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# Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad

Samuel P. Baumgartner  
*University of Akron*, [samuel8@uakron.edu](mailto:samuel8@uakron.edu)

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Judgments Abroad**

*Samuel P. Baumgartner*

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# Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad

Samuel P. Baumgartner\*

## I. Introduction

Questions of recognition and enforcement of foreign judgments have entered center stage. Recent empirical work suggests that there has been a marked increase in the frequency with which U.S. courts are asked to recognize and enforce foreign judgments.<sup>1</sup> The U.S. litigation surrounding a multibillion-dollar Ecuadoran judgment against Chevron indicates that the stakes in some of these cases can be high indeed.<sup>2</sup> Conversely, we learn that U.S. injunctions in patent cases, an area where enforcement abroad is likely to be particularly tricky, nevertheless include a substantial number of cases in which U.S. judgments will need to be recognized and enforced abroad to be effective.<sup>3</sup> Although we do not know for sure, the same may well be true of U.S. judgments in subject-matter areas other than patent law. This rising importance of questions of judgments recognition has not been lost on lawmakers. In November of 2011, the Subcommittee on Courts, Commercial and Administrative Law of the U.S. House of Representatives' Judiciary Committee held hearings on whether to adopt federal legislation on the question of recognizing and enforcing foreign judgments in the United States.<sup>4</sup> And at the

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\* Professor and Director of Faculty Research and Development, University of Akron School of Law.

<sup>1</sup> See Marcus S. Quintanilla & Christopher Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 35-36 (2011).

<sup>2</sup> See, e.g., *Patton Boggs LLP v. Chevron Corp*, 683 F.3d 397 (D.C. Cir. 2012) (upholding district court's decision, among others, that Ecuadoran plaintiffs' U.S. firm had failed to state a claim with regard to its allegation that defendant's counsel had tortuously interfered with its contractual relationship with the plaintiffs); *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), cert. denied, \_\_\_ S.Ct. \_\_\_ (2012) (reversing district court's injunction against Ecuadoran judgment holders preventing them from enforcing their judgment anywhere outside the Republic of Ecuador); *Chevron Corp v. Donziger*, \_\_\_ F.Supp.2d \_\_\_ (S.D.N.Y 2012) (granting partial summary judgment for Chevron on its complaint based on RICO and other fraud causes of action against Ecuadoran lead plaintiffs and their attorneys, dismissing affirmative defenses based on res judicata and collateral estoppel of Ecuadoran judgment).

<sup>3</sup> See Marketa Trimble, *Cross-Border Injunctions in U.S. Patent Cases and their Enforcement Abroad*, 13 MARQ. INTEL. PROP. L. REV. 331, 335-45 (2009).

<sup>4</sup> See United States House of Representatives, Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, Hearing on: Recognition and Enforcement of Foreign Judgments, Tue., 11/15/2011 (available at: [http://judiciary.house.gov/hearings/hear\\_11152011\\_2.html](http://judiciary.house.gov/hearings/hear_11152011_2.html)). A year earlier, Congress entered the area for the narrow purpose of "prohibit[ing] recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services" in U.S. courts

Hague Conference of Private International Law, the project – begun in the 1990s and later shelved – to enter into a world-wide convention on the recognition of foreign judgments, has just been put on the agenda for further study.<sup>5</sup>

One of the central questions in determining the relevant U.S. interests in support of (or in opposition to) both a federal judgments project and the negotiations at The Hague as well as specific proposed provisions within them is how U.S. judgments are currently treated abroad. The answer is simply: It depends. On the one hand, there 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. In addition, the prospect of recognizing and enforcing a U.S. judgment abroad may depend on the domicile or the nationality of the defendant, the subject matter of the suit, the type of damages awarded, and the way the proceedings leading to the U.S. judgment were conducted.<sup>6</sup>

In this Article, I focus on the major obstacles U.S. judgment holders have encountered abroad as a matter of foreign recognition doctrine and to analyze the reasons underlying those obstacles. Focusing on doctrinal obstacles is not, of course, a substitute for careful empirical study. However, it provides a good basis for understanding what types of problems U.S. judgment holders are likely to encounter and why. I propose that we distinguish those obstacles on the basis both of the purpose they are meant to serve and of the way in which they have developed. Doing so, I think, represents an important step toward understanding how the effectiveness of U.S. judgments abroad can potentially be improved, be it through negotiations at The Hague or in other ways. Thus, I submit that the doctrinal obstacles identified pursue three distinct purposes: the protection of the sovereignty of the recognition state; the protection of other public interests of the recognition state; and the protection of the party against whom the U.S. judgment is to be used from what the recognition state views as substandard legal norms or

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unless certain minimum requirements are met. *See* Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010).

<sup>5</sup> *See* Hague Conference of Private International Law, Council on General Affairs and Policy of the Conference (17-20 April 2012), Conclusions and Recommendations Adopted by the Council 3, available at [http://www.hcch.net/index\\_en.php?act=progress.listing&cat=5](http://www.hcch.net/index_en.php?act=progress.listing&cat=5) (“the Council decided to establish a Working Group whose initial task shall be to prepare proposals for consideration by the Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters”). The earlier effort to negotiate a world-wide treaty on jurisdiction and the recognition of judgments did, however, produce a treaty with a much narrower scope. *See* Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

<sup>6</sup> *See* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO WASH. INT’L L. REV. 173 (2008) [hereinafter Baumgartner, *U.S. Judgments*]. *See also* Linda J. Silberman, *Some Judgments on Judgments: A View from America*, 19 KING’S L.J. 235 (2008).

procedural treatment.<sup>7</sup> Given that most of the issues arising in this country's recognition practice regarding foreign money judgments appear to focus on the protection of the interests of the parties of the original litigation,<sup>8</sup> it may come as a surprise that sovereign and other public interests still underlie many of the doctrinal obstacles to the recognition of U.S. judgments abroad, including in areas where we have long lost sight of sovereignty concerns in the United States.

I further suggest that we separate the doctrinal obstacles encountered by U.S. judgments holders abroad into two categories on the basis of how they have developed. The first category is the more obvious one. It consists of doctrines that were set in place some time ago and that apply to all judgments from jurisdictions with which the relevant country does not have a recognition treaty, including the United States. The second category is more subtle. It consists of slight changes to existing recognition doctrine that some foreign jurisdictions have adopted specifically in reaction to litigation in the United States. As we shall see, however, it is difficult to cleanly separate these two categories because reactions to U.S. litigation have not only led to the second category of doctrinal obstacles, but also influenced, to some degree, the interpretation of the first. But the realization that this second category exists leads to the question why courts abroad would occasionally interpret existing recognition requirements so as to generate new pockets of doctrine that prevent the recognition and enforcement of U.S. judgments in certain circumstances. The reason, I argue, is that recognition law is influenced, as is all law applicable

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<sup>7</sup> For a more general discussion of some of the interests a jurisdiction may need to balance in crafting its recognition regime see, for example, I/2 REINHOLD GEIMER & ROLF A. SCHÜTZE, *INTERNATIONALE URTEILSANERKENNUNG* 1367-79 (1984); Arthur T. von Mehren & Donald Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601, 1603-05 (1968).

<sup>8</sup> See, e.g., *Evans Cabinet Corp. v. Kitchen Intern., Inc.*, 593 F.3d 135, 143-148 (1<sup>st</sup> Cir. 2010) (remanding to determine whether Quebec court had personal jurisdiction over defendant); *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 476-82 (7<sup>th</sup> Cir. 2000) (holding that English judgment was not "rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law" according to Illinois Uniform Money Judgments Recognition Act); *Presley v. N.V. Masureel Veredeling*, 370 S.W.3d 425, 431-34 (Tex. App. 2012) (upholding lower court's finding that Belgian judgment neither violated arbitration agreement nor arose from a system that failed to provide due process); *EOS Transport, Inc. v. Agri-Source Fuels LLC*, 37 So.3d 349, 352-55 (Fla. App. 2010) (affirming lower court's decision that Canadian court did not have personal jurisdiction over defendant); *Java Oil Ltd. v. Sullivan*, 86 Cal. Repr.3d 177, 184-87 (Cal. App. 2008) (holding that award by Gibraltar court of attorney's fees does not violate California public policy). *But see, e.g., Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1220-24 (9<sup>th</sup> Cir. 2006) (discussing, but ultimately finding lack of ripeness of, question of whether French judgment violated First Amendment and thus California public policy); *Telnikoff v. Matusevitch*, 702 A.2d 230, 239-51 (Md. 1997) (refusing enforcement of British libel judgment for violation of First Amendment freedom of speech); *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661, 662-65 (N.Y. Sup. 1992) (same).

to transnational litigation,<sup>9</sup> by four factors that tend to have implications beyond the interests of the parties in a particular case: power politics, domestic legal and procedural culture, the preferences of groups and individuals inside and outside the state apparatus, and relevant information asymmetries. In what follows, I address these matters in turn. My expertise is with the recognition of U.S. judgments in Europe. But I will add occasional references to other countries where I know about them.

## II. Concerns for the National Sovereignty of the Recognition State

Concerns for the national sovereignty of the recognition state are the primary reason why countries today have rules on the recognition and enforcement of foreign judgments in the first place. With the advent of the nation state in the 17<sup>th</sup> century, the view quickly spread that judicial judgments are manifestations of state power, the effects of which stop at water's edge.<sup>10</sup> In order for a judgment to have any effects outside the rendering state's territory, then, it needs first to be granted those effects by the other states on their respective territories. The Dutch comity doctrine of the 17<sup>th</sup> century, which strongly influenced recognition practice in the United States,<sup>11</sup> softened this approach with a general policy (although not an obligation) in favor of recognizing foreign judgments. But European nationalism in the 19<sup>th</sup> century strengthened the view that the decision whether or not to grant foreign judgments any effects was entirely in the hands of the recognition state.<sup>12</sup> Thus, many of the continental European jurisdictions adopted a rule of not recognizing foreign judgments while dealing with the practical difficulties arising from this rule by negotiating more liberal approaches in bilateral, and later multilateral, treaties with most of their trading partners.<sup>13</sup> In a number of nations, this is still the general approach today. Since the United States has not concluded any treaties in this area, however, U.S. judgments for the most

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<sup>9</sup> Cf. Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1371-78 (2004) (identifying factors distinguishing transnational from domestic litigation) [hereinafter Baumgartner, *Transnational Litigation*].

