of the Convention would necessarily require analysis of the fairness of foreign courts when deciding whether to enforce a judgment against a U.S. citizen. This dilemma has invited commentators to speculate as to how much deference U.S. courts should grant to the procedures of foreign courts.[124] This issue will undoubtedly become increasingly prevalent in U.S. courts should the Convention be ratified. Therefore, the U.S. government will be forced to provide a satisfactory answer as to the standards U.S. courts will employ to decide whether foreign courts have complied with due process.

The U.S.'s current conception of international due process standards has been heavily criticized as granting "[b]lind deference to foreign courts."[125] This criticism is aimed at the United States Court of Appeals for the Seventh Circuit's ruling in *Society of Lloyd's v. Ashenden*. In that case, the court held that U.K. judgments need not comport with U.S. standards of due process, but rather, with a "looser" standard of international due process.[126] Judge Posner, writing for the court, proposed that

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[122] Wagner & Morrow, *supra* note 80, at 3. *See supra* Section II(c) for a discussion of the resolution of the punitive damages issue in Article 10 of the Convention.

[123] *See id.*; The Convention, *supra* note 1, art. 7.

[124] Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1162 (2007).

[125] *Id*.

[126] *Id.* at 1162–63.

> [We] call this the 'international concept of due process' to distinguish it from the complex concept that has emerged from American case law. We note that it is even less demanding than the test the courts use to determine whether to enforce a foreign arbitral award under the New York Convention, whose due process defense . . . has been interpreted to mean the enforcing jurisdiction's concept of due process, albeit a rather minimal such concept.[127]

This loose standard of "basic fairness" reflects the current litmus test employed by American courts to decide whether a judgment should be recognized.[128] When applied to recognition of a judgment, this standard seeks to determine not whether the losing party was denied due process, but rather, whether "in the court's view, the foreign country, as a general matter, has a fair judicial system."[129] Thus in the context of recognition and enforcement, this analysis turns on whether the domestic court views the foreign judicial system as, in Judge Posner's words, "civilized" or "uncivilized."[130]

Judge Posner's conception of international due process is untenable for a variety of reasons. First, his designation of certain states as "civilized" or "uncivilized" is crude and offensive. Second, as assistant professor Montré D. Carodine of Washington & Lee University School of Law posits, this test may violate separation of powers by inviting the judiciary to make foreign policy.[131] Finally, the most salient issue with Posner's test, and indeed the issue that most concerns the American business community, is the fact that the Posner test fails to consider whether the parties actually received due process, regardless of whether the overall judicial scheme was "civilized" or not.

This deficiency is best displayed in the case of *Bank Melli Iran v. Pahlavi*, in which the Ninth Circuit was asked to decide whether to enforce an Iranian judgment against the defendant, the sister of the former Shah of Iran.[132] The primary inquiry became whether the defendant had received due process in the Iranian courts, not whether Iran's judicial system was "civilized."[133] The defendant was not permitted to re-enter Iran, yet the court still entered a default judgment against her on the basis of her failed

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[127] *Id.* (quoting Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000)) (citation omitted).
[128] *See Soc'y of Lloyd's*, 233 F.3d at 477 (citing *Hilton, supra* note 10).
[129] Carodine, *supra* note 124, at 1163.
[130] *Id.*
[131] *Id.* at 1163–64.
[132] Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995).
[133] *Id.* at 1409.

appearance in court despite notice by publication.[134] Because the Ninth Circuit's proceedings pre-dated the *Society of Lloyd*'s decision that gave rise to the Posner test, the court came to the conclusion that the former Shah's sister had been denied due process, and the judgment against her was not enforced.[135] It stands to reason, however, that the judgment would have been recognized and enforced had the Ninth Circuit adopted the Posner test, because the Posner test's inquiry is limited to the fairness of the overall judicial system as opposed to the specific proceedings. Thus, should the Convention become binding law in the United States, Congress would do well to set a clear standard for due process under the Convention that avoids the shortcomings of the Posner test and ensures consistency across the circuit courts.

Fortunately, the desired standard has already been employed by U.S. courts to interpret the New York Convention, and this standard could easily be applied to the 2019 Convention. The New York Convention provides that a foreign arbitral tribunal has violated due process when "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."[136] Courts have interpreted this provision as "sanction[ing] the application of the forum state's standards of due process."[137] In other words, the enforcing court applies its domestic due process standards to determine whether recognition is proper under the New York Convention. Pursuant to that provision, parties are permitted to raise a due process defense against enforcement.

As the New York Convention essentially serves the same purpose as the 2019 Convention, that is, providing recognition and enforcement mechanisms for foreign rulings, it would be a natural parallel for courts interpreting the 2019 Convention's due process requirements. This interpretation of the Convention would circumvent the troubling aspects of the Posner test by ignoring the overall judicial scheme of the foreign state (unless it is relevant), and instead focusing on whether the parties actually received due process.[138] This standard would create judicial

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[134] *Id.* at 1412–1413.

[135] *Id.* at 1413.

[136] New York Convention, *supra* note 3, art. V(1)(b).

[137] Parsons & Whittemore Overseas Co., v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 975–76 (2d Cir. 1974).

[138] *E.g.*, Iran Aircraft Indus. v. Avco Corp, 980 F.2d 141 (2d Cir. 1992) (applying U.S. due process principles to find that enforcement of arbitral award would not be proper because defendant did not receive notice).

certainty for U.S. businesses seeking to challenge enforcement because U.S. businesses have perennially accounted for due process in their litigation strategies. Further, this standard is judicially manageable because courts could rely on familiar case law under the New York Convention to analyze due process. Thus, the U.S. government could feel confident that American businesses would support ratification of the Convention because businesses would not need to substantially change their litigation strategies when challenging enforcement.

B. THE CONVENTION'S JURISDICTIONAL FRAMEWORK WOULD NOT DISPLACE THE PROTECTIONS GRANTED BY *GOODYEAR DUNLOP* AND *DAIMLER*

Recent U.S. Supreme Court decisions have created a jurisdictional framework with which American companies can properly predict whether they will be subject to a court's jurisdiction.[139] These holdings have been generally business-friendly, as U.S. companies will only be subject to a court's jurisdiction when their activities in the forum state are "so continuous and systematic as to render it essentially at home in the forum state."[140] This high jurisdictional bar means that American businesses can comfortably assume that their litigation expenses will be limited to resolving disputes in their home states. However, if the U.S. ratifies the Convention, fears would arise that these holdings would be utterly displaced by the jurisdictional framework set out in Article 5, which provides that "a judgment is eligible for recognition and enforcement [whenever any] of the following requirements is met. . ."[141] Essentially, the fear is that where once a business could only be sued in its home state, under the 2019 Convention it could now be sued in countless states in which it had merely a slight presence as long as any of Article 5's jurisdictional requirements are met. These concerns present an obstacle to drawing support for U.S. ratification, as increased power to haul businesses into court under the Convention "would undoubtedly mean exponentially higher operating expenses in areas like legal services and

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[139] *See generally* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); Daimler AG v. Bauman, 571 U.S. 117 (2014).

[140] *Goodyear Dunlop*, 131 S. Ct. at 2851.

[141] The Convention, *supra* note 1; *see also infra* Section II(b) (discussing the Convention's jurisdictional framework).

insurance, to name a couple."[142] Therefore, analysis of the Convention's jurisdictional power is required to answer these concerns.

The *Daimler* and *Goodyear Dunlop* decisions created uncertainty as to the jurisdictional requirements for recognition and enforcement of foreign judgments in U.S. courts.[143] In *Daimler* and *Goodyear Dunlop*, the Supreme Court held that the Due Process Clause prohibits an assertion of general jurisdiction in a plenary action (i.e. an action that is to be adjudicated and enforced in the same jurisdiction) arising out of conduct in a foreign state.[144] In light of these holdings, American courts were forced to decide whether *Daimler* and *Goodyear Dunlop* require an award debtor (i.e. a losing party) to be "at home" in the U.S. court's forum in order to recognize the judgment against them.[145] In the context of recognizing a foreign judgment, this standard would make it extremely difficult—and indeed almost impossible—to assert jurisdiction over a foreign company, as they are unlikely to have so many assets in the U.S. as to render them "at home." Because Article 5 of the Convention would completely supersede this post-*Daimler* standard and provide a new basis for jurisdiction, it would be incumbent on the courts to decide whether the Convention's jurisdictional framework passes constitutional muster.[146]