<sup>10</sup> See, e.g., DIETER MARTINY, III/1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 14-16 (1984).

<sup>11</sup> See *Hilton v. Guyot*, 159 U.S. 113, 163-66 (1895).

<sup>12</sup> See, e.g., MARTINY, *supra* note 10, at 16-21 & 26-27. As a result, Italy, for instance, made recognition more difficult to obtain in the late 19<sup>th</sup> century, whereas Norway dropped its recognition-friendly code provision soon thereafter in favor of a general rule of non-recognition, still in force today. See *id.* at 27 n.161.

<sup>13</sup> See, e.g., *id.* at 16-18; SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS: TRANSATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION 54-55 (2003).

part have no effects in these countries. This is true, among others, in Austria, China, Denmark, Finland, Norway, Sweden, and, to a lesser extent, in the Netherlands and Russia.<sup>14</sup>

As in the United States, however, courts and lawmakers in other jurisdictions have long since abandoned this approach in favor of giving effect to foreign judgments under certain conditions, even in the absence of a treaty obligation to do so. The conditions for recognition thus spelled out look very much alike, at least at a general level. They usually begin with the requirement that the judgment to be recognized be final in the rendering state. They then include a test for the personal jurisdiction of the rendering state; a test for proper service of process; some sort of due process test; and a public policy exception (including an opportunity to argue fraud). In addition, a number of countries require reciprocity and a few add some version of a choice of law test.<sup>15</sup> However, if we look more closely, we again see national sovereignty interests at play in the way these tests have been applied in some jurisdictions.

The primary purpose of the requirement of proper service, for instance, is everywhere the same: to ensure that the defendant had adequate notice and an opportunity to defend.<sup>16</sup> However, service of process has also been viewed in continental Europe, at least since the 17<sup>th</sup> century, as

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<sup>14</sup> In many of these countries, the rule against recognizing foreign judgments has softened over the years. For instance, almost all of them will recognize and enforce foreign judgments in certain matters of family law; Norway and Sweden will recognize judgments from courts that based their jurisdiction on a forum selection agreement between the parties; Finnish courts will recognize judgments in cases that could not have been brought in Finland for lack of personal jurisdiction or that pertain to property rights on immovable property located abroad; and the Dutch courts have interpreted their respective statute to proscribe the enforcement, but not the recognition, of foreign judgments, in addition to permitting enforcement in certain family law matters and in cases in which the defendant accepted the rendering court's jurisdiction. *See, e.g.*, Michel J. Moser, *People's Republic of China*, in DISPUTE RESOLUTION IN ASIA 85, 94 (Michael Pryles ed., 2006); Gerhard Walter & Samuel P. Baumgartner, *The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS [hereinafter RECOGNITION AND ENFORCEMENT] 1, 9-10 & 17-18 (Gerhard Walter & Samuel P. Baumgartner eds., 2000). In Russia, the rule against recognizing and enforcing foreign judgments outside a treaty obligation to the contrary has more recently been overcome in a number of courts if reciprocity is otherwise established. *See, e.g.*, Dmitry Kurochkin, *Russia*, in 2 ENFORCEMENT OF FOREIGN JUDGMENTS at 5-6 (2011 update).

<sup>15</sup> At least in Europe, a preference rule in case of inconsistent adjudications in the same matter by tribunals from different states is also usually cast in terms of a recognition requirement. On all of these conditions for recognition, see, for example, Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 13-26 & 31-37 (1988); von Mehren & Trautman, *supra* note 7, at 1610-1665; Walter & Baumgartner, *supra* note 14, at 21-35. Note that the French *Cour de cassation* abolished the French choice of law test in a 2007 decision involving the recognition of a U.S. judgment. *See infra* note 43 and accompanying text.

<sup>16</sup> *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §482(2)(b) (1987); Juenger, *supra* note 15, at 20; Walter & Baumgartner, *supra* note 14, at 24-25.

an exercise of governmental power.<sup>17</sup> It contains, after all, an order to the defendant to participate in proceedings against him in a court of law, lest there will be serious consequences. In the United States, we may have lost sight of this aspect of service after decades of revisions to the Federal Rules of Civil Procedure and their state counterparts permitting and then prioritizing service by private parties and through mail.<sup>18</sup> But in other countries, this has remained an important aspect of service, and the rule against exercising governmental power on the territory of another state without that state's consent is indirectly enforced at the recognition stage. As a result, service of process by foreign officials and private individuals, whether in person or through the use of mail or by electronic means, often results in the non-recognition of the resulting judgment where this is not an accepted form of service in the recognition state, be it by virtue of the Hague Service Convention and applicable reservations to it,<sup>19</sup> or according to the domestic law of the recognition state where the Hague Service Convention does not apply.<sup>20</sup>

Similar problems can arise with regard to activities related to discovery. U.S.-style discovery may be unknown abroad, but the gathering of evidence in civil litigation is not.<sup>21</sup> In civil law countries, however, the decision what evidence must be gathered and how is made by the court, upon request by the attorneys. The court or, in some countries, a court-appointed

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<sup>17</sup> See, e.g., THOMAS BISCHOFF, DIE ZUSTELLUNG IM INTERNATIONALEN RECHTSVERKEHR IN ZIVIL- ODER HANDELSACHEN 174-75 (1997); JÖRG PAUL MÜLLER & LUZIUS WILDHABER, PRAXIS DES VÖLKERRECHTS 282 (2d ed. 1982).

<sup>18</sup> See, e.g., FED. R. CIV. PROC. 4(c) & (d); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 817 (4<sup>th</sup> ed. 2007); Honorable Joseph F. Weis, Jr., *Service By Mail – Is the Stamp of Approval From the Hague Convention Always Enough?*, 57 LAW & CONTEMP. PROBS. 165, 167 (Summer 1994) (suggesting that “it is clear that an important function of service of process is to give notice” and that [t]hat task can be performed efficiently and inexpensively through the use of postal channels”).

<sup>19</sup> See Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

<sup>20</sup> See, e.g., 120 BGHZ 305 (1992) (Germany) (upholding decision below that service by international mail on the German defendant in violation of the Hague Service Convention rendered the resulting South Carolina judgment non-recognizable, even though the documents adequately informed the defendant of the proceedings in South Carolina in sufficient time to defend); BGE 135 III 623 (2009) (Switz.) (reversing lower court's decision to recognize an Italian judgment as against Art. 27(2) of the Lugano Convention and the Swiss reservation to Article 10(a) of the Hague Service Convention because the Italian court had served the Swiss defendant by sending summons and complaint through international mail, even though the defendant had actually received the served documents in a timely manner). *But see* 122 III 439 (1996) (Switz.) (holding that lower court's granting of enforcement of U.S. judgment was not arbitrary, despite service in violation of applicable international treaty, since defendant had entered general appearance and had been properly represented by counsel).

<sup>21</sup> See, e.g., UGO MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW 756-809 (7<sup>th</sup> ed. 2009).

official also questions the witnesses.<sup>22</sup> This active role of the court in the process of gathering evidence long ago led to the view that the taking of evidence represents the exercise of sovereign power that cannot be extended to the territory of a foreign sovereign without that sovereign's consent.<sup>23</sup> Such consent has traditionally been given in response to a letter rogatory or through the means identified in an applicable international treaty, such as the Hague Evidence Convention.<sup>24</sup> The fact that the conduct of discovery has largely been delegated to the attorneys in the U.S. discovery process has not been viewed abroad as rendering discovery any less of a governmental act. After all, unjustified non-compliance with discovery requests will result in an order to compel and in sanctions from the court if the order is not complied with.<sup>25</sup> Judgments emanating from proceedings involving discovery from or on foreign territory may thus be refused to be recognized as well.<sup>26</sup> The difficulty, of course, is in knowing which precise acts in the process of discovering evidence located abroad are considered to represent the exercise of a sovereign act on foreign territory and thus may have adverse consequences for the recognition of a resulting judgment. Such acts certainly include the actual conducting of depositions and inspections on foreign territory. But they may also include requests and orders directed at nonparties from abroad to appear for depositions in the United States and to bring along documents for inspection. In some instances, even the direction of such requests and orders at foreign parties in U.S. litigation may be seen as the exercise of a governmental act on the territory of the state of the parties' domicile.<sup>27</sup>

In sum, concerns for the protection of national sovereignty are alive and well as a pillar of the law on the recognition on foreign judgments in a number of foreign countries, and they lurk in areas where U.S. lawyers may not have anticipated them. The national views on sovereignty here identified have a long history and are often strongly held. Thus, the frequently heard suspicion in this country that this is just an attempt to protect one's nationals from litigation in the United States is both unfounded to the extent that the sovereignty doctrine has

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<sup>22</sup> *Id.* at 786-95.

<sup>23</sup> *See, e.g.*, BERNARD AUDIT, *DROIT INTERNATIONAL PRIVÉ* 351 (4th ed. 2006); GERHARD WALTER & TANJA DOMEJ, *INTERNATIONALES ZIVILPROZESSRECHT DER SCHWEIZ* 358-59 (5<sup>th</sup> ed. 2012); Hans-Jürgen Ahrens, § 363, *in* BERNHARD WIEZCOREK, *ZIVILPROZESSORDNUNG UND NEBENGESETZE* 85, 91 (Rolf A. Schütze ed., 3d ed. 2010). On the history of this view see, for example, BAUMGARTNER, *supra* note 13, at 50-52 & 60-61.

<sup>24</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention].

<sup>25</sup> *See, e.g.*, FED. R. CIV. PRO. 37(a) & (b).

<sup>26</sup> *See, e.g.*, 118 BGHZ 312, 323-24 (1992) (Germany) (dictum); *See also* ADRIAN DÖRIG, *ANERKENNUNG UND VOLLSTRECKUNG US-AMERIKANISCHER ENTSCHEIDUNGEN IN DER SCHWEIZ* 428 (1998) (arguing that discovery in violation of Swiss sovereignty should lead to non-recognition of the resulting judgment in Switzerland).

<sup>27</sup> *See infra* notes 62-67 and accompanying text.

long been used abroad to delimit appropriate spheres for the exercise of state power and counterproductive if taken as a basis unilaterally to force the relevant countries to abandon their views.<sup>28</sup> The reaction to such unilateral attempts has often been the strengthening of those views on sovereignty and their adamant enforcement at recognition time.<sup>29</sup> At the same time, however, there is indeed evidence that the sovereignty doctrine has more recently been extended in its coverage with regard to discovery of materials in the hands of domestic parties in U.S. cases so as to provide more extensive protection of domestic nationals from U.S. litigation as well as domestic sovereignty from U.S. power, a matter to which I shall return shortly.<sup>30</sup>

### III. Public Interest

The discussion of recognition requirements both in the cases and in the academic literature of most nations today focuses primarily on the purpose of protecting the losing party in the foreign litigation from the application of laws and procedures that fail to meet a minimum threshold of fairness.<sup>31</sup> However, there is also a larger public interest that may play a significant role in fashioning those recognition requirements and in the way they are applied in practice. The sovereignty concerns just discussed can be seen as a distinct and important subgroup of this public interest, which is multifaceted and includes a number of different concerns. The most obvious manifestation of such a public interest resides in recognition requirements that were set up at least partly to protect such a public interest. For instance, the only intended purpose of the reciprocity requirement, where it is still in place, is to force foreign jurisdictions with less liberal recognition regimes to change their ways.<sup>32</sup> Any benefits that accrue to the party opposing

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<sup>28</sup> *Cf.*, e.g., BORN & RUTLEDGE, *supra* note 18, at 917 (“Why is it that foreign states object to unilateral extraterritorial U.S. discovery of evidence located on their territory? Is it simply because they want to protect local companies and nationals from liability to foreign plaintiffs?”); ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 229 (1996) (“I have long wondered how the concept of sovereignty crept into the subjects here discussed ... Is it really pertinent to ... the procurement of evidence for purposes of discovery or trial?”); Brief for the United States and the Securities and Exchange Commission as Amici Curiae, at 22, 23, *Société Nationale Industrielle Aérospatiale*, 482 U.S. 522 (No. 85-1695) (suggesting that assertions of judicial sovereignty “often have an abstract quality and do little, in and of themselves, to elucidate the substantive foreign interests at stake” and thus that “assertions of ‘judicial sovereignty’ may simply illustrate a foreign nation’s desire to protect its nationals from liability”).

<sup>29</sup> *See*, e.g., Baumgartner, *Transnational Litigation*, *supra* note 9, at 1334 & 1338-40.

<sup>30</sup> *See infra* text accompanying notes 67-68.

<sup>31</sup> *See*, e.g., *supra*, note 8 and accompanying text; GEIMER & SCHÜTZE, *supra* note 7, at 1367-79.

<sup>32</sup> *See*, e.g., AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE §7 cmt. b (Proposed Final Draft 2005); MARTINY, *supra* note 10, at 537; Whether, in fact, the reciprocity requirement has been able to serve that purpose in the two centuries or more

recognition are purely incidental to this public interest in pressuring foreign jurisdictions.<sup>33</sup> Similarly, the public policy exception is at least partly designed to protect the recognition state's public interest.<sup>34</sup> Consider, for example, older cases in which foreign judgments were held to violate public policy because they enforced a contract that resulted in a violation of the recognition state's weapons control legislation or its currency exchange regulations.<sup>35</sup>

Moreover, the public interest pursued may appear in the form of a policy to provide the party from the recognition state with special protection from litigation abroad. In some countries, this policy is at least partly traceable to 19<sup>th</sup>-century nationalism, which reinvigorated the concept that individuals should have both the privilege and the obligation to be subject to the laws and procedures of the country of which they are nationals, no matter where they may be.<sup>36</sup> In other nations, the idea is much older.<sup>37</sup> The purpose, however, remains the same: As opposed to recognition requirements that are in place to protect the litigants from substandard foreign proceedings or substantive laws, the idea here is to protect the domestic party from litigation abroad or from the application of foreign law irrespective of fairness in a given case. This is particularly evident in the area of personal jurisdiction. In France, for example, the Code Civil of 1804 contains both a provision that was soon interpreted by the predecessor of the *Cour de cassation* to permit French nationals to sue foreigners in France in most cases and a provision that was interpreted to permit any French defendant in foreign litigation to oppose the recognition of the ensuing foreign judgment in France unless the defendant had either consented

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that it has been on the books in some countries is an empirical question that still needs to be answered. Cf., e.g., MARTINY, *supra* note 10, at 575 (noting unresolved debate in Germany on this question).

<sup>33</sup> The reciprocity requirement consequently may end up protecting the foreign, rather than the domestic party of the recognition state in a particular case. See, e.g., Rolf A. Schütze, § 328, in BERNHARD WIEZCUREK, ZIVILPROZESSORDNUNG UND NEBENGESETZE 450, 478 (Rolf A. Schütze, ed., 2d ed. 2007).

<sup>34</sup> See, e.g., MARTINY, *supra* note 10, at 456-58.

<sup>35</sup> See, e.g., Kammergericht München, decision of Dec. 6, 1955, reproduced in 7 WIRTSCHAFT UND WETTBEWERB 261 (1957) (Germany); Reichsgericht, decision of Jan. 25, 1921, reproduced in 14 WARN. RESPR. 34 (1921) (Germany). See also WALTER & DOMEJ, *supra* note 23, at 433 (referring to a foreign judgment enforcing a contract for the delivery of war weaponry in violation of Switzerland's weapons control legislation as an example of a clear violation of Swiss public policy).

<sup>36</sup> See, e.g., FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 41-42 (special ed., 2005); ERWIN RIEZLER, INTERNATIONALES ZIVILPROZESSRECHT UND FREMDENRECHT 78 (1949); Ralf Michaels, *The New European Choice of Law Revolution*, 82 TUL. L. REV. 1607, 1614-15 (2008).

<sup>37</sup> For example, the protection of Swiss domiciliaries from foreign judgments against them, see *infra* note 42 and accompanying text, goes back to the beginning of the Swiss Confederacy and to one of its main concerns – the guarantee for its citizens of a judge from among their own as opposed to the Habsburg vassals and the bishops of the Catholic church to which they had been subjected in the past. See, e.g., EMIL SCHURTER & HANS FRITZSCHE, DAS ZIVILPROZESSRECHT DES BUNDES 5-24 (1924).

to the foreign court's jurisdiction in advance or entered a general appearance.<sup>38</sup> The *Cour de cassation* finally abandoned the latter interpretation in a case from 2006,<sup>39</sup> thus permitting the enforcement of foreign, including U.S., judgments against French nationals on the basis of the same jurisdictional grounds as foreign judgments against foreigners – that is, when there was a significant connection between the litigation and the rendering state.<sup>40</sup> Similar limitations, however, are still in place in England and in Switzerland. In England, foreign *in personam* judgments can generally be recognized only when the defendant was present within the rendering state at the time of service or if it agreed to the court's jurisdiction.<sup>41</sup> And in Switzerland, foreign *in personam* judgments against Swiss domiciliaries are recognized only if the defendant consented to jurisdiction, although there are a number of exceptions.<sup>42</sup>

A similar purpose of protecting the recognition state's nationals or domiciliaries can be served by a choice of law test, where it still exists. This test usually proscribes recognition if the rendering court failed to apply certain substantive laws of the recognition state that would have been applied by a court in the recognition state and that, in effect, often would have granted greater protection to the defendant from the recognition state.<sup>43</sup> While the French *Cour de cassation* has recently followed the suggestion of many French commentators to abolish such a choice of law test,<sup>44</sup> it remains a serious obstacle to the recognition of foreign judgments against Portuguese nationals, including U.S. judgments, in Portugal.<sup>45</sup>

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<sup>38</sup> See Code Civil Arts. 14 & 15; Kevin M. Clermont & John R.B. Palmer, *French Article 14 Jurisdiction, Viewed from the United States*, in DE TOUS HORIZONS, MÉLANGES XAVIER BLANC-JOUVAN 473, 480-83 (2005); Catherine Kessedjian, *France*, in RECOGNITION AND ENFORCEMENT, *supra* note 14, at 185, 193-94.

<sup>39</sup> See *Prieur v. de Montenach*, Cass. civ. 1ère, May 23, 2006, Bull., I, N°254, N°04-12777.

<sup>40</sup> See, e.g., Gilles Cuniberti, *The Liberalization of the French Law of Foreign Judgments*, 56 INT'L & COMP. L.Q. 931, 933 & 935-36 (2007).

<sup>41</sup> For corporations, this requires the conducting of business at a fixed place, or through an agent who has a fixed place, within the rendering forum. The defendant can agree to the court's jurisdiction either by means of a forum selection clause or by entering a general appearance. See, e.g., RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION 697-702 (2010).

<sup>42</sup> See Private International Law Act, art. 149 (Switz.). The exceptions include judgments based on counterclaims by Swiss domiciliaries; claims arising from the operation of a Swiss business's branch office in the rendering state; claims by consumers domiciled in the rendering state who had bought the Swiss domiciliary's product there or on the basis of advertising in the rendering state; as well as a number of claims in the areas of family law and successions. See *id.*, arts. 26(d), 50, 58, 65, 70, 73, 84, 96, 120(1) & 149(2).

<sup>43</sup> See, e.g., Walter & Baumgartner, *supra* note 14, at 32.