American courts have yet to decide definitively whether the constitutional requirements articulated in *Daimler* and *Goodyear Dunlop* create a jurisdictional barrier for recognition and enforcement of foreign judgments. The Second Circuit held that *Daimler* and *Goodyear Dunlop* apply to recognition and enforcement in the case of *Sonera Holding B.V. v. Çukurova Holding A.S.*, where the court dismissed an action for lack of jurisdiction because the defendant's presence in New York did not render it "at home."[147] In *Sonera*, a Dutch holding company attempted to enforce a judgment against a Turkish company based on conduct that occurred entirely outside the U.S.[148] Relying on *Daimler*, the Second Circuit ruled that "Çukurova's contacts fall short of those required to render it at home in New York. To subject it to all-purpose jurisdiction in that state would

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[142] Wagner & Morrow, *supra* note 80.

[143] *See generally* Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. Rev. 344 (2016).

[144] *See Goodyear Dunlop*, 131 S. Ct. 2846; *Daimler*, 571 U.S. 117.

[145] *Daimler*, 571 U.S. at 120–21.

[146] *See* The Convention, *supra* note 1.

[147] Sonera Holding B.V. v. Çukurova Holding A.S., 750 F.3d 221 (2d Cir. 2014).

[148] *Id.*

deny it due process."[149] If the remaining circuits follow the Second Circuit's line of reasoning, parties seeking to enforce a judgment in the U.S. will only succeed if the judgment debtor is a U.S. company. However, other case law predating *Daimler* held that much less stringent jurisdictional requirements apply to the context of recognition and enforcement.

Several cases from lower courts in New York have recently held that no jurisdictional requirement is necessary for an action to enforce a foreign judgment.[150] The New York Appellate Court held in *Abu Dhabi Commercial Bank* that because the Due Process Clause contains no provision requiring a showing of jurisdiction, no such jurisdictional requirement exists when pursuing recognition and enforcement of a judgment.[151] This relaxed jurisdictional approach was even adopted by the Canadian Supreme Court in the case of *Chevron Corp. v. Yaiguaje*, where they specifically referenced the New York cases.[152] In light of these differing interpretations of due process, professors Siberman and Simowitz argue that "an intermediate path is clearly needed," and that a more relaxed jurisdictional nexus should be applied in the recognition and enforcement context.[153] Indeed, some jurisdictional nexus will be required, because failing to include definitive jurisdictional requirements will incentivize parties to forum shop to states with lax requirements to enforce judgments where the award debtor has no connection. However, strict adherence to the *Goodyear Dunlop/Daimler* standard will make it impossible to enforce judgments against foreign defendants. How can these differing conceptions of jurisdiction be reconciled? Once again, the solution to this dilemma is found in the New York Convention.

The New York Convention's consent-based jurisdictional hook could be applied to the 2019 Convention to solve the jurisdiction issue.[154] Because all parties to the New York Convention have already consented to the jurisdiction of the signatories, U.S. courts have interpreted this as an implied waiver of the right to object on jurisdictional grounds.[155] Thus, in

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[149] *Id.* at 226.

[150] Silberman & Simowitz, *supra* note 143, at 348 (citing Abu Dhabi Com. Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co., 986 N.Y.S.2d 454 (App. Div. 2014)); Lenchyshyn v. Pelko Elec., Inc., 723 N.Y.S.2d 285 (App. Div. 2001).

[151] *Abu Dhabi Com. Bank*, 986 N.Y.S.2d at 458.

[152] Silberman & Simowitz, *supra* note 143, at 355 (citing Chevron Corp. v. Yaiguaje, [2015] 3 S.C.R. 69 (Can.)).

[153] *Id*. at 350.

[154] *Id.* at 389 (suggesting but not endorsing use of the New York Convention's jurisdictional hook).

[155] *See* Creighton Ltd. v. Qatar, 181 F.3d 118 (D.C. Cir. 1999).

light of the 2019 Convention, a perfect argument for jurisdiction by consent exists to satisfy due process concerns. The implied waiver of jurisdictional defenses could be applied *only* to the disputing parties—perhaps via reservations included in the ratification—which would prevent American businesses from being dragged to distant third-party states to have a judgment enforced against them. This solution would also allow American companies to enforce judgments against foreign debtors who could otherwise escape punishment through a jurisdictional defense. Thus, this solution avoids the *Goodyear Dunlop/Daimler* loophole while still satisfying due process concerns.