<sup>44</sup> See *Cornelissen v. Avianca Inc.*, Cass. civ. 2de, Feb. 20, 2007, Bull., I, N°68, N°05-14.082; Cuniberti, *supra* note 40, at 937-39.

<sup>45</sup> Technically, judgments against Portuguese nationals that did not apply more favorable Portuguese law even though Portuguese choice of law rules would have so required, are subjected to a review on the merits. See,

#### IV. Subtle Changes to Recognition Doctrine in Response to U.S. Litigation

While these more blatant forms of protecting domestic litigants have tended to disappear ever so slowly, however, other, more subtle, attempts to protect one's own nationals, national sovereignty, and domestic legal system have emerged specifically in response to litigation in the United States. Litigation in the United States has long been viewed as a dangerously costly and widely unpredictable proposition abroad.<sup>46</sup> Some damage awards can be many multiples of what would be available elsewhere;<sup>47</sup> discovery can be considerably more extensive, intrusive, and expensive;<sup>48</sup> the power of judges, including their power to sanction, is breathtaking from a civil law perspective;<sup>49</sup> the availability of class actions and comparatively modest pleading requirements appear to encourage lawsuits that need not be well supported by existing law; the rarity of trials can lead to (settlement) outcomes mostly based on a shadow of a shadow – or, more succinctly, on the perceived views of the judge and the negotiating savvy of the relevant attorneys;<sup>50</sup> and the American rule of costs ensures<sup>50</sup> that the resulting costs are incurred no matter

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*e.g.*, Carlos Manuel Ferreira Da Silva, *Portugal*, in RECOGNITION AND ENFORCEMENT, *supra* note 14, at 465, 480-81.

<sup>46</sup> As Lord Denning famously quipped, “[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can get his case into their courts, he stands to win a fortune.” *Smith Kline & French Labs Ltd. v. Bloch*, [1983] 2 All E.R. 72, 74 (Denning, J.). *See also* Baumgartner, *Transnational Litigation*, *supra* note 9, at 1320-21 (reporting that “the published reports of three [U.S.] cases [in Germany] between 1978 and 1981 brought home to a larger audience of German lawyers the perceived realities of some aspects of U.S. law that in-house counsel of German companies had long lamented: large, from German standards virtually inconceivable, damage awards handed down by unpredictable juries; expensive, party-driven discovery with comparatively immense scope and scant protection of trade and business secrets; and a willingness of at least some U.S. courts to enforce their procedural rules transnationally in the face of sovereignty objections by the foreign governments involved”).

<sup>47</sup> *See, e.g.*, *Castanho v. Brown & Root (U.K.) Ltd.*, [1980] 1 W.L.R. 833, 859 (Shaw, J.) (estimating that “in the United States the scale of damages for injuries of the magnitude sustained by the plaintiff is something in the region of ten times what is regarded as appropriate by ... the courts of [England]”).

<sup>48</sup> *See, e.g.*, BORN & RUTLEDGE, *supra* note 18, at 910-12; ARTHUR T. VON MEHREN & PETER MURRAY, LAW IN THE UNITED STATES 167 (2d ed. 2007); David Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 748-69 (1986).

<sup>49</sup> *See, e.g.*, BAUMGARTNER, *supra* note 13, at 85-86; HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT 321 (3d ed. 2002) (speaking of „draconian sanctions“).

<sup>50</sup> On both of these points combined, *see, e.g.*, Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASH. U. L.Q. 835, 843-46 (2002) [hereinafter Baumgartner *Human Rights and Civil Litigation*]; Paul Oberhammer, *Deutsche Grundrechte und die Zustellung US-amerikanischer Klagen im Rechtshilfeweg*, 24 PRAXIS DES INTERNATIONALES PRIVAT- UND VERFAHRENSRECHTS 40, 42-43 (2004).

what the merits of the claim. The U.S. Supreme Court has pulled the rug from under some of the doctrines giving rise to these views in recent cases by imposing a plausibility requirement on pleadings,<sup>51</sup> rendering class certification considerably more difficult,<sup>52</sup> and outlawing so-called foreign-cubed securities class actions,<sup>53</sup> among other things.<sup>54</sup> But in this context, perception is more important than reality. Hence, it should not be surprising that foreign defendants caught in U.S. litigation would attempt to get their home courts to consider any resulting judgment to be non-recognizable. What is perhaps more surprising is that courts in countries with otherwise relatively liberal recognition regimes have occasionally complied, and they have done so not only with case-specific decisions but also with subtle changes in recognition doctrine that tend to negatively affect certain types of U.S. judgments. One might be tempted to think that this is just another manifestation of the type of parochialism that led to the outright protection of nationals or domiciliaries discussed above.<sup>55</sup> But things are more complicated, and I suggest that the reasons for these developments need to be understood by those in the United States who consider the adoption of federal legislation on the recognition of foreign judgments as well as those who consider further treaty negotiations at The Hague.

### *1. State Power*

If we look more closely, then, it appears that there are four main reasons that explain why foreign courts have sometimes adopted broader interpretations of their recognition requirements so as to protect domestic litigants, national sovereignty, and the domestic legal system from the effects of litigation in the United States: power politics – or the perception thereof; significant differences in legal and procedural culture; information asymmetries regarding those differences;

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<sup>51</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 677-84 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-63 (2007).

<sup>52</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51 (2011) (holding that the requirement in Rule 23(a)(2) that there be “questions of law or fact common to the class” for class certification means that the plaintiffs’ “claim must depend on a common contention [which, in turn] must be of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke” and that “[a] party seeking class certification ... must be prepared to prove that [the requirements of Rule 23 are in fact met]”).

<sup>53</sup> See *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010) (the term “foreign cubed” refers to class actions brought by foreigners against a foreign corporation over shares of stock bought on a foreign exchange).

<sup>54</sup> See, e.g., Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT’L L. 663, 663-64 (2012) (arguing that the premise that “German and other foreign companies need protection against litigation in United States courts [] may be on the cutting edge of obsolescence”) [hereinafter Burbank, *Paper Tiger*].

<sup>55</sup> See *supra* text accompanying notes 36-45.

and the expressed preferences of relevant individuals and groups. The United States is a powerful country, economically as well as militarily. Thus, U.S. courts have not had occasion to worry too much about potential international repercussions of their decisions in transnational litigation; and where they have worried, the real concerns have usually been federalism and separation of powers.<sup>56</sup> Similarly, in reforming the provisions on transnational service of process and discovery in 1963 and 1994, the drafters of the Federal Rules of Civil Procedure were more interested in providing U.S. litigants with the flexibility of means they may need to proceed in transnational cases than in taking seriously foreign sovereignty concerns.<sup>57</sup> There are, of course, other reasons to explain this behavior, and U.S. power may not even be on the minds of most U.S. judges who decide cases involving parties, witnesses, or evidence from abroad.<sup>58</sup> The important thing is, however, that decisions of U.S. courts in this area have sometimes been viewed abroad as an outgrowth of the United States' political power.<sup>59</sup> If one combines the political power of the United States with the power of U.S. judges and the power of the – from a foreign perspective enormous – costs of litigation in this country, it should be possible to understand why foreigners have viewed U.S. decisions in transnational litigation that celebrate U.S. law and U.S. justice over foreign sovereignty concerns as yet another instance in which the United States is flexing its muscle.<sup>60</sup> This (perceived) assertion of power does not come without costs, however. I have elsewhere explored how decisions by lower U.S. courts in the late 1970s

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<sup>56</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725-28 (2004); *American Insurance Association v. Garamendi*, 539 U.S. 396, 420-29 (2003); *Zschernig v. Miller*, 389 U.S. 429, 432-41 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416-37 (1964).

<sup>57</sup> See, e.g., Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 112-24 (Summer 1994).

<sup>58</sup> I have elsewhere tried to develop the reasons for American unilateralism in transnational litigation more generally. See BAUMGARTNER, *supra* note 13, at 21-45. Cf. also David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 579 (2002) (claiming that “Americans ... are accustomed to thinking that our legal system ... provides a model that other nations would be well advised to emulate. ... In contrast, many Americans are apt to be far less comfortable with the notion that when it comes to justice, we may have something to learn from other nations”).

<sup>59</sup> See, e.g., SCHACK, *supra* note 49, at 319 (suggesting that “politically and economically, [the judicial conflict between U.S. courts and Europe in transnational litigation] is about blocking U.S. assertions of power”); Burkhard Hess, *Aktuelle Brennpunkte des transatlantischen Justizkonflikts*, 50 DIE AKTIENGESELLSCHAFT 897, 905 (2005) (observing that a struggle for power between the United States and European Union states explains the conflict in trans-Atlantic judicial relations); Rolf Stürner, *Der Justizkonflikt zwischen U.S.A. und Europa*, in DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA 1, 35-43 (Walther J. Habscheid ed., 1986) (attributing U.S. approaches to transnational litigation to U.S. hegemony and exploring the reasons for that hegemony).

<sup>60</sup> Not surprisingly, foreign resentment has been particularly strong where litigation in U.S. courts has been combined with actual pressure from the federal and state governments against the foreign defendants involved. See, e.g., Baumgartner, *Human Rights and Civil Litigation*, *supra* note 50, at 846-49.

and early 1980s that paid little attention to German sovereignty concerns changed the attitude of courts, commentators, and government officials in Germany from one unreceptive to German industry requests for protection from the effects of U.S. litigation to one favoring protection not only of German industry, but also of German sovereignty, and the German legal system.<sup>61</sup> The recognition of U.S. judgments is an area where such a perceived need for protection can be put to work, and there is evidence that this is indeed what has happened.<sup>62</sup>

Thus, for example, the German *Bundesgerichtshof* has indicated in dictum, and commentators in other countries have suggested, that U.S. discovery in violation of the recognition state's notions of sovereignty may lead to the non-recognition of the emanating U.S. judgment.<sup>63</sup> This may not only include cases in which discovery clearly occurred on the territory of the recognition state, such as by conducting a deposition,<sup>64</sup> an inspection of property, or a physical or mental examination in that state,<sup>65</sup> but also cases in which a non-party from the recognition state was requested to attend a deposition in the United States or to present documents from the recognition state for inspection in the United States without processing that request through diplomatic channels or, where applicable, the Hague Evidence Convention.<sup>66</sup> Indeed, in an effort to protect their own domiciliaries and their national sovereignty from the power of U.S. courts, the governments of Germany, France, and Switzerland in submissions to the U.S. Supreme Court in the *Aerospatiale* case, expanded their traditional understanding of sovereignty in this context to argue that even requests directed at foreign parties to attend a deposition in the United States or to produce documents for inspection here would violate their sovereignty if not processed through the Hague Evidence Convention channels.<sup>67</sup> Since this last

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<sup>61</sup> See Baumgartner, *Transnational Litigation*, *supra* note 9, at 1318-38.

<sup>62</sup> See *id.* at 1338-44.

<sup>63</sup> See *supra* note 26 and accompanying text.

<sup>64</sup> It is less clear whether this includes depositions by telephone, video link, or other electronic means that permit questioning of deponents abroad by attorneys located in the United States. One view is that the deposition still takes place on the territory within which the witness is located and thus implicates local sovereignty the same way as a deposition actually taking place there. See, e.g., Alexander R. Markus, *Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen*, \_\_ SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND FINANZMARKTRECHT 65, 77-79 (2002).

<sup>65</sup> In Switzerland, the Supreme Court has held that this includes a lawyer interviewing persons on Swiss territory for purposes of drawing up an affidavit upon information and belief for use in a foreign (in this case an Australian) proceeding. Acting in this way not only represents a violation of national sovereignty but also a federal felony under Article 271(1) of the Swiss Criminal Code. See BGE 114 IV 128 (1988).

<sup>66</sup> See, e.g., DIETER LEIPOLD, LEX FORI, SOUVERÄNITÄT, DISCOVERY: GRUNDFRAGEN DES INTERNATIONALEN ZIVILPROZESSRECHTS 63-64 (1988).

<sup>67</sup> Brief for the Federal Republic of Germany as Amicus Curiae at 2-3, 13-14, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522 (1987) (No. 85-1695); Brief of the Government of

argument really pushes the boundaries of the traditional understanding of judicial sovereignty in these countries, it is less than obvious that such a discovery request to a party, too, may lead to non-recognition of an ensuing U.S. judgment.<sup>68</sup> But the concern about the power, including the judicial power, of the United States should be clear.

However, expanding their traditional view of when the extraterritorial taking of evidence violates their national sovereignty is not the only way in which some countries have responded to the refusal of U.S. courts to take their traditional sovereignty concerns seriously in transnational litigation. Upon closer examination, one may also wonder why so many countries have continued to abide by their traditional views on sovereignty with regard to service of process and the gathering of evidence abroad in the first place, especially since commentators in some of these countries have noted that the letter rogatory process is slow and not always certain to yield the needed evidence for their own courts,<sup>69</sup> and that the notion of service of process as a governmental act that needs the consent of the requested state to be effective there ill serves defendants from the requested state if foreign courts then resort to constructive service or service on an imaginary agent of the defendant in the forum state to be able to proceed with the litigation.<sup>70</sup> To the lawmakers and judges in these countries, apparently, retaining their traditional views on sovereignty has been important to counteract U.S. power in transnational litigation.

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Switzerland as Amicus Curiae in Support of Petitioners at 2-3, 8, *Aérospatiale* (No. 85-1695); Brief of Amicus Curiae the Republic of France in Support of Petitioners at 3, 14-16, *Aérospatiale* (No. 85-1695).

<sup>68</sup> See, e.g., SCHACK, *supra* note 49, at 310 (noting that, contrary to the views the German government has expressed in U.S. litigation, the forum court, including a German court in a proceeding pending in Germany, can order a foreign party to appear in the forum state to testify and arguing that an order to a foreign party to produce documents for inspection in the forum state is unproblematic under international law). *But see* PETER SCHLOSSER, *DER JUSTIZKONFLIKT ZWISCHEN DEN USA UND EUROPA* 25 (1985); Stürner, *supra* note 59, at 26 (both arguing that the sheer intensity of discovery requested from a party could trigger German sovereignty concerns); LEIPOLD, *supra* note 67, at 64-66 (arguing that discovery orders directed at German parties implicate German sovereignty if backed by impending criminal sanctions, including criminal contempt sanctions).

<sup>69</sup> See, e.g., SCHACK, *supra* note 49, at 313-14; WALTER & DOMEJ, *supra* note 23, at 359-60. Within the European Union, these concerns have led to some improvements on the traditional letter rogatory process. First, rather than requesting the taking of evidence by a court in another EU member state through a central authority, a court in an EU member state can directly request its counterpart to take the needed evidence. If it is not against fundamental principles of the requested state, the forum court can also request to travel to the requested state to take the evidence itself as long as it does not need to use coercive measures to do so. See Council Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, 2001 O.J. (L 174) 1, arts. 2 & 17.

<sup>70</sup> See, e.g., SCHACK, *supra* note 49, at 257-59; WALTER & DOMEJ, *supra* note 23, at 361-62. Not surprisingly, then, the European Union's new Service Regulation permits service of process within the European Union not only by a streamlined letter of request procedure, but also by registered mail with acknowledgment of receipt and by direct service from "a person interested in a judicial proceeding" to the "judicial officers, officials, or other competent persons of the Member State addressed, where such direct service is permitted under the law of that

Note that I am not arguing here that the Supreme Court got the treaty interpretation wrong in the *Aerospatiale* and *Schlunk* decisions,<sup>71</sup> nor that these decisions (and many more by lower U.S. courts) did not involve – sometimes difficult – questions relating to the authority of treaties and customary international law vis-à-vis domestic statutes, court-made rules, and common law – state and federal – under the U.S. Constitution, the Rules Enabling Act,<sup>72</sup> and the Rules of Decision Act.<sup>73</sup> Instead, my point is that when U.S. courts and lawmakers refuse to incur sovereignty costs to the United States by seriously considering the sovereignty concerns of other nations in cross-border cases, they may assume, perhaps because of U.S. power, that this can be done without further consequences. If so, however, they may forget that power is a two-edged sword and that by doing so, they have just incurred costs to U.S. litigants down the line. Thus, for example, Justice O’Connor in her opinion in *Schlunk* correctly pointed out to U.S. plaintiffs that service of process outside of the channels of the Hague Service Convention may render the judgment in that particular case unenforceable abroad.<sup>74</sup> What Justice Stevens and the majority in *Aerospatiale* may not have realized, however, is that the Court’s opinion, by not engaging the foreign claim that certain discovery requests outside the channels of the Hague

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Member State.” See Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, and repealing Council Regulation (EC) No. 1348/2000, 2007 O.J. (L 324) 97, arts. 4, 14 & 15. The version of this Regulation that was passed seven years earlier had still permitted Member states to declare that they would not allow service by mail and direct service under Articles 14 & 15, and a number of Member states had made such declarations. See Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, O.J. (L 160) 37, arts. 14 & 15; Consolidated Version, Information communicated by Member States under Article 23 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, available at [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/pdf/vers\\_consolide\\_en\\_1348.pdf](http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/vers_consolide_en_1348.pdf) (last visited: Nov. 1, 2012).

<sup>71</sup> Volkswagenwerk AG v. Schlunk, 486 U.S. 694 (1988); Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522 (1987). Cf. PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 16-21 (3d ed. 2006) (concluding that the *Schlunk* decision’s interpretation of Article 1 of the Hague Service Convention that the question of when a judicial or extrajudicial document needs to be served abroad is to be determined by the law of the requesting state is supported by the negotiating history of the Convention, the practice of courts in several member states, and by the views of the delegates of most member states).

<sup>72</sup> 28 U.S.C. §§ 2072-74.

<sup>73</sup> 28 U.S.C. § 1652. See, e.g., Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1478-97 (1991) (reviewing GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (1989)) [hereinafter Burbank, *World*]

<sup>74</sup> 486 U.S. 694, at 706.

Evidence Convention violate their sovereignty and thus customary international law, might make the recognition of *all* U.S. judgments more difficult in some countries in the future.<sup>75</sup>

## 2. *Fundamental Differences in Procedural Systems and Information Asymmetries*

This discussion of foreign sovereignty concerns brings me to the next two factors I suggest have influenced foreign doctrine on the recognition of U.S. judgments – fundamental differences between the procedural systems of the United States and other countries and lack of sufficient knowledge about those differences among many of the relevant players in transnational litigation. The differences between U.S. law and the U.S. litigation system on the one hand and the laws of other countries on the other, to the extent they are known to the recognition court, may seem to be overwhelming.<sup>76</sup> For instance, as Professor Lowenfeld noted some time ago with regard to discovery, “[t]he rest of the world ... thinks U.S. lawyers ... start lawsuits ... on minimal bases, and rely on their adversaries ... to build their cases for them,” while “Americans ... have sometimes tended to think of the rest of the world as engaged in a massive conspiracy of concealment masquerading as privacy ... and secrecy laws intended to draw corporate and sovereign veils over all kinds of evil, from drug dealing to tax evasion to commercial fraud to manufacture of defective products.”<sup>77</sup> Foreign recognition courts may thus be tempted to conclude that some of these differences amount to a public policy violation, although many foreign authorities correctly point out that these differences alone cannot by themselves be reason to refuse to accord a U.S. judgment recognition.<sup>78</sup>

More important, therefore, is the fact that lack of knowledge about many of these differences and underlying assumptions can lead to frustrated expectations. For instance, the view that orders to foreign non-parties to appear in the forum state to testify or to provide

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<sup>75</sup> Similarly, the academics chiefly responsible for the 1963 amendments to the Federal Rules of Civil Procedure and parallel 1964 federal legislation recognized that, by permitting plaintiffs to serve process in violation of the law of the receiving state, the recognition and enforcement of an ensuing U.S. judgment may be put in danger. *See, e.g.*, Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-63*, 77 HARV. L. REV. 601, 635-36 (1964). But rather than realizing that this might cause trouble for all U.S. litigants down the road, these academics assumed that, to the contrary, the foreign states in question would ultimately see the light and follow the lead of the United States. *See, e.g.*, Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1018-19 (1965).