C. THE U.S. SHOULD RATIFY THE CONVENTION BECAUSE THE CONVENTION SATISFIES DUE PROCESS REQUIREMENTS

Satisfying the concerns of the American business community is crucial to adoption of the Convention. As discussed in this analysis, the Convention satisfies due process requirements by (1) making an inquiry into the fairness of the original proceeding, and (2) limiting jurisdiction to the home states of the warring parties through consent. Both of these proposed solutions create judicially manageable standards and predictability for American businesses involved in litigation. Further, concerns over ratification may be reduced slightly by the fact that "[t]o encourage states to sign up to the . . . Convention, the drafters, quite wisely, have provided [states] with the option to pick and choose which acceding states they will recognize and enforce judgments from under the Convention."[156] Thus, if the U.S. exercises this right to limit the number of states whose jurisdiction it will consent to, then it is quite possible that American businesses may be able to avoid overly-troublesome litigation with undesired states. This would particularly mitigate the due process concerns of Judge Posner, by ensuring that the U.S. consents only to the jurisdiction of states that have generally fair legal systems. Thus, because U.S. ratification is crucial to the success of the Convention,[157] and because ratification could provide the American business community with increased accessibility to foreign judiciaries, the U.S. must ratify the Convention to complete the Hague Conference's judgments project once and for all.

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[156] Alexander Schavelev, *New Convention to Help Businesses Enforce Foreign Judgments*, PINSENT MASONS (July 8, 2019), https://www.pinsentmasons.com/out-law/analysis/new-convention-to-help-businesses-enforce-foreign-judgments [https://perma.cc/YGS5-FG66].

[157] Dogauchi, *supra* note 114.

IV. CONCLUSION

Because transnational litigation is a costly and ill-favored facet of international business, member states of the Hague Conference have demanded greater international cooperation relating to the recognition and enforcement of foreign judgments. As the culmination of a twenty-seven-year project to reach consensus on this issue, the 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments was supposed to provide the long-desired legal framework governing recognition and enforcement. However, with Uruguay as its only signatory, the question remains as to whether the Convention will fail as its earlier iteration did in 1971, or whether it will achieve the same broad success as the New York Convention. As discussed in this article, the United States is positioned to legitimize the new Convention by being the second state to ratify it—the key barrier to ratification being whether the U.S. government could gain the support of its domestic business community.

Concerns over the efficacy of the new Convention stem largely from issues regarding the recognition of punitive damages, due process, and expanded jurisdiction over American companies. First, regarding punitive damages, the Convention's deference to the enforcing state is conciliatory in favor of states whose legal systems do not include recognition of punitive damages. Thus, American businesses may be unsatisfied with this provision. Second, businesses can feel confident that their due process rights will be protected when a foreign judgment is enforced against them in American courts. Under the new Convention, courts could apply the same due process standards used under the New York Convention, providing American due process standards for recognition and enforcement of foreign judgments. Third, the New York Convention provides further guidance as to how the Convention's jurisdictional framework can be implemented. Under the consent-based theory, businesses will accept the Convention's jurisdiction in exchange for the benefit of obtaining favorable judgments that can be enforced in foreign courts. Ultimately, the Convention will require some compromise in order to achieve concrete standards of international recognition and enforcement.

In conclusion, it is unclear whether broad support for U.S. ratification exists, especially in the wake of the Trump administration. However, if the Biden administration participates in international

cooperation at Obama-era levels,[158] U.S. ratification could become a reality in the next four to eight years. Thus, the world stands at the precipice of creating a new international legal order that will allow for predictability and equality in international business. Achieving a comprehensive framework for recognition and enforcement would create sorely needed predictability in transnational litigation costs and it will reduce the risks of such litigation. Thus, the U.S. business community will no doubt be closely following the Convention's progress in the coming years.

[158] *See, e.g.*, *President Obama: The United States Formally Enters the Paris Agreement*, WHITE HOUSE BLOG (Sept. 3, 2016), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement [https://perma.cc/ZAU4-RB3P].