<sup>76</sup> *See supra* text accompanying notes 46-54.

<sup>77</sup> Andreas F. Lowenfeld, *Some Reflections on Transnational Discovery*, 8 J. COMP. BUS. & CAP. MARKET L. 419, 419-20 (1986).

<sup>78</sup> *See, e.g.*, 118 BGHZ 312 at 323 (holding that the presence of U.S. discovery alone does not render a U.S. judgment unenforceable in Germany); SCHACK, *supra* note 49, at 371; JOACHIM ZEKOLL, *US-AMERIKANISCHES PRODUKTHAFTPFLICHTRECHT VOR DEUTSCHEN GERICHTEN* 137-41 (1987).

documents for inspection there implicate the foreign country's sovereignty and thus need to proceed through diplomatic channels or the channels set up by an applicable treaty was relatively unproblematic as long as continental European countries applied it primarily among themselves, that is, among countries with similar views on the matter. Once European businesses increasingly found themselves to be defendants in U.S. litigation in the 1970s and 1980s, however, it became clear that U.S. courts had little patience for these views of sovereignty. The reason was not only a lack of understanding of the very different views on these matters in continental Europe. It is also true that the mechanics of U.S. discovery and its underlying purposes are to some degree incompatible with these continental European views on sovereignty, which lead to the application of the requested state's procedural law in executing a letter rogatory (or a letter of request under the Hague Evidence Convention).<sup>79</sup> Worse, Article 23 of the Hague Evidence Convention permits a member state to "declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."<sup>80</sup> Many of the Convention's member states have indeed made such a declaration,<sup>81</sup> although some have since narrowed its scope to what they view as fishing expeditions.<sup>82</sup> They have done so because many of the relevant players in the respective civil law countries were unfamiliar with the separation of what in their jurisdictions is a single process of producing evidence during the main hearing into a pretrial evidence-gathering process (discovery) and a process of presenting the unearthed evidence to the trier of fact (trial) in the

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<sup>79</sup> See Hague Evidence Convention, *supra* note 24, art. 9(1). At least under the Hague Evidence Convention, the requesting state can request the use of "a special method or procedure to be followed, unless this is incompatible with the internal law of the State of execution" and the executing state has to use the methods of compulsion available in internal proceedings. *Id.* arts. 9(2) & 10. But application of the law of the requested state's law may mean that the witnesses will be questioned by the judge upon questions previously suggested by the attorneys and that the requested state's much broader privileges may apply. See, e.g., Baumgartner, *Transnational Litigation*, *supra* note 9, at 1324-25.

<sup>80</sup> Hague Evidence Convention, *supra* note 24, art. 23.

<sup>81</sup> Of the 57 member states of the Convention, all but 15 currently maintain a reservation under Article 23. See Hague Conference on Private International Law, Convention of 18 March, 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters, Status Table, available at: [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=82](http://www.hcch.net/index_en.php?act=conventions.status&cid=82) (last visited: October 12, 2012)

<sup>82</sup> Of the 42 member states with Article 23 reservations, ten (China, Cyprus, Estonia, Korea, Mexico, The Netherlands, Romania Switzerland, the United Kingdom, and Venezuela) limit their reservations to certain aspects of document discovery, mostly to what they consider fishing expeditions. See *id.* Thus, for example the reservation of the United Kingdom is limited to letters of request that

require[] a person: (a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or (b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody, or power.

Declaration and Reservation of the United Kingdom of Great Britain and Northern Ireland, *id.*

United States.<sup>83</sup> These individuals simply assumed that, with an Article 23 reservation, they could limit wide-ranging discovery requests while U.S. courts could always make more particularized requests for evidence from their territory once trial was underway and the scope of the evidentiary inquiry would be in sharper focus. This view, of course, failed to take into account both the fact that discovery in this country is conducted by the parties' attorneys before trial and that the need for a concentrated trial would make trial interruptions to obtain evidence from abroad impracticable.<sup>84</sup>

Lawmakers, judges, and academics from those countries, making assumptions on the basis of their judge-centered evidence-gathering process,<sup>85</sup> thus failed to realize for quite some time (and some of them still do not understand today) that their approach to responding to U.S. letters of request under the Hague Evidence Convention has very considerably limited the usefulness of the Convention's letter-of-request procedure for litigants in the United States.<sup>86</sup> Thus, lack of knowledge about the very different litigation system across the Atlantic Ocean and the assumptions underlying it not only led U.S. judges to dismiss foreign sovereignty concerns a bit too cavalierly,<sup>87</sup> but also produced wrong assumptions in continental Europe about how U.S. courts would deal with transnational service and discovery. Hence, what has appeared abroad as an exercise of U.S. power politics, is to some degree a sensible reaction to unrealistic expectations among Europeans. That has not prevented these frustrated expectations from becoming the source of limitations to the recognition of U.S. judgments as described above, however.<sup>88</sup>

### 3. *Preferences of Individuals and Groups*

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<sup>83</sup> See, e.g., Gerber, *supra* note 48, at 749-50, 752-55 (contrasting the U.S. separation into a pretrial discovery phase and a trial before a jury with the German hearing, in which the court collects the evidence suggested by the parties, receives that evidence, and evaluates it as the trier of fact).

<sup>84</sup> See, e.g., *id.*; VON MEHREN & MURRAY, *supra* note 48, at 172.

<sup>85</sup> See, e.g., Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1020-22 (1998) and *supra* text accompanying note 22.

<sup>86</sup> See, e.g., BORN & RUTLEDGE, *supra* 28, at 967 (suggesting that "Article 23 severely limits the value of the convention to U.S. litigants"). Cf. also *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, at 536-37 (surmising that "[s]urely, if the Convention had been intended to replace completely the broad discovery powers that the common law courts in the United States previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common law contracting Parties to agree to Article 23").

<sup>87</sup> Cf. *supra* text accompanying notes 28-29.

<sup>88</sup> See *supra* text accompanying notes 63-68.

The final factor that has helped shape recognition doctrine with regard to U.S. judgments is the expressed preference of individuals and groups. I am not referring here to the efforts that judgment debtors inevitably undertake to prevent a U.S. or other judgment against them to be recognized and enforced abroad in a particular case. Instead, I suggest that there have been efforts by individuals and groups more generally to change recognition doctrine so as to render the recognition and enforcement of U.S. judgments more difficult. An important portion of this consists of pressure by interest groups. Foreign manufacturers selling their products into the U.S. market in particular seem to be taken aback at times by the very different law and litigation system they inevitably encounter here. As a result, they have repeatedly tried to achieve protection from U.S. litigation at home through trade groups and in other ways.<sup>89</sup> To the extent that law makers, government officials, and judges in their home countries tend to have little knowledge about the U.S. litigation system, these industry groups have been able to make use of the shock value of horror stories from cases real and imagined about litigation in the United States.<sup>90</sup> Businesses selling their products in the United States and their attorneys are thus able to use superior knowledge about U.S. law and practice to obtain changes to the domestic recognition regime that would not perhaps occur if the domestic actors had a good sense of the true picture of the litigation landscape in the United States – another case of information asymmetries playing a role. Moreover, where such efforts to obtain protection from U.S. litigation combine with perceptions that U.S. courts and lawmakers are using litigation procedure as a source of power politics,<sup>91</sup> they fall on particularly fertile ground. I have elsewhere described the efforts by German industry representatives, for example, to gain protection from U.S. litigation by the German government and German courts in the late 1970s and early 1980s.<sup>92</sup> These efforts remained without success until a number of high-profile cases brought home to a larger German audience just how different U.S. law and procedure can be and until it became clear that a number of U.S. courts were unwilling to seriously consider the German sovereignty concerns regarding service of process and discovery discussed above. Before that, industry complaints were not taken too seriously, presumably on the grounds that those who operate in the U.S. market should not be surprised that U.S. law and procedure is brought to bear on their activity and that U.S. law and procedure cannot possibly be as bad as described. But these industry complaints also were not taken too seriously until the relevant government officials, judges, and one particularly influential group in the German legal system – law professors – began to perceive a problem for the country, its legal system, and its sovereignty

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<sup>89</sup> For a recent example, see Burbank, *Paper Tiger*, *supra* note 54, at 663 (describing a July 2011 event in Germany for corporate defense counsel to discuss strategies to protect German and other foreign defendants from litigation in the United States).

<sup>90</sup> See, e.g., Baumgartner, *Transnational Litigation*, *supra* note 9, at 1320-21.

<sup>91</sup> See *supra* text accompanying notes 56-74.

<sup>92</sup> See Baumgartner, *Transnational Litigation*, *supra* note 9, at 1318.

that went beyond simple industry interests.<sup>93</sup> Thus, industry groups are not the only ones potentially influencing doctrine in this context. The preferences of other important players in the making and application of the relevant law also play an important role.

As an area where preferences of groups and individuals have affected recognition doctrine in favor of local industry, consider punitive damages. Traditionally, there is no parallel to punitive damages in the legal systems of continental Europe. Continental legal scholarship prides itself on having been able to untangle, during the Enlightenment period, the civil aspects of tort and contract law from the criminal sanctions they entailed in Roman law, so that the law of damages in contracts, torts, and other aspects of private law today is about compensation and restitution, while criminal law deals with punishment and deterrence.<sup>94</sup> This approach, to the continental legal mind, is considerably more sophisticated than the Roman law approach from which it sprang. Add to that the concern in some countries that awards of punitive damages implicate constitutional protections against the imposition of criminal punishment, such as the rule that the crime be clearly defined by statute ahead of time and the rule against double jeopardy.<sup>95</sup> Does this mean that the imposition of punitive damages in the United States is so repugnant from the point of view of continental doctrine as to amount to a public policy violation? The problem with this line of argument is that penal elements have not been as clearly absent from continental doctrines of private law as some would have it. Continental European legal systems have frequently allowed for the parties to a contract to agree to a sum of money to be paid as punishment in case of a breach, for example.<sup>96</sup> And the courts in a number of countries consider the defendant's culpability when assessing damages for pain and suffering.<sup>97</sup> Moreover, punitive damages may cover costs in the United States, such as attorney's fees, that the defendant would have to pay in the continental system as a result of the loser-pays rule. Indeed, the prospect of punitive damages may make a claim economically viable to a U.S. attorney operating under a contingent fee arrangement when economic viability is not an issue for a

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<sup>93</sup> *Id.* at 1318-44.

<sup>94</sup> *See, e.g.,* Sébastien Borghetti, *Punitive Damages in France*, in *PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES* 55, 55 (Helmut Koziol & Vanessa Wilcox eds., 2009); Nils Jansen & Lukas Rademacher, *Punitive Damages in Germany*, in *id.*, at 75-76; Jean-; Attila Menyhárd, *Punitive Damages in Hungary*, in *id.*, at 87, 91; Alessandro P. Scarso, *Punitive Damages in Italy*, in *id.*, at 103, 106-09.

<sup>95</sup> *See, e.g.,* Jansen & Rademacher, *supra* note 94, at 76.

<sup>96</sup> One can argue that, since the parties to a contract must agree to this type of punishment ahead of time, the presence of this provision does not do much to support the recognizability of punitive damage awards. *See, e.g.,* PETER MÜLLER, *PUNITIVE DAMAGES UND DEUTSCHES SCHADENSERSATZRECHT* 60 (2000). But it does show that penal elements are not entirely lacking in the continental European law of damages.

<sup>97</sup> *See, e.g.,* MÜLLER, *supra* note 96, at 259-76; BGE 125 III 412, 417 (1999) (Switz.). Indeed, until 1974, Germany had a few provisions on the books that permitted the victim of a few select crimes to ask for the imposition of a fine to be paid to her in addition to the conviction of the defendant. *See* MÜLLER, *supra* note 96, at 49-53.

plaintiff with a solid claim looking for an attorney in a system with a loser pays rule. Partly for these reasons and because, as Justice Cardozo famously put it, “we are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home,”<sup>98</sup> early evaluations in Germany, for example, cautiously concluded that U.S. punitive damage awards do not automatically violate German public policy.<sup>99</sup>

This assessment changed as German industry groups increased attempts to achieve protection from U.S. judgments, pointing to several outsized jury awards of punitive damages. The assessment also changed as a result of an increasing realization in German legal circles that U.S. courts did not seem to take German sovereignty concerns with regard to service of process and discovery too seriously. Academic commentary thus increasingly argued that U.S. punitive damage awards violate German public policy, at least to the extent they do not include an amount compensating for matters that would be covered by a German judgment in a similar case.<sup>100</sup> In 1992, the German *Bundesgerichtshof* held that punitive damages “of not insignificant size” violated German public policy and that the punitive portion of a U.S. judgment thus could not be enforced in the country.<sup>101</sup> Similar arguments were made in other European countries and considered by their courts. In 1982, for instance, a court in the Swiss canton of St. Gallen refused to enforce an entire U.S. judgment because it included a punitive award.<sup>102</sup> On the other hand,

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<sup>98</sup> *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111 (1918).

<sup>99</sup> See, e.g., MARTINY, *supra* note 10, at 471; Friedrich Graf von Westphalen, „Punitive Damages“ in *US-amerikanischen Produkthaftungsklagen und der Vorbehalt des Art. 12 EGBGB*, 27 RECHT DER INTERNATIONALEN WIRTSCHAFT 141, 148-49 (1981) (concluding that there are certainly cases where punitive damages would not be considered to be against German public policy in the choice of law context (where a public policy violation tends to be more easily found than in the context of recognition of foreign judgments)). See also Eike von Hippel, *Schadensersatzklagen gegen deutsche Produzenten in den Vereinigten Staaten*, 17 AWD 61, 64-65 (1971) (concluding that U.S. products liability judgments against German manufacturers will usually be recognizable in Germany (without, however, specifically discussing punitive damages)). *But see* MARTINY, *supra* note 10, at 236 (noting that the purposes of penalization and general deterrence might so strongly dominate an award of punitive damages as to make that award effectively a criminal judgment, rather than a civil one, and thus no longer enforceable under German law but stressing, at the same time, that increasing product safety is a legitimate objective to pursue in German law).

<sup>100</sup> See, e.g., PETER HOECHST, *DIE US-AMERIKANISCHE PRODUZENTENHAFTUNG* 122 (1986); ZEKOLL, *supra* note 78, at 152; Ernst C. Stiefel & Rolf Stürner, *Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile exzessiver Höhe*, 38 VERSICHERUNGSRECHT 829, 841 (1987).

<sup>101</sup> BGHZ 118, 312, 334-45 (1992). For a discussion of this case in English, see, for example, Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany - The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729 (1992).

<sup>102</sup> Bezirksgericht Sargans, Oct. 1, 1982, partially reproduced in Jens Drolshammer & Heinz Schärer, *Die Verletzung des materiellen ordre public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen „punitive-damages Urteils“*, 82 SCHWEIZERISCHE JURISTENZEITUNG 309, 310-11 (1986). As an additional reason against enforcement, the court apparently mentioned improper service of process. *Id.* at 310.

the district court of the canton of Basel City held a judgment from a California court in a contract case to be enforceable under Swiss law even though it included a \$50,000 award for punitive damages in addition to \$120,060 in compensatory damages. The court reasoned, among other things, that the punitive award in this case had the same effect as an unjust enrichment claim under Swiss law and that it was not excessively high.<sup>103</sup>

German academic commentary on punitive damages and concerns for local industry became influential in other countries as well, both inside and outside of continental Europe. The matter was also discussed at length during the negotiations for a world-wide convention on jurisdiction and the recognition of judgments at The Hague throughout the 1990s.<sup>104</sup> This discussion resulted in Article 11 of the Hague Convention on Choice of Court Agreements of 2005, which provides that “[r]ecognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary and punitive damages, that do not compensate a party for actual loss or harm suffered.”<sup>105</sup> In 1997, the Supreme Court of Japan followed the German Supreme Court in holding a U.S. punitive award to be in violation of Japanese public policy.<sup>106</sup> The highest civil court in Italy, the *Corte di Cassazione* followed suit in a 2007 case involving a million-dollar award in a product liability case against an Italian manufacturer of motorcycle helmets.<sup>107</sup> And, most recently, the same French *Cour de cassation* that has recently been instrumental in considerably liberalizing French recognition practice (including for the recognition of U.S. judgments),<sup>108</sup> too, held that a punitive award of \$ 1,460,000 was disproportionate to the damage actually sustained and the contractual obligations breached – the rendering court in California had awarded \$ 1,391,650.12 in compensatory damages – and thus violated French public policy.<sup>109</sup> However, the Court did note in dictum that

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<sup>103</sup> Zivilgericht Basel Stadt, Feb. 2, 1989, reproduced in 1990 BASLER JURISTISCHE MITTEILUNGEN 31. On this decision see, for example, Baumgartner, *U.S. Judgments*, supra note 6, at 220-21.

<sup>104</sup> See Hague Conference, Summary of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, art. 33 (on file with author).

<sup>105</sup> Convention on Choice of Court Agreements, supra note 5, art. 1(1). Article 1(2) of the Convention continues: “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 related to the proceedings.”

<sup>106</sup> See, e.g., Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT’L & COMP. L. 285, 293-94 (1999).

<sup>107</sup> See *P.J. v. Fimez*, Cass. civ., Jan. 19, 2007. On this decision, see, for example, Francesco Quarta, *Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court’s Veto*, 31 HASTINGS INT’L & COMP. L. REV. 753 (2008).

<sup>108</sup> See supra text accompanying notes 39-40 & 44.

<sup>109</sup> See *Schlenzka & Langhorne v. Fontaine Pajot S.A.*, Cass. Civ. 1ère, Dec. 1, 2010, Recueil Dalloz 2011, 423.

“an award of punitive damages is not per se contrary to [French] public policy.”<sup>110</sup> All of this has happened while some commentators in Europe have pointed out that the case against punitive damages has not been as clearly established as some would have it and that courts have increasingly permitted punitive elements to play a role in certain aspects of determining damages,<sup>111</sup> and while France, Germany, and the European Union have considered adopting punitive damages in limited settings.<sup>112</sup>

The changes in doctrine that may come about as a result of the expressed preferences of groups and individuals in favor of protecting domestic law and parties from litigation in the United States are frequently subtle, however. This is demonstrated by another example from Germany. Under German law, a foreign judgment can be recognized only if the rendering court had jurisdiction according to German rules of personal jurisdiction. One of the available German bases of jurisdiction for these purposes if the foreign action was based on a tort claim is that the defendant had committed the alleged tort in the rendering state or if the alleged tort had its effects there. The factual question whether the defendant had indeed committed a tort thus becomes doubly relevant – for the decision on the merits as well as for the decision whether the rendering court had jurisdiction so as to permit the recognition and enforcement of its judgment in Germany. Hence, when deciding whether to grant recognition, should the German recognition court be able to revisit the question of whether a tort had in fact been committed? In a 1993 case involving the recognition of a default judgment from Washington state, the German *Bundesgerichtshof* held that, yes, that question is open for reconsideration at the recognition stage in the context of a default judgment.<sup>113</sup> The Court reasoned that, otherwise, German defendants would be forced to defend abroad under any circumstances.<sup>114</sup> That, in turn would give plaintiffs an incentive to bring cases in favorable fora on trumped-up charges in the hope that the defendant will not be able to mount an effective defense.<sup>115</sup> The Court also reasoned that it was perfectly legitimate for the defendant to try to avoid the high costs of litigation in the

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<sup>110</sup> *Id.* On this decision see, for example, Benjamin West Janke & François-Xavier Licari, *Enforcing Punitive Damage Awards in France After Fountaine Pajot*, 60 AM. J. COMP. L. 775 (2012).

<sup>111</sup> See, e.g., MÜLLER, *supra* note 96, at 101-289; Borghetti, *supra* note 94, at 56-73; Felix Dasser, *Punitive Damages: Vom „fremden Fötzel“ zum „Miteidgenoss?“* 96 SCHWEIZERISCHE JURISTENZEITUNG 101, 105-07 (2000).

<sup>112</sup> See, e.g., MÜLLER, *supra* note 96, at 290-95; Janke & Licari, *supra* note 110, at 796; Bernhard A. Koch, *Punitive Damages in European Law*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, *supra* note 94, at 197-209.

<sup>113</sup> BGHZ 124, 237 (1993).

<sup>114</sup> *Id.* at 242-43.

<sup>115</sup> *Id.* at 244.

United States.<sup>116</sup> This reasoning reflects what was by then a wide-spread view among German lawyers brought about at least partly by industry stories about U.S. litigation, that, in the United States, personal jurisdiction is easy to obtain, strike suits are widespread, and that even a meritorious defense is an unreasonably expensive proposition. In this decision, to be sure, the *Bundesgerichtshof* adopted a doctrinal approach that had been urged by a number of academic writers for all foreign judgments (not just for judgments from the United States) and before concerns about involvement of German industry in U.S. litigation had become an issue.<sup>117</sup> But given the Court's reasoning, it is likely that efforts to protect German industry from U.S. litigation played a role in the Court's adopting this approach.

## V. Conclusion

With all the focus in this Article on problems that U.S. judgments holders may encounter abroad, it is easy to lose sight of the fact that there are a number of countries that quite liberally recognize and enforce judgments from the United States. Among those countries are Germany,<sup>118</sup> Italy,<sup>119</sup> and, most recently, France – countries on which I have put a particular spotlight here.<sup>120</sup> Even in Switzerland, where foreign judgments cannot generally be recognized if they were rendered against a Swiss domiciliary (though with a number of significant exceptions), the Supreme Court has been quite liberal in dealing with certain aspects of recognition doctrine affecting judgments from the United States.<sup>121</sup> I also hasten to add that the changes in recognition doctrine resulting from efforts to protect national sovereignty, the domestic legal system, and domestic parties in response to U.S. power, the perceived pathologies of the U.S. litigation system, and interest group pressure have been subtle and relatively circumspect where, and to the extent, they have taken place. My purpose here has not been, however, to assess how U.S. judgments fare abroad. Instead, I have intentionally focused on the parts of recognition doctrine that have generated problems for U.S. judgments holders, attempting to analyze the reasons for these problems.

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<sup>116</sup> *Id.* at 246.

<sup>117</sup> *See, e.g.*, REINHOLD GEIMER, ZUR PRÜFUNG DER GERICHTSBARKEIT UND DER INTERNATIONALEN ZUSTÄNDIGKEIT BEI DER ANERKENNUNG AUSLÄNDISCHER URTEILE 102, 163-64 (1966); MARTINY, *supra* note 10, at 357.

<sup>118</sup> *See, e.g.*, Baumgartner, *U.S. Judgments*, *supra* note 6, at 200-214.

<sup>119</sup> *Id.* at 214-19.

<sup>120</sup> On France, see *supra* text accompanying notes 38-44.

<sup>121</sup> *See, e.g.*, Baumgartner, *U.S. Judgments*, *supra* note 6, at 219-27.

Indeed, my finding that many of these problems arise from doctrines that attempt to protect the sovereignty and, more generally, the public interest of the recognition state may, in the not-so-distant future, turn out to be of only historical interest. The relevant doctrines and underlying concerns go back to the 19<sup>th</sup> Century or earlier, and many countries have since abandoned some or all of those doctrines.<sup>122</sup> Perhaps, even doctrinal changes that have been adopted specifically in reaction to litigation in the United States may be cast aside under certain conditions in the future. For instance, since the German *Bundesgerichtshof* declared punitive damages awards to be against German public policy in 1992, a number of German scholars have argued that the case against punitives is not perhaps as clear-cut as the Court made it out to be and that awards of such damages should be recognized in principle, although not perhaps beyond a certain size.<sup>123</sup> As the limited use of punitives gains currency within the European Union,<sup>124</sup> the *Bundesgerichtshof* may change its jurisprudence on this matter.

More likely, however, things will remain the same for some time to come. Countries have been very slow in moving away from doctrines limiting the recognition and enforcement of judgments from the United States. In the current landscape of transnational litigation, there appears to be no incentive to liberalize the relevant recognition regime. Countries in Europe and elsewhere have entered into extensive networks of treaties, both bilateral and multilateral, providing for the reciprocal and liberalized recognition and enforcement of judgments with their most important trading partners.<sup>125</sup> Since the United States has long chosen to stay away from such treaties, the rules applicable to judgments from the United States are the same that apply to judgments from far-away countries with which the recognition state has limited trading relationships and the fairness of whose legal systems tends to be more doubtful than that of the treaty partners'.<sup>126</sup> Thus, since relationships with most of the important trading partners are

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<sup>122</sup> See *supra* text accompanying notes 10-45.

<sup>123</sup> See, e.g., DIRK BROCKMEIER, PUNITIVE DAMAGES, MULTIPLE DAMAGES UND DEUTSCHER ORDRE PUBLIC 88-130 (1999); INA EBERT, PÖNALE ELEMENTE IM DEUTSCHEN PRIVATRECHT 525-31 (2004); MÜLLER, *supra* note 96, at 101-289; JOACHIM ROSENGARTEN, PUNITIVE DAMAGES UND IHRE ANERKENNUNG UND VOLLSTRECKUNG IN DER BUNDESREPUBLIK DEUTSCHLAND 147-208 (1994); Dagmar Coester Waltjen, *Deutsches internationales Zivilverfahrensrecht und die punitive damages nach US-amerikanischem Recht*, in HERAUSFORDERUNGEN DES ZIVILVERFAHRENSRECHTS 15, 25-34 (Andreas Heldrich & Toshiyuki Kono eds., 1994).

<sup>124</sup> See *supra* note 112 and accompanying text.

<sup>125</sup> See, e.g., Baumgartner, *U.S. Judgments*, *supra* note 6, at 181. Within the European Union, the applicable law on the recognition and enforcement of judgments from other member states of the Union has changed from a treaty – the Brussels Convention – to community legislation, which has increasingly been intertwined with other Community law as well as with efforts to unify other aspects of transnational litigation. See, e.g., Samuel P. Baumgartner, *Changes in the European Union's Regime of Recognizing and Enforcing Foreign Judgments and Transnational Litigation in the United States*, 18 SW. J. INT'L L. 567, 570-82 (2012).

<sup>126</sup> See, e.g., Baumgartner, *U.S. Judgments*, *supra* note 6, at 182.

covered by more liberal treaties, many countries have no pressing reason to change their recognition regime for non-treaty partners. I also suspect, but do not know, that the rules applicable to the recognition of judgments from non-treaty partners have often been happily used to block the effects of U.S. judgments.

Since many of the doctrinal problems encountered by U.S. judgment debtors are based on a public interest of the recognition state, however,<sup>127</sup> negotiating away these problems is likely to be more challenging than if this were merely a matter of finding agreement on what represents fair treatment of the litigants in the rendering state. Thus, finding a mutually agreeable treaty text will require negotiators to engage their underlying jurisprudential assumptions about the proper conduct of litigation in general and transnational litigation in particular. The U.S. delegation may also do well to engage foreign fears about litigation in the United States. Indeed, treaty negotiations represent an excellent opportunity to overcome the information asymmetries discussed above and to set up mechanisms for future information exchanges.<sup>128</sup> On the other hand, the discussion above should also make clear that attempts to bring about better recognition and enforcement of U.S. judgments abroad through the use of unilateral displays of U.S. power, be it by Congressional legislation or by court decision, are likely to have the opposite effect.<sup>129</sup>

Finally, it bears noting that I have focused here on aspects of substantive recognition doctrine, that is, on the requirements that must be met for a judgment to be recognizable or enforceable. For those interested in the potential problems faced by judgment holders from the United States, another fruitful avenue of research will be to look at the procedures that apply in obtaining a declaration of recognizability or enforceability.<sup>130</sup> Indications are that countries vary widely with regard to questions such as how much such a proceeding costs, who has to pay for it,

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<sup>127</sup> See *supra* text accompanying notes 10-45.

<sup>128</sup> See, e.g., BAUMGARTNER, *supra* note 13, at 120-25. See also Burbank, *World*, *supra* note 73, at 1477:

Differences of opinion are more likely between [than within] signatory states, because mutually agreed upon language masks fundamental assumptions about law and society that may not derive from a shared tradition, and no tribunal can impose a uniform interpretation. But ... the framework for dialogue that an international convention establishes – perhaps its most enduring contribution – may help resolve conflicts that stem not so much from ambiguous language as from differences in those fundamental assumptions.

<sup>129</sup> See *supra* text accompanying notes 56-75.

<sup>130</sup> In some countries, recognition is automatic as soon as a recognizable foreign judgment has become final, while enforcement requires a prior declaration of enforceability. In those countries, typically, either party can challenge the recognizability of the foreign judgment either as a preliminary question in a related proceeding or ask for a declaration of (non-)recognizability. In other countries, especially in the Romanic tradition, no foreign judgment has any effect until declared recognizable. See, e.g., Walter & Baumgartner, *supra* note 14, at 35.

how simple or complicated it is, how long it lasts, and whether preliminary enforcement measures are available.<sup>131</sup>

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<sup>131</sup> See, e.g., *id.* at 37-39; Burkhard Hess, Thomas Pfeiffer & Peter Schlosser, Report on the Application of Regulation Brussels I in the Member States 226-33, 259-71, final version September 2007, [http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf).