

# *NOTES*

## **RETHINKING REVIEW OF FOREIGN COURT JURISDICTION IN LIGHT OF THE HAGUE JUDGMENTS NEGOTIATIONS**

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*The United States is distinct among nations in its constitutionalization of personal jurisdiction. This Note explains the intertwined history of U.S. specific jurisdiction law and the so-called “Hague Judgments Project,” which is facilitating negotiations toward a treaty regulating recognition and enforcement of foreign judgments. This Note argues that the constitutionality of any such proposed treaty will remain uncertain unless U.S. courts clarify existing personal jurisdictional doctrine, particularly regarding the “jurisdictional filters” question: May U.S. courts lawfully recognize and enforce a foreign judgment issued upon a jurisdictional basis that would have been unconstitutional in domestic litigation? This Note answers “yes,” at least when the foreign court’s exercise of personal jurisdiction is compatible with internationally accepted norms. By proposing a cogent response to this question, this Note hopes to facilitate the negotiation and adoption of a future judgments convention.*

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## INTRODUCTION

On May 5, 1992, Edwin D. Williamson, then Legal Adviser to the U.S. Department of State, wrote to the Secretary General of the Hague Conference on Private International Law.<sup>1</sup> Citing the fact that the United States was not a party to any international judgments convention or treaty, Williamson requested that the Hague Conference begin preliminary work toward such an instrument.<sup>2</sup> The “Hague Judgments Project” was originally intended to increase the enforcement of U.S. judgments, among other goals.<sup>3</sup> The common wisdom remains that American judgments are difficult to enforce abroad.<sup>4</sup>

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<sup>1</sup> Letter from Edwin D. Williamson, Legal Adviser, U.S. Dep’t of State, to Georges Droz, Secretary General, Hague Conference on Private Int’l Law (Mar. 5, 1992), available at <http://www.state.gov/documents/organization/65973.pdf>.

<sup>2</sup> *Id.* at 1–2.

<sup>3</sup> Arthur T. von Mehren, Story Professor of Law Emeritus, Harvard Law Sch., Remarks at the Conference Held at New York University School of Law on the Proposed Convention, in THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS 59, 60 (Andreas F. Lowenfeld & Linda J. Silberman eds., 2001).

<sup>4</sup> See, e.g., Patrick J. Borchers, *Judgments Conventions and Minimum Contacts*, 61 ALB. L. REV. 1161, 1161 (1998) (“[I]t is often difficult to obtain foreign recognition of an American judgment . . . .”). This difficulty has been due at least in part to the fact that U.S. courts historically exercised broader general jurisdiction than did most foreign courts. See, e.g., Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1294–96 (1998) (noting that American courts could exercise general jurisdiction based on the activities of defendants’ subsidiaries or agents, whereas European courts are prohibited from doing so under the Brussels regime). Although the U.S. Supreme Court recently abridged the “doing business” doctrine of general jurisdiction, see *Daimler A.G. v. Bauman*, 134 S. Ct. 746 (2014) (declining to allow California courts to exercise general jurisdiction over Daimler Chrysler’s U.S. subsidiary because the corporation did not have affiliations to make it sufficiently “at home” in the State), other reasons that foreign courts may remain suspicious of American judgments include procedural quirks such as civil jury trials, higher damages, and class actions. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 475 (3d ed. 2006); see also, e.g., *Solimene v. B. Grauel & Co., Landgericht [LG]* [regional courts] June 13, 1989, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 988, 1989 (Ger.), translated in LOWENFELD, *supra* at 534–37 (declining to enforce an American product liability judgment due to pretrial discovery, perceived excess in American products liability law

The first round of the Hague Judgments Project negotiations, which took place between 1996 and 2001, envisioned a treaty that would regulate both jurisdiction and the recognition and enforcement of foreign judgments.<sup>5</sup> Ultimately, however, these negotiations “left a number of issues unresolved failing consensus.”<sup>6</sup> In particular, American delegates saw the proposed instrument’s provisions on personal jurisdiction as potentially incompatible with the Fourteenth Amendment’s Due Process Clause, which bars U.S. courts from exercising jurisdiction over a defendant who lacks “minimum contacts” with the forum.<sup>7</sup> The earlier project was scrapped in favor of negotiating a less ambitious Choice of Court Convention.<sup>8</sup>

Work on the so-called “Judgments Project” resumed eleven years later.<sup>9</sup> Presumably because of the constitutional difficulties posed by

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generally, and the unexplainable “height of the original award of damages of US \$275,000.”).

<sup>5</sup> Permanent Bureau, Hague Conf. on Private Int’l Law, *Continuation of the Judgments Project*, at 4 (Feb. 2010), <http://www.hcch.net/upload/wop/genaff2010pd14e.pdf> [hereinafter *Continuation of the Judgments Project*]; see also Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 198 (2001) (explaining that under a mixed convention model, required, permitted, and prohibited jurisdictional bases in the court of origin result in mandatory, discretionary, and prohibited recognition and enforcement, respectively, by the courts of other contracting States). Such a “mixed” framework allows “[s]harply divergent State practices which States are unwilling or unable to give up . . . [to] continue both with respect to the assertion of adjudicatory authority and the recognition and enforcement of judgments without putting into question the convention as a whole.” *Id.* at 199.

<sup>6</sup> *Continuation of the Judgments Project*, *supra* note 5, at 4.

<sup>7</sup> See *infra* notes 55–66 and accompanying text (discussing constitutional uncertainties during the first round of Hague Negotiations).

<sup>8</sup> Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 546 (2005). The Hague Choice of Court Convention was to provide for the enforcement of forum selection clauses and judgments based upon such clauses. *Id.* As of this writing, the Choice of Court Convention is not yet in force; although both the European Union and the United States are signatories to the Convention, neither has yet ratified it. Hague Conf. on Private Int’l Law, *Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements*, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98) (last updated Feb. 19, 2010) [hereinafter *Status Table 37*]. Note, however, that the E.U. is taking steps toward ratification, and the Convention would enter into force in the event such ratification is successful. Pietro Franzina, *The E.U. Prepares to Become a Party to the Hague Convention on Choice of Court Agreements*, CONFLICTOFLAWS.NET (Feb. 11, 2014), <http://conflictotoflaws.net/2014/the-eu-prepares-to-become-a-party-to-the-hague-convention-on-choice-of-court-agreements/>.

<sup>9</sup> See Council on General Affairs and Policy of the Conference (17–20 April 2012), Hague Conf. on Private Int’l Law, *Conclusions and Recommendations Adopted by the Council*, at 3 (Apr. 2012), [http://www.hcch.net/upload/wop/gap2012concl\\_en.pdf](http://www.hcch.net/upload/wop/gap2012concl_en.pdf) (establishing a Working Group to “prepare proposals . . . in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters”).

the provisions on jurisdiction during the first round of negotiations, the currently envisioned treaty will not regulate personal jurisdiction directly; rather, it will regulate only the recognition and enforcement of foreign judgments.<sup>10</sup> Recognition and enforcement of judgments is largely based on so-called “jurisdictional filters,” or review of the court of origin’s jurisdiction by the court where recognition and enforcement of a judgment is sought.<sup>11</sup> In other words, a court considering whether to recognize and enforce a foreign judgment will first consider whether the foreign court properly exercised personal jurisdiction over the parties.

It remains unclear whether the Hague Judgments Project’s attempt to circumvent U.S. constitutional difficulties by cabining the project to jurisdictional filters will succeed. Indeed, to this day it remains unclear what limits, if any, the U.S. Constitution places on jurisdictional filters.<sup>12</sup> Must American courts apply the so-called “mirror image rule” and review foreign court jurisdiction under the same Fourteenth Amendment due process analysis that governs personal jurisdiction under U.S. law?<sup>13</sup> Or should they grant foreign courts more deference in light of the fact that other legal systems use

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<sup>10</sup> *Infra* notes 69–71 and accompanying text. The Permanent Bureau of the Hague Conference concluded in 2010 that while technically “the option of an instrument dealing with assumption of jurisdiction . . . and the recognition and enforcement of the resulting judgments . . . is still open,” past experience suggested that “a strong case could be made at this stage for a global instrument focussing on the recognition and enforcement of judgments” only. *See Continuation of the Judgments Project*, *supra* note 5, at 6, ¶¶ 11–12.

<sup>11</sup> Jurisdictional filters are the standard of review for whether jurisdiction was properly exercised in the judgment-rendering forum; the acceptable bases of foreign court jurisdiction may not always align with acceptable bases of jurisdiction under domestic law. *See Hague Conf. on Private Int’l Law, Conclusions and Recommendations of the Expert Group on Possible Future Work on Cross-Border Litigation in Civil and Commercial Matters*, at 2 n.2 (Apr. 2012), <http://www.hcch.net/upload/gaf2012wd2e.pdf> (identifying jurisdictional filters as “jurisdictional criteria for recognition and enforcement of judgments”). This Note uses the terms “jurisdictional filters” and “review of foreign court jurisdiction” interchangeably.

<sup>12</sup> U.S. courts struggle to consistently apply the Constitution to foreign judgments. *See, e.g.*, Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility*, 61 ALB. L. REV. 1207, 1225 (1998) (“[T]here is no consensus . . . about whether U.S. due process standards or some test of ‘minimum fairness’ should be applied to the exercise of foreign jurisdiction to determine the enforceability of the foreign judgment.”).

<sup>13</sup> *See LOWENFELD*, *supra* note 4, at 531 (noting that while some countries apply the mirror image rule, under which “if a judgment of country X is presented in country Y, the court in Y asks whether, if the facts were reversed, the Y court would exercise jurisdiction over the defendant and the claim,” other countries “point out that measuring the jurisdiction of foreign countries by internal standards may go well beyond what international due process requires, and simply ask whether the exercise of jurisdiction in the particular case was consistent with certain minimum requirements” (emphasis omitted)).

different criteria to determine whether it is appropriate to compel a defendant to appear in court?<sup>14</sup>

Although there is currently no definitive answer to these questions,<sup>15</sup> finding one will be critical to negotiating any multilateral judgments convention that includes the United States.<sup>16</sup> This uncertainty has been particularly acute for foreign judgments rendered based on specific jurisdiction in tort,<sup>17</sup> which is “the real issue that probably matters most in the judgments recognition realm,”<sup>18</sup> and is also an area where European and American law noticeably diverge.<sup>19</sup> It is this divergence in particular that could jeopardize the current iteration of the Hague Judgments Project.<sup>20</sup>

This Note argues that the prevailing “mirror image rule,” which equates review of foreign court jurisdiction with American jurisdiction rules, is undesirable. U.S. courts have applied the mirror image rule without sufficiently explaining their reasoning.<sup>21</sup> Particularly, they have failed to justify the need for the mirror image rule under either the governing state-law uniform legislation (Uniform Act) or the U.S. Constitution. This Note will demonstrate that neither the Uniform Act nor the Constitution requires the mirror image rule. Accordingly, this Note proposes that a form of the international due process test,

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<sup>14</sup> See, e.g., Council Regulation 44/2001, art. 5(3), 2001 O.J. (L 12) 1 (EU) [hereinafter Brussels Regulation] (conferring jurisdiction upon the forum where the tort or delict occurs).

<sup>15</sup> Maier, *supra* note 12.

<sup>16</sup> See Permanent Bureau, Hague Conf. on Private Int'l Law, *Annotated Checklist of Issues to be Discussed by the Working Group on Recognition and Enforcement of Judgments*, at 23, 33–34 (Jan. 2013), <http://www.hcch.net/upload/hidden/2013/jdgm2013/note01en.pdf> [hereinafter *Annotated Checklist*] (identifying jurisdictional filters as “the most significant condition” in any judgments convention, and noting that “developments at a national level, including . . . evolving case law . . . may also be relevant to the range and structure of jurisdictional filters, to the extent that they are transposable to a multilateral level”).

<sup>17</sup> Specific or “activity-based” jurisdiction is transactional, and arises from “the particular activity that took place in [a forum].” LINDA J. SILBERMAN, ALLAN R. STEIN & TOBIAS BARRINGTON WOLFF, CIVIL PROCEDURE: THEORY AND PRACTICE 76–77 (3d ed. 2009). It is usually referred to in contrast with general jurisdiction, which in the United States attaches only when the defendant can be considered “at home in the forum State.” Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

<sup>18</sup> Ronald A. Brand, *Jurisdictional Developments and the New Hague Judgments Product*, in A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 99 (Permanent Bureau, Hague Conf. on Private Int'l Law ed., 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2288071](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288071) [hereinafter Brand, *Jurisdictional Developments*].

<sup>19</sup> See Borchers, *supra* note 4, at 1162–63 (describing the differences between specific jurisdiction under Brussels Regulation I in Europe and American jurisdictional rules).

<sup>20</sup> See *infra* notes 77–81 and accompanying text (describing how disagreement on tort jurisdiction has complicated the Hague negotiations).

<sup>21</sup> See *infra* Part II.B (discussing such cases).

which looks to transnational rather than domestic norms of fairness, could be applied to review foreign court jurisdiction.<sup>22</sup>

Although U.S. courts thus far have only applied the international due process doctrine to review foreign court *procedure*, the rationale for applying it to review of foreign court jurisdiction is identical. The international due process doctrine matured in the early 2000's—a time at which judges and litigants were already cognizant of globalization's vast impact in the international litigation sphere. This Note interprets this doctrinal development as a reaction to the practical concerns that (a) foreign judgments had begun to circulate much more frequently than ever before; and (b) American *procedural* due process standards had become so complex that “[w]ere we not to apply a less stringent approach to foreign judgments, a judgment rendered by a foreign court would never be enforced in the United States.”<sup>23</sup>

Requiring foreign courts to adhere to U.S. jurisdictional due process standards raises concerns similar to those raised by requiring foreign courts to meet U.S. procedural due process standards,<sup>24</sup> such that applying an international due process standard to review of foreign court jurisdiction is an appropriate response. The proposal would mean that at least in some cases, U.S. courts might lawfully recognize and enforce foreign judgments issued upon jurisdictional bases that would have been prohibited in domestic practice. Until American courts clarify and liberalize the standards for review of foreign court jurisdiction, the prospects for the Hague Judgments project will remain uncertain.

Part I explores the fraught relationship between U.S. personal jurisdiction jurisprudence—which is uniquely grounded in constitutional law<sup>25</sup>—and judgment enforcement in the international litigation context. First, it explains the ever-increasing differences between American and European rules on tort jurisdiction. Second, it demonstrates why defining the constitutional limitations on jurisdictional fil-

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<sup>22</sup> See *infra* notes 122–50 and accompanying text (discussing the development of the international due process doctrine).

<sup>23</sup> Soc'y of Lloyds v. Webb, 156 F. Supp. 2d 632, 641 (N.D. Tex. 2001).

<sup>24</sup> See *infra* notes 111–13 and accompanying text (explaining how departure of U.S. jurisdictional law from international norms will logically result in a lower rate of recognition and enforcement of foreign judgments).

<sup>25</sup> Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 141 (“[O]ther nations do not consider jurisdiction a constitutional matter.”). Canada is apparently the only other country in which personal jurisdiction has a constitutional component. See Club Resorts Ltd. v. Van Breda, [2012] S.C.R. 572, 588, 590 (Can.), available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/8004/index.do> (explaining that Canada's “real and substantial connection test” for personal jurisdiction has “a private international law face on the one hand and a constitutional face on the other”).

ters will be a precondition to successfully negotiating a multilateral judgments convention.

Part II examines how most U.S. courts have read the Uniform Act<sup>26</sup> to require the mirror image rule, which applies domestic standards to review of foreign court jurisdiction. It then suggests that neither the Uniform Act nor the Fourteenth Amendment's Due Process Clause require the mirror image rule. First, courts could plausibly read Section 5(b) of the Uniform Act to include more expansive bases of foreign jurisdiction. Second, under the international due process doctrine, the fact that foreign court behavior does not perfectly conform to American notions of Fourteenth Amendment due process is not itself a bar to recognition and enforcement. Rather, the U.S. court where recognition and enforcement is sought should review foreign court procedures according to international norms—in other words, U.S. courts should not reject foreign procedures that are commonplace and whose legitimacy is widely accepted in the international sphere.

Part III argues that although the international due process doctrine has thus far only been applied to review the fairness of foreign proceedings themselves, the doctrine could also provide a cogent, sensible basis for review of foreign court jurisdiction. Such a rule would be easy to apply since there is already widespread international agreement regarding unacceptable or “exorbitant” bases of jurisdiction. Most importantly, the proposed rule would allow a future American delegation to the Hague Judgments negotiations to confidently endorse the project.

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<sup>26</sup> The Uniform Law Commissioners completed the Uniform Foreign Money Judgments Recognition Act in 1962, and the Uniform Foreign-Country Money Judgments Recognition Act in 2005. LEGISLATIVE FACT SHEET: FOREIGN MONEY JUDGMENTS RECOGNITION ACT, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited Nov. 8, 2014) [hereinafter UFMJRA FACT SHEET]; LEGISLATIVE FACT SHEET: FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited Nov. 8, 2014) [hereinafter UFCMJRA FACT SHEET]. The 1962 and 2005 acts contain identical jurisdictional filters provisions. *Compare* UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT §§ 4(a)(2), 5 (1962), *with* UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT §§ 4(b)(2), 5 (2005). Although Section 5(a) enumerates acceptable bases of foreign jurisdiction, Section 5(b)'s catch-all provision, allowing courts to “recognize other bases of jurisdiction,” fails to provide any guidance regarding the determination of such other acceptable bases. *Id.*

## I

THE HAGUE JUDGMENTS NEGOTIATIONS  
AND U.S. JURISDICTIONAL LAW:  
AN INTERTWINED HISTORY

This Part focuses on how the confusion surrounding American due process limitations on personal jurisdiction in tort contributed to the interruption of the Judgments Project in 2001, and has the potential to do the same in future negotiations. Subpart A discusses the differences between U.S. and European<sup>27</sup> standards for specific jurisdiction in tort matters, and emphasizes how specific jurisdiction in the United States is diverging from global norms. Subpart B draws a parallel between the failure of the Hague Judgments negotiations in 2001 and the problems that could arise in the judgment project's present iteration. It reviews how the uncertainty surrounding the *Asahi* decision<sup>28</sup> contributed to the failure of the first round of Hague negotiations in 2001. Subpart C then argues that the uncertainty surrounding the *McIntyre* decision has the potential to endanger the current round of negotiations.<sup>29</sup>

*A. Differences Between U.S. and E.U. Standards for Personal Jurisdiction in Tort Matters*

Although the differences between general jurisdiction rules in the United States and Europe have largely disappeared,<sup>30</sup> stark differences remain in the rules for specific (or “activity-based”) jurisdiction in unintentional tort cases. Tort jurisdiction has been one of the most discussed areas over the course of the Judgments Project, because “some of the present European Brussels Convention rules on tort . . . —for instance, the place where the injury occurs—would be probably

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<sup>27</sup> The Brussels I Regulation, which governs jurisdiction and judgments among European Union member states, is evidence of European norms regarding recognition and enforcement of judgments. Brussels Regulation, *supra* note 14. The Brussels Regulation was recently revised to reflect developments in forum selection and parallel proceedings, but “[t]he basic jurisdictional rules in the recast Regulation remain the same as in the existing Regulation.” Simon James et al., *Recast Brussels I Regulation Enhances Jurisdiction Agreements in the E.U.*, CLIFFORD CHANCE (Jan. 22, 2013), [http://www.cliffordchance.com/briefings/2013/01/recast\\_brussels\\_irregularitionenhance.html](http://www.cliffordchance.com/briefings/2013/01/recast_brussels_irregularitionenhance.html). The recast Brussels Regulation will go into effect in 2015. Council Regulation 1215/2012, art. 66, O.J. 2012 (L 351) (EU).

<sup>28</sup> See *infra* Part I.B (discussing *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987)).

<sup>29</sup> See *infra* Part I.C (discussing *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011)).

<sup>30</sup> See *supra* note 4 and accompanying text (discussing the *Daimler* decision).

unconstitutional in America.”<sup>31</sup> Indeed, it had been clear since *World Wide Volkswagen Corp. v. Woodson* in 1980 that jurisdiction cannot always be exercised at the place of injury because of the limits originating from the Due Process Clause of the U.S. Constitution.<sup>32</sup>

This stands in stark contrast to the broad E.U. approach to tort jurisdiction. The Brussels Regulation allows a Member State domiciliary to be sued “in matters relating to tort . . . in the courts for the place where the harmful event occurred or may occur.”<sup>33</sup> European courts can thus exercise jurisdiction at the place of injury whether or not the defendant purposefully directed his conduct toward that place. For instance, in *Bier B.V. v. Mines de Potasse d'Alsace S.A.*, the European Court of Justice held that the Dutch courts had jurisdiction over a French defendant who had released pollutants into the Rhine River in France, which later found their way to the plaintiff’s property in the Netherlands.<sup>34</sup> Without further factual findings, such a result would probably have been unconstitutional under U.S. law.<sup>35</sup>

Yet the most important difference between personal jurisdiction in the United States and Europe is not substantive; rather, it is the *constitutionalization* of the U.S. law of specific jurisdiction that presents the most difficulties for the Hague Judgments Project.<sup>36</sup> The

<sup>31</sup> Trevor C. Hartley, Professor of Law, London Sch. of Econ., Remarks at the Conference Held at New York University School of Law on the Proposed Convention, in THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS, *supra* note 3, at 27–28 (“You look at some [American judgments], like *Asahi*, and it seems the American Supreme Court Justices aren’t quite sure what some of these things mean either.”). The Brussels Convention was superseded by the E.U. Brussels I Regulation in 2002. *Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters* (“Brussels I”), EUROPA: SUMMARIES OF EU LEGISLATION, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33054\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm) (last updated May 3, 2011).

<sup>32</sup> 444 U.S. 286, 295 (1980) (holding that Oklahoma courts had no jurisdiction over defendant New York car dealership although the injury had occurred in Oklahoma because the dealership itself did not conduct any business activities in Oklahoma).

<sup>33</sup> Brussels Regulation, *supra* note 14, art. 5(3).

<sup>34</sup> Case 21/76, 1976 E.C.R. 1735, reprinted in LOWENFELD, *supra* note 4, at 216, 218 (granting plaintiff the option of suing at the place where the damage occurred, with no mention of foreseeability or purposeful conduct by the defendant directed toward that place).

<sup>35</sup> See Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITTS. L. REV. 661, 693–96 (1999) [hereinafter Brand, *Due Process*] (comparing the *Bier* case to U.S. jurisprudence and concluding that “tort jurisdiction under Brussels Article 5(3) . . . appears to be broader than U.S. due process analysis would allow”).

<sup>36</sup> The first U.S. Supreme Court case requiring personal jurisdiction to comply with the Fourteenth Amendment’s guarantee of due process was *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (“[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.”). Although *Pennoyer*’s substance has since been overruled, its constitutionalization of personal jurisdiction is here to stay. See, e.g., *Int’l Shoe Co. v. Washington*, 326 U.S. 310,

fact that the Fourteenth Amendment regulates personal jurisdiction restricts the Americans' ability to "treatify" it, since "rules . . . adopted in a proposed convention cannot impair the due process rights of the defendant as understood in the U.S. Supreme Court's most recent jurisprudence."<sup>37</sup>

Constitutionalization has also ensured the continuing instability of that jurisprudence.<sup>38</sup> Whereas the codified E.U. Brussels regime aims "to provide for a clear and certain attribution of jurisdiction,"<sup>39</sup> U.S. personal jurisdiction law is based entirely on interpreting two words: "due process."<sup>40</sup> The resulting doctrinal instability was readily apparent in the 1987 case *Asahi Metal Industry Co. v. Superior Court*, in which a divided Supreme Court disagreed on the degree of contacts between the defendant and the forum required by the Fourteenth Amendment.<sup>41</sup> In the wake of *Asahi*, American commentators criti-

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319 (1945) ("Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.").

<sup>37</sup> Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 330 (2002).

<sup>38</sup> See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 122 (1992) (describing the Court's "haphazard jurisdictional doctrine" as an "unavoidable consequence" of constitutionalization).

<sup>39</sup> Case C-364/93, *Marinari v. Lloyds Bank plc*, 1995 E.C.R. I-02719, available at <http://curia.europa.eu/common/reecdoc/convention/gemdoc96/html/4-1996/04-u-en-1996.htm>.

<sup>40</sup> Borchers, *supra* note 38, at 122 ("For well over a century, the law of jurisdiction in the United States has labored under the notion that jurisdictional principles can be deduced from the due process clause of the fourteenth amendment." (citing *Pennoyer*, 95 U.S. at 733)).

<sup>41</sup> *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987). Justice O'Connor, writing for the plurality, would have required action that the defendant "purposefully directed toward the forum State," *id.* at 112 (O'Connor, J., plurality opinion), a seemingly stricter standard than the "stream of commerce" test announced in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."). The *Asahi* plurality also imposed an additional "reasonableness" requirement for a court to exercise activity-based jurisdiction. 480 U.S. at 113 (O'Connor, J., plurality opinion). Justice Brennan wrote in a concurring opinion that "[a]s long as a [defendant] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117 (Brennan, J., concurring).

cized the minimum contacts doctrine as “hard to discern” at best<sup>42</sup> and utter “chaos” at worst.<sup>43</sup>

After this confusion contributed to the collapse of the first round of Hague Judgments negotiations,<sup>44</sup> the 2011 decision in *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>45</sup> blurred the parameters of “minimum contacts” even further. In *McIntyre*, Justice Kennedy, writing for the plurality, found that an English manufacturer lacked the requisite “minimum contacts” with New Jersey, the would-be forum state.<sup>46</sup> This was because the defendant had not particularly “targeted” the New Jersey market when it employed an Ohio distributor to sell its products throughout the United States.<sup>47</sup>

*McIntyre* further exemplifies how the constitutionalization of personal jurisdiction generates doctrinal instability. The Supreme Court Justices themselves were bitterly divided over the decision.<sup>48</sup> Lower

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<sup>42</sup> Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1469 (1991) (book review); see also, e.g., Linda J. Silberman, “Two Cheers” for International Shoe (*And None for Asahi*): An Essay on the Fiftieth Anniversary of International Shoe, 28 U.C. DAVIS L. REV. 755, 759–61 (1995) (noting that although the *Asahi* decision “appears to have altered . . . the *International Shoe* test” by adding a reasonableness prong, lower courts seem to equate reasonableness with minimum contacts anyway).

<sup>43</sup> Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 3 (1993) (discussing how the Court’s opinions are muddled, confusing, inspire little confidence, and do not even make sense to the Justices themselves).

<sup>44</sup> See *infra* notes 55–66 and accompanying text (discussing how constitutional uncertainty hampered the American delegation during the first round of negotiations).

<sup>45</sup> 131 S. Ct. 2780 (2011). *McIntyre* was the Supreme Court’s first specific-jurisdiction stream-of-commerce case since *Asahi*, 480 U.S. 102. Howard B. Stravitz, *Personal Jurisdiction for the Twenty-First Century: The Implications of McIntyre and Goodyear Dunlop Tires*, 63 S.C. L. REV. 463, 463 (2012). Many commentators had hoped when the Supreme Court added two personal jurisdiction cases to its 2010 docket that the Court would use the opportunity to clarify existing personal jurisdiction law. E.g., *id.*

<sup>46</sup> See *McIntyre*, 131 S. Ct. at 2790–91 (Kennedy, J., plurality opinion) (explaining the plurality’s agreement with the New Jersey Supreme Court that *J. McIntyre, Inc.* lacked minimum contacts with New Jersey). Counsel for the defendant conceded the defendant’s wish to target the United States market as a whole. Transcript of Oral Argument at 5–6, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-1343.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1343.pdf).

<sup>47</sup> See *McIntyre*, 131 S. Ct. at 2788 (“The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum . . . .”).

<sup>48</sup> Six Justices believed that *McIntyre*’s activity was insufficient to establish minimum contacts between the defendant and the forum state of New Jersey. See Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 482 (2012) (describing succinctly the “4-to-2-to-3” split in the *McIntyre* Court). Those Justices were divided as to why. Whereas Justice Kennedy focused on “target[ing],” 131 S. Ct. at 2788 (plurality opinion), Justice Breyer focused on the amount of product that the defendant had sold into New Jersey. See *id.* at 2791, 2792 (Breyer, J., concurring) (arguing that “[n]one of our precedents finds that a single isolated sale . . . is sufficient” to establish minimum contacts). Justice Ginsburg, writing for the dissent, protested that the decision would allow foreign corporations

courts have expressed confusion about *McIntyre*, and the case's lack of explicit guidance has led them to distinguish unintentional tort cases before them based on the amount of product sold into the United States,<sup>49</sup> the location of the distributor,<sup>50</sup> and contractual minutiae,<sup>51</sup> to name a few factors.<sup>52</sup> Academics have expressed similar confusion.<sup>53</sup> In light of *McIntyre*'s inscrutable mandate, “[t]he story of what *McIntyre* will mean for jurisdictional doctrine is only beginning to be written.”<sup>54</sup>

### B. Consequences of the Divergent Rules on Tort Jurisdiction for the Hague Judgments Project

The first round of Hague Judgments negotiations (1994–2001) envisioned a convention regulating both primary exercises of jurisdiction and jurisdictional filters.<sup>55</sup> Recall that a court where recognition

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marketing products in the United States “to avoid products liability litigation in the United States” altogether just by “engag[ing] a U.S. distributor to ship its machines stateside.” *Id.* at 2794 (Ginsburg, J., dissenting).

<sup>49</sup> See *Graham v. Hamilton*, No. 3:11–609, 2012 WL 893748, at \*4 (W.D. La. Mar. 15, 2012) (noting that the *McIntyre* defendant likely sold a single machine into New Jersey, whereas defendant “GM Canada places over 800,000 vehicles into the U.S. market each year,” making it probable that some vehicles would end up in Louisiana).

<sup>50</sup> See *Xia Zhao v. Skinner Engine Co.*, No. 2:11-CV-07514-WY, 2012 WL 5451817, at \*8 (E.D. Pa. Nov. 8, 2012) (holding that since the distributor and the purchaser of the machine were both in Pennsylvania, there was targeting of the Pennsylvania market when the distributor sold the machine to the purchaser).

<sup>51</sup> See *Honeywell Int'l, Inc. v. Venstar, Inc.*, 287 F.R.D. 478, 482 (D. Minn. 2012) (reasoning that because the distribution contract between plaintiff and defendant demarcated a “Product Territory” which included Minnesota, the defendant was “legally obligated . . . to sell Venstar products in Minnesota”). Interestingly, counsel for defendant in the *McIntyre* case had conceded in a line of questioning by Justice Kagan that there would have been a basis for jurisdiction in such a scenario. See Transcript of Oral Argument, *supra* note 46, at 17 (conceding that an arrangement to serve certain enumerated states would result in jurisdiction in those states).

<sup>52</sup> See Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 760–61 (2012) (discussing recent personal jurisdiction cases and concluding that “lower federal and state courts will continue to go their own way and reach inconsistent results applying their own formulations of jurisdictional due process”).

<sup>53</sup> See, e.g., Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637, 637 (2012) (citing *McIntyre* as evidence for the proposition that “the Supreme Court has been captured by the Chamber of Commerce”); Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 469 (2012) (characterizing *McIntyre* as part of a cultural “backlash that champions corporate and governmental interests against the claims of individual citizens or the vindication of legislative or judicial norms”); Steinman, *supra* note 48, at 483 (suggesting that *McIntyre* has few implications for other personal jurisdiction cases, since Justice Breyer’s controlling opinion was based on a very narrow reading of the factual record); Stravitz, *supra* note 52, at 760 (arguing that *McIntyre*’s unclear mandate did little to resolve the confusion surrounding *Asahi*).

<sup>54</sup> Adam N. Steinman, *The Meaning of McIntyre*, 18 Sw. J. INT'L LAW 417, 444 (2012).

<sup>55</sup> Regulating both direct exercise and indirect review of jurisdiction in a single convention made intuitive sense; it was envisioned that harmonizing acceptable

and enforcement is sought applies a jurisdictional filter when it determines whether jurisdiction was properly exercised in the forum that rendered the judgment.<sup>56</sup>

Commentators at this time identified “the messy state of American jurisdiction” as “one of the significant difficulties facing the United States in attempting to enter into any international judgments convention.”<sup>57</sup> The American delegation was acutely aware that some potential treaty provisions might run afoul of prevailing constitutional limitations on personal jurisdiction (at the time exemplified by *Asahi*).<sup>58</sup> In order to address this problem, the Preliminary Draft Convention of 2001 provided for jurisdiction at the place of injury *unless* the defendant “could not reasonably have foreseen that the [tortious] act or omission could result in an injury of the same nature in that State.”<sup>59</sup> This reflected a compromise between the American

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jurisdictional bases would essentially automate judgment recognition at the second stage. For instance, suppose signatory states *A* and *B* were to treatify *x* as a required basis of jurisdiction. A domestic court in *A* then issues a judgment with *x* as the basis for jurisdiction. Because *x* is now also an accepted jurisdictional basis in *B*, a court in *B* would have no trouble determining that jurisdiction was properly exercised in the court of origin. *See von Mehren, supra* note 3, at A42–43 (describing the idea of a “double convention”). On the other hand, a convention regulating jurisdictional filters only would not require the courts of *B* to exercise *x* as a basis for jurisdiction under domestic law, but would still require them to enforce a judgment rendered in *A* on the basis of *x*. *See id.* (suggesting that such a “single convention” would be appropriate where the signatory states are “essentially without strong political and economic commitments *vis-à-vis* [each other]”).

<sup>56</sup> See *supra* note 11 for an explanation of the various standards U.S. courts use for jurisdiction filters.

<sup>57</sup> Borchers, *supra* note 4, at 1162, 1164 (“[E]ven if a convention . . . apparently conforms to the United States domestic jurisdictional law, the unstable state of domestic jurisdictional law makes it impossible to guarantee that a convention would *never* produce such a conflict.” (emphasis omitted)).

<sup>58</sup> See Brand, *Due Process*, *supra* note 35, at 701–05 (“[T]he United States cannot become a party to a multilateral treaty with jurisdictional provisions that might allow the exercise of jurisdiction beyond the limits of due process.”). Note that Ronald Brand was a member of the American delegation. *Faculty Profile of Ronald A. Brand*, Pitt Law WEBSITE, <http://www.law.pitt.edu/people/full-time-faculty/ronald-a-brand> (follow “Awards & Activities” hyperlink). The U.S. Department of State publicly took the position that an international judgments convention would be unable to trump contrary Supreme Court jurisprudence. *See Negotiations at the Hague Conference for a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 8 (2000) (statement of Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, U.S. Dept. of State) [hereinafter Kovar Statement] (“[W]e cannot, consistent with the Constitution, accept tort jurisdiction based solely on the place of the injury . . .”), available at [www.state.gov/documents/organization/6846.doc](http://www.state.gov/documents/organization/6846.doc).

<sup>59</sup> Peter Nygh and Fausto Pocar, Hague Conf. on Private Int’l Law, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters Report*, at 7, Preliminary Doc. No. 11 (Aug. 2001) [hereinafter *Preliminary Draft Convention*], <http://www.hcch.net/upload/wop/jdgmpd11.pdf>. This was the second draft

and European rules.<sup>60</sup> The provision did not wholeheartedly embrace the American “minimum contacts” rule, which the Europeans found “vague and unpredictable.”<sup>61</sup> As a result, it was still unlikely that even the compromise provision properly adhered to the Supreme Court’s due process requirements, since the Court had long before declared that foreseeability alone was not enough to establish “minimum contacts” between the defendant and forum.<sup>62</sup>

The true problem was that due to the doctrinal uncertainty surrounding the *Asahi* decision, it would have been impossible to draft *any* proposal that would not at least run the risk of overstepping U.S. constitutional bounds.<sup>63</sup> This feeling was apparent at the conference held at New York University in 1999 on the proposed Hague Judgments Convention, where one attendee quipped that in *Asahi* “it seems the American Supreme Court Justices aren’t quite sure what [activity-based jurisdiction] mean[s] either.”<sup>64</sup>

Ultimately, the American delegation felt that “[t]he mere possibility of a due process violation . . . [was] sufficient to prevent the United States from being constitutionally able to become a party to a convention” regulating jurisdiction and judgments.<sup>65</sup> Negotiations ultimately stalled and were scrapped in favor of a simpler convention on choice of court agreements.<sup>66</sup> The United States has not ratified the

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convention to come out of The Hague—the 1999 version’s provisions on jurisdiction were a near carbon copy of the Brussels Convention. Teitz, *supra* note 8, at 545.

<sup>60</sup> See Silberman, *supra* note 37, at 333–34 (“The tort provisions in [the Draft Convention] . . . have gone a long way in trying to fit with U.S. constitutional requirements.); cf. *Preliminary Draft Convention*, *supra* note 59, at 61 (observing that “the connection to the place of the injury was regarded by the Special Commission as being too severe on the person who is alleged to be responsible,” such that “jurisdiction will only lie at the place of the injury if the person alleged to be responsible could reasonably have foreseen injurious consequences from his act or omission in that place”).

<sup>61</sup> Kovar Statement, *supra* note 58, at 8.

<sup>62</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (“[F]oreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.”); Silberman, *supra* note 37, at 330 (acknowledging that the Draft Convention’s provisions on tort jurisdiction “may fall short of U.S. constitutional requirements”).

<sup>63</sup> See *supra* notes 41–43 and accompanying text (discussing *Asahi*).

<sup>64</sup> Hartley, *supra* note 31, at 28.

<sup>65</sup> Ronald A. Brand, *Due Process as a Limitation on Jurisdiction in U.S. Courts and a Limitation on the United States at the Hague Conference on Private International Law*, U.S. DEP’T OF STATE (Feb. 1998), [http://1997-2001.state.gov/www/global/legal\\_affairs/brand.html](http://1997-2001.state.gov/www/global/legal_affairs/brand.html) [hereinafter Brand, *Hague Conference*] (emphasis added); see also Brand, *Due Process*, *supra* note 35, at 691 (“The many possibilities for jurisdiction in states with minimal or no relationship to the defendant under [the Brussels Regulation] rule create obvious problems for U.S. agreement to such a provision in a multilateral treaty on jurisdiction and the recognition and enforcement of judgments.”).

<sup>66</sup> Teitz, *supra* note 8, at 546. However, this problem was by no means the only impediment: Disagreements about loose rules versus concrete standards, parallel

resulting Choice of Court Convention, and the Convention has not yet entered into force.<sup>67</sup>

### C. McIntyre and the Recent Negotiations

Over a decade later, and after *McIntyre* had increased the uncertainty surrounding American personal jurisdiction rules,<sup>68</sup> the Hague Conference had not yet given up on the idea of a more expansive judgments convention. In April 2012, the Hague Conference Council on General Affairs and Policy instructed the Permanent Bureau to “prepare proposals for . . . a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters.”<sup>69</sup> Unlike the convention envisioned by U.S. diplomats in 1992, this instrument was originally intended to regulate jurisdiction only indirectly via jurisdictional filters, not through direct exercise of personal jurisdiction.<sup>70</sup> That is, it would not require or restrict any bases of jurisdiction in the first instance, which would remain governed by national law.<sup>71</sup> Thus U.S. courts would never be required under the newly proposed convention to exercise jurisdiction that does not comport with current “minimum contacts” doctrine.

*McIntyre*’s implications in the judgment enforcement context remain unclear. As discussed above, jurisdiction rules proved very difficult to harmonize before this attempt,<sup>72</sup> which is why the Hague Conference had embarked on creating an instrument which would

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proceedings, and the common law doctrine of *forum non conveniens* were also major areas of disagreement. See Silberman, *supra* note 37, at 328–32 (describing various conflicts between the parties).

<sup>67</sup> *Status Table 37*, *supra* note 8.

<sup>68</sup> See *supra* notes 48–54 and accompanying text (describing *McIntyre* and confusion it has generated among lower courts and academics).

<sup>69</sup> *Annotated Checklist*, *supra* note 16, at 4 (citing Council on General Affairs and Policy of the Conference (17–20 April 2012), Hague Conf. on Private Int’l Law, *Conclusions and Recommendations Adopted by the Council* (Apr. 2012), [http://www.hcch.net/upload/wop/gap2012concl\\_en.pdf](http://www.hcch.net/upload/wop/gap2012concl_en.pdf)).

<sup>70</sup> See *id.* at 23 (describing jurisdictional filters as a condition for a foreign judgment to receive recognition and enforcement).

<sup>71</sup> See Council on General Affairs and Policy of the Conference (17–20 April 2012), Hague Conf. on Private Int’l Law, *Conclusions and Recommendations Adopted by the Council*, at 3, ¶¶ 17–18 (Apr. 2012), [http://www.hcch.net/upload/wop/gap2012concl\\_en.pdf](http://www.hcch.net/upload/wop/gap2012concl_en.pdf) (explaining that the Hague Conference is looking into a “future instrument relating to recognition and enforcement of judgments, including jurisdictional filters,” but the matter of an instruction directly regulating jurisdiction would require “further study and discussion”).

<sup>72</sup> See *supra* notes 65–66 and accompanying text (describing challenges parties faced in reconciling jurisdiction rules); Hague Conf. on Private Int’l Law, *Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference*, at 4, ¶ 2 (Feb. 2002) (describing difficulties relating to activity-based jurisdiction).

regulate the circulation of judgments, but not direct exercises of personal jurisdiction.<sup>73</sup> Still, any judgments convention negotiated at The Hague would regulate jurisdictional filters, in which the court where recognition and enforcement is sought would be required in some cases to recognize judgments based on certain agreed-upon jurisdictional bases such as, for example, the defendant's place of domicile or the place of performance of a contract.<sup>74</sup>

The constitutional implications of only regulating jurisdictional filters are unclear because U.S. courts have not articulated due process limits on jurisdictional filters. Consider, for instance, a "reverse-*McIntyre*" case: An American manufacturer contracts with an English distributor to market the manufacturer's products throughout the European Union. If a machine is then sold to an employer in the Netherlands, and a Dutch employee is injured, the Dutch courts would have jurisdiction over a suit arising from that injury under the Brussels Regulation.<sup>75</sup>

Under *McIntyre*, an American court would be prohibited from exercising jurisdiction under such circumstances, but one critical question remains. If the Dutch court renders a judgment against the American manufacturer, and the Dutch claimant goes after the manufacturer's U.S. assets, could the American court recognize the Dutch judgment?<sup>76</sup> If not, then any attempts at negotiating a judgments con-

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<sup>73</sup> See *Annotated Checklist*, *supra* note 16, at 23 (explaining the significance of jurisdictional filters).

<sup>74</sup> See, e.g., *id.* at 25–26 (explaining one such jurisdictional basis).

<sup>75</sup> See Brussels Regulation, *supra* note 14, art. 5(3) (conferring jurisdiction upon the forum where the tort or delict occurs). Note that the Brussels Regulation applies only to suits between litigants from E.U. member states, and the Dutch court in this hypothetical would have found an equivalent basis under domestic law to summon the American into court. See Borchers, *supra* note 38, at 129–30 (noting that because the Brussels regime is "generally inapplicable to defendants domiciled outside the EC," U.S. defendants remain subject to "the national rules of jurisdiction, including the famous exorbitant bases"). This hypothetical points to the Brussels Regulation not because it would be the applicable law, but as evidence of internationally acceptable norms. See *supra* note 27 (discussing the Brussels Regime's significance). The Dutch courts would also have been able to exercise jurisdiction over the American manufacturer under the 2001 Preliminary Draft Convention, Article 10 of which provides an affirmative defense to jurisdiction in the place of injury only if the defendant could not have foreseen the injury taking place in such jurisdiction. See *Preliminary Draft Convention*, *supra* note 59, at 7 (conferring tort jurisdiction upon the courts of a State "in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State").

<sup>76</sup> Justice Breyer asked a series of questions during the *McIntyre* oral arguments suggesting he believed the answer to this question would be "no." Breyer's thinking about the *McIntyre* case seemed to hinge on the fairness of foreign jurisdiction over a comparable American defendant in foreign countries. Transcript of Oral Argument at 34–35, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (No. 19-1343), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/](http://www.supremecourt.gov/oral_arguments/argument_transcripts/).

vention including both the United States and the European Union would seem dead on arrival, judging from the first round of Hague negotiations (1994–2001). The first round of negotiations envisioned a convention that would directly regulate personal jurisdiction. But the constitutional limitations on jurisdiction prevented the United States from promising broader specific jurisdiction in exchange for Europe's acquiescence to broader enforcement of American judgments.<sup>77</sup> This lack of *quid pro quo* was an important reason for the first impasse.<sup>78</sup>

While the current round of negotiations is attempting to avoid a similar impasse by regulating jurisdiction only indirectly through jurisdictional filters, the Americans could still run up against the unanswered “reverse-*McIntyre*” question. If the Europeans concede broader recognition of American judgments, will the Americans be able to promise broader recognition of European jurisdiction-based tort judgments in return? Given that (a) during the first round, American delegates expressed that “[t]he mere possibility of a due process violation . . . is sufficient to prevent the United States from being constitutionally able to be a party to a convention,”<sup>79</sup> and (b) U.S. courts have failed to articulate the due process limits (if there are any) on jurisdictional filters,<sup>80</sup> then the answer is still probably “no.” There would be no *quid pro quo*—and presumably, no deal.<sup>81</sup>

## II THE CURRENT STATE OF REVIEW OF FOREIGN COURT JURISDICTION AND DUE PROCESS IN THE UNITED STATES

As discussed above, the constitutionality of the Hague Judgments Project will remain uncertain until U.S. courts clarify whether the

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09-1343.pdf. Particularly, Breyer was concerned that “if someone goes into a shop in West Virginia and buys a thousand pots and says I’m going to sell them in Madras, or I might sell them anywhere in the world,” then the West Virginian seller could be liable anywhere in the world. *Id.* at 34. This Note takes an alternative view, arguing that U.S. courts must also consider international comity and the needs of the transnational litigation system in such scenarios, in addition to the interests of American defendants.

<sup>77</sup> See *supra* notes 61–66 and accompanying text (describing conflicts between Americans and Europeans in reaching a consensus on jurisdiction).

<sup>78</sup> See *supra* notes 61–66 and accompanying text.

<sup>79</sup> Brand, *Hague Conference*, *supra* note 65.

<sup>80</sup> See *infra* notes 106–07 and accompanying text (describing how U.S. courts have failed to articulate whether their applications of jurisdictional filters are based in statutory or constitutional law).

<sup>81</sup> This is also why an attempt to give U.S. courts an “out” by including a provision allowing them to decline to enforce foreign judgments rendered upon bases of jurisdiction that would be considered unconstitutional in the United States is likely not feasible; the Americans would remain with nothing to bargain away.

mirror image rule is required for jurisdictional filters as a matter of Fourteenth Amendment due process. To arrive at the constitutional question, however, courts must first determine that the statutory law governing jurisdictional filters *also* allows a more liberal standard than the mirror image rule.<sup>82</sup> Recall that under the mirror image rule, “if a judgment of country *X* is presented in country *Y*, the court in *Y* asks whether, if the facts were reversed, the *Y* court would exercise [personal] jurisdiction.”<sup>83</sup>

The purpose of this Part is to demonstrate that the mirror image rule is arguably neither statutorily nor constitutionally required. Subpart A explains Uniform Act Section 4, which lists the grounds for nonrecognition of foreign judgments. Although due process also regulates personal jurisdiction, the Act bifurcates review of a foreign legal system’s procedural due process generally under Section 4(a)(1) from review of foreign court jurisdiction under Section 4(a)(2).<sup>84</sup>

The remainder of this Part explains how this bifurcation has led to inconsistent results. Subpart B explains how courts in 4(a)(2) cases still scrutinize foreign court jurisdiction according to its conformance with “every jot and tittle” of U.S. due process case law.<sup>85</sup> Subpart C explains how courts deciding 4(a)(1) cases have developed the international due process doctrine to avoid subjecting foreign in-court procedures to the same scrutiny.

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<sup>82</sup> Statutory reform is one possible way to remove this roadblock. However, state-by-state reform of the present Uniform Act regime seems unpromising, and the American Law Institute’s (ALI’s) efforts at passing federal legislation regulating foreign judgments have thus far proved fruitless. *See generally* LOWENFELD, *supra* note 4, at 584–86 (discussing the ALI project toward drafting a federal Foreign Judgments Recognition and Enforcement Act). Had the resulting ALI proposed statute been enacted, it would have eliminated the mirror image rule: Section 6(a)(v) of the Proposed Statute provided for nonrecognition where the basis of the foreign court’s exercise of jurisdiction was “unreasonable or unfair given the nature of the claim and the identity of the parties”; under the proposed statute, the fact that the foreign court’s basis of jurisdiction was “not an acceptable basis of jurisdiction for courts in the United States” would not, by itself, be sufficient to show that the basis was unreasonable or unfair. AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 6(a)(v) (2006). This Note assumes that statutory reform is unlikely for the time being, and argues instead that the current statutory regime permits a more liberal interpretation.

<sup>83</sup> LOWENFELD, *supra* note 4, at 531 (emphasis omitted).

<sup>84</sup> *See* UFMJRA § 4(a)(1)–(2) (1962); UFCMJRA § 4(b)(1)–(2) (2005) (providing grounds for nonrecognition and enforcement of a foreign judgment if it was rendered under a system that “does not provide impartial tribunals or procedures compatible with the requirements of due process of law” and if “the foreign court did not have personal jurisdiction over the defendant,” respectively).

<sup>85</sup> *See* Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 478 (7th Cir. 2000) (explaining that any reasonable approach to applying a foreign judgment would have to require foreign conformity to the international concept of due process of law).

### A. An Introduction to the Uniform Act Provisions on Review of Foreign Court Jurisdiction and Due Process

Although commentators have criticized the practice as “awkward,” uniform state legislation largely governs review of foreign judgments in the United States.<sup>86</sup> What this Note refers to as “the Uniform Act” actually represents two separate efforts by the Uniform Law Commissioners: the 1962 Uniform Foreign Money-Judgments Recognition Act (“UFMJRA”) and the 2005 Uniform Foreign-Country Money Judgments Recognition Act (“UFCMJRA”).<sup>87</sup>

Sections 4 and 5 of the Uniform Act list bases for nonrecognition and acceptable bases of foreign court jurisdiction, respectively. Section 4(a) of the UFMJRA and Section 4(b) of the UFCMJRA<sup>88</sup> list the same mandatory bases for nonrecognition of a foreign judgment:

- (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
- (2) the foreign court did not have personal jurisdiction over the defendant; or
- (3) the foreign court did not have jurisdiction over the subject matter.

Section 5(a) (which is nearly identical in the UFMJRA and UFCMJRA) enumerates certain acceptable bases of foreign court

<sup>86</sup> 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4473 (2d ed. 2002) (arguing that “[t]he practice of relying on state law outside of federal-question cases deserves reconsideration” and that the law of foreign judgments should be unified via treaty or national law). Thirty-three states, as well as the District of Columbia and the U.S. Virgin Islands, have enacted either the Uniform Foreign Money-Judgments Recognition Act or its successor, the Uniform Foreign-Country Money Judgments Recognition Act. See UFCMJRA FACT SHEET, *supra* note 26 (listing states that have enacted the Uniform Foreign-Country Money Judgments Recognition Act); UFMJRA FACT SHEET, *supra* note 26 (listing states that have enacted the Uniform Foreign Money-Judgments Recognition Act). The relative merits of the Uniform Act regime are contentiously debated. *Compare Recognition and Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 9 (2011) (Statement of Linda J. Silberman, Martin Lipton Professor of Law, New York University School of Law) (describing the “patchwork of state laws” governing foreign judgments as a “state of affairs [that] is undesirable”), *with Why States Should Adopt UFCMJRA*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UFCMJRA> (last visited Nov. 8, 2014) (describing the uniform law project as “ha[ving] been in large part successful in carrying out its purpose of establishing clear and uniform standards under which state courts will enforce the foreign-country money judgments that come within its scope”).

<sup>87</sup> See UFMJRA FACT SHEET, *supra* note 26 (describing the 1962 Uniform Act); UFCMJRA FACT SHEET, *supra* note 26 (describing the 2005 Uniform Act).

<sup>88</sup> For the sake of brevity, this Note refers to these identical provisions as “Uniform Act Section 4(a).”

jurisdiction pursuant to Section 4(a)(3),<sup>89</sup> whereas Section 5(b) contains a catch-all provision allowing courts to recognize other jurisdictional bases.<sup>90</sup>

Because many foreign judgment enforcement cases are heard in federal court,<sup>91</sup> many state supreme courts have not had the chance to thoroughly interpret their state's version of the Uniform Act.<sup>92</sup> This leads to an interpretive conundrum: Because federal courts do not *technically* have interpretive authority over state law, in many states federal judges are left guessing as to how state courts would have interpreted the Uniform Act. As will become apparent in the following discussion, this practice has led federal judges to stick to more conservative interpretations of the ambiguous text, leading to doctrinal stagnation. This problem has become particularly apparent for the standard of review of foreign court jurisdiction.

The remainder of this Part will contrast Uniform Act Section 4(a)(2) with 4(a)(1) cases. Recall that 4(a)(2) mandates nonrecognition when the foreign court lacked personal jurisdiction over the defendant, and Section 4(a)(1) mandates nonrecognition when the foreign judicial system did not provide due process of law.<sup>93</sup> Neither subsection contains a choice of law provision (that is, neither instructs U.S. courts exactly *whose* law applies to the determination of systemic due process or personal jurisdiction). Yet U.S. courts have applied different standards to determine due process in 4(a)(1) cases and personal jurisdiction in 4(a)(2) cases. Whereas courts apply the “international due process” test to 4(a)(1) cases, they most often apply U.S. law to 4(a)(2) cases.<sup>94</sup>

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<sup>89</sup> UFMJRA § 5; UFCMJRA § 5. Despite minor word changes, the substance of Section 5 of the two Acts is the same, except for a provision in the later UFCMJRA that extends Subsection 5(a)(4)'s coverage to business entities other than corporations. UFCMJRA § 5 cmt. 2.

<sup>90</sup> See UFMJRA § 5(b) (stating that courts may recognize other bases of jurisdiction); UFCMJRA § 5(b) (stating that courts may recognize bases of personal jurisdiction other than those listed to support a foreign-country judgment).

<sup>91</sup> This is because cases involving foreign judgments can often be filed in or removed to federal court on the basis of diversity jurisdiction. *See* 28 U.S.C. § 1332(a)(2) (2012) (conferring federal jurisdiction in suits between “citizens of a State and citizens or subjects of a foreign state”).

<sup>92</sup> *See, e.g.*, Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 909 (N.D. Iowa 2002) (“There is scant law interpreting Iowa’s version of the Uniform Foreign Money-Judgments Recognition Act . . . ”).

<sup>93</sup> UFCMJRA § 4(b); UFMJRA § 4(a).

<sup>94</sup> *E.g.*, Monks Own, Ltd. v. Monastery of Christ in the Desert, 168 P.3d 121, 129 (N.M. 2007) (applying U.S. law to affirm the district court order domesticating the Canadian judgment). However, the 4(a)(1) cases have not yielded perfectly consistent results; there remains a “division of authority” among courts who have considered the question of whether the jurisdiction of the foreign court “ought to be determined according to the law

Considering that jurisdiction is couched in due process terms in the United States, the remainder of this Note argues that American courts where recognition of a foreign judgment is sought should harmonize the standards applicable to 4(a)(1) and 4(a)(2). In other words, courts should apply international standards of fairness to both the systemic due process and jurisdictional determinations.

### *B. Review of Foreign Court Jurisdiction Under Uniform Act Section 4(a)(2): The Domestic “Mirror Image” Standard*

The prevailing mirror image rule in Uniform Act Section 4(a)(2) cases requires foreign court jurisdictions to comport with American notions of jurisdictional due process.<sup>95</sup> However, courts have uniformly failed to state whether this is a constitutional requirement or a statutory one. After summarizing the relevant case law, this Part will argue that the mirror image rule is undesirable. Particularly, the mirror image rule will lead to decreased recognition and enforcement of foreign judgments as U.S. specific jurisdiction law increasingly diverges from international norms, and its continued prevalence could hamper the ongoing Hague negotiations.

One widely cited decision applying the mirror image rule is *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*<sup>96</sup> In that case, Philadelphia Chewing Gum, an American company, hired an agent to conduct negotiations via letter and telephone with Somportex, an English company, to sell Philadelphia’s products in England. When the negotiations fell through, Somportex sued Philadelphia in

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of the rendering or the enforcing jurisdiction.” *Evans Cabinet Corp. v. Kitchen Int’l, Inc.*, 593 F.3d 135, 142 (1st Cir. 2010). *See also Siedler v. Jacobson*, 383 N.Y.S.2d 833, 834 (Sup. Ct. 1976) (interpreting New York’s version of the Uniform Act to restrict foreign judgment recognition to bases of jurisdiction *narrower* than those permitted under New York’s long-arm statute). *Siedler*, however, is generally viewed as an outlier among Uniform Act cases. *See, e.g., Saad Gul, Old Rules for a New World? The Constitutional Underpinnings of U.S. Foreign Judgment Enforcement Doctrine*, 5 APPALACHIAN J.L. 67, 93 (2006) (describing *Siedler* as a departure from the normal rule of “applying American notions of justice and fair play to international cases”).

<sup>95</sup> *See Monks Own*, 168 P.3d at 126 (observing that the majority of courts that have considered the question have concluded that American jurisdictional due process rules apply when U.S. courts are reviewing foreign court jurisdiction under the Uniform Act); *see also Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 896 (N.D. Tex. 1980) (reviewing foreign court jurisdiction with an eye to whether “the [foreign] court’s exercise of jurisdiction comports with our own notions expressed in due process terms”), abrogated by *Success Motivation Inst. of Japan, Ltd. v. Success Motivation Inst., Inc.*, 966 F.2d 1007 (5th Cir. 1992); 1 LINDA SILBERMAN, TRANSNATIONAL JOINT VENTURES § 5:3 (2012) (“Several American courts have refused to recognize a foreign judgment where the exercise of jurisdiction by the foreign court is thought to be contrary to American standards of jurisdiction.”).

<sup>96</sup> 453 F.2d 435 (3d Cir. 1971).

England, and Philadelphia defaulted.<sup>97</sup> When Somportex brought an enforcement action in Pennsylvania federal court, Philadelphia challenged the English court's jurisdiction, claiming it had "insufficient contacts [with England] to meet the due process tests of *International Shoe*."<sup>98</sup> The Third Circuit dismissed this argument, however, finding that "the English procedure comports with our standards of due process."<sup>99</sup>

Ultimately, the Third Circuit in *Somportex* was dealing with an easy case. The challenged English procedure (in which "a conditional appearance attacking jurisdiction may . . . be converted into an unconditional one"<sup>100</sup>) was "identical to [the procedure] set forth in both the Federal and Pennsylvania rules."<sup>101</sup> The Third Circuit simply disallowed the American judgment debtor from challenging an English exercise of personal jurisdiction that would have been perfectly legal at home. Thus, the Third Circuit's determination that the debtor's "activity would constitute the 'quality and nature of the defendant's activity,'" as held sufficient to establish personal jurisdiction in contemporaneous cases,<sup>102</sup> suggests that compatibility with American-style jurisdictional due process is *sufficient* for 4(a)(1) purposes. Yet *Somportex* does not hold that such a finding is *necessary*. In other words, *Somportex* says nothing about whether American courts are categorically prohibited from going beyond the limits of the mirror image rule, since this question was not before the Third Circuit in *Somportex* at all.

Yet, this is exactly how American courts have been interpreting *Somportex*. For example, in *de la Mata v. American Life Insurance Co.*,<sup>103</sup> the District of Delaware cited *Somportex* and its progeny in applying the mirror image rule, stating that "federal courts have held that [jurisdictional filters] *should* be determined by our own standards of judicial power as promulgated by the Supreme Court under the due

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<sup>97</sup> *Id.* at 436–39.

<sup>98</sup> *Id.* at 443 (emphasizing that a defendant with no office, employee, or transaction of business within the country has insufficient contacts).

<sup>99</sup> *Id.* at 444 (affirming the English court's determination of jurisdiction).

<sup>100</sup> *Id.* at 441–42.

<sup>101</sup> *Id.* at 442.

<sup>102</sup> See, e.g., *id.* at 444 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (holding that the defendant had sufficient contacts with California in the form of a single holder of the defendant's insurance policy)). While *McGee* has not been explicitly overruled, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), reflected an effort by the Court to "stem the tide of expanding jurisdiction" exemplified by *McGee*. See SAMUEL ISSACHAROFF, CIVIL PROCEDURE 102–07 (3d ed. 2012) (discussing the Supreme Court's limitation of specific jurisdiction in the wake of the *McGee* decision).

<sup>103</sup> *De la Mata v. Am. Life Ins. Co.*, 771 F. Supp. 1375 (D. Del. 1991), aff'd, 961 F.2d 208 (3d Cir. 1992).

process clause of the Fourteenth Amendment.”<sup>104</sup> Similarly, the Seventh Circuit in *Koster v. Automark Industries, Inc.*, cited *Somportex* for the otherwise unjustified proposition that “[w]hether it be Wisconsin or the Netherlands, the standard of minimum contacts is the same.”<sup>105</sup>

In another case, the Northern District of California concluded that foreign court jurisdiction “must be . . . in compliance with the requirements of traditional notions of fair play and substantial justice under the due process clause of the United States Constitution.”<sup>106</sup> The Northern District cited only *International Shoe* in support of this conclusion, however.<sup>107</sup> It did not explain either (a) how the text of California’s version of the Uniform Act limits acceptable bases of jurisdiction to those compatible with the *International Shoe* line of cases, or (b) alternatively, why and how the Fourteenth Amendment itself regulates jurisdictional filters *in addition* to direct exercises of personal jurisdiction. As Part II.C will explain, proposition (b) is not self-evident. Outside of the jurisdictional realm, U.S. courts have now on many occasions enforced foreign judgments rendered under procedures that may have been unconstitutional in U.S. courts.<sup>108</sup>

So far, only a handful of published cases have resulted in nonrecognition due to defective jurisdiction of the rendering court. In most cases arising out of contract disputes, for example, U.S. courts have had no problem finding that minimum contacts existed between the defendant and the foreign court.<sup>109</sup> The Eastern District of New York has even allowed for recognition so long as “under corresponding facts a New York court would take jurisdiction,” whether or not the

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<sup>104</sup> *Id.* at 1384 (emphasis added).

<sup>105</sup> 640 F.2d 77, 79 (7th Cir. 1981) (citing *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), for the proposition that minimum contact standards remain the same, regardless of the state).

<sup>106</sup> *Bank of Montreal v. Kough*, 430 F. Supp. 1243, 1247 (N.D. Cal. 1977) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945), for the application of a due process analysis in assessing a foreign court’s jurisdiction), *aff’d*, 612 F.2d 467 (9th Cir. 1980).

<sup>107</sup> *See id.* at 1247.

<sup>108</sup> *See infra* notes 130–33 and accompanying text (defining the international due process doctrine).

<sup>109</sup> *E.g., de la Mata v. Am. Life Ins. Co.*, 771 F. Supp. 1375, 1384 (D. Del. 1991) (finding that the defendant “maintained more substantial contacts with Bolivia [the original forum] than did the nonresident defendant in *McGee*”); *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 896–98 (N.D. Tex. 1980) (noting that the defendant “has engaged in much purposeful activity in England directly related [to the dispute]” and therefore the English court’s exercise of jurisdiction was legitimate); *Cherun v. Frishman*, 236 F. Supp. 292, 298 (D.D.C. 1964) (holding that a litigant who securitized his Ottawa home in consideration of a loan agreement executed in the United States had sufficient contacts with Ontario). Enforcement in *de la Mata* was denied on other grounds. 771 F. Supp. at 1390.

jurisdictional basis *articulated* by the foreign court would pass due process muster.<sup>110</sup>

As U.S. jurisdictional doctrine continues to diverge from the global norm,<sup>111</sup> however, foreign judgments could become less enforceable if American courts continue to apply the mirror image rule, scrutinizing foreign court jurisdiction under the domestic “minimum contacts” analysis. As evolving Supreme Court jurisprudence steadily restricts the scope of specific tort jurisdiction (first in *Asahi*, then in *McIntyre*), U.S. norms become increasingly irreconcilable with those of the international community at large.<sup>112</sup> This trend necessarily results in a lower rate of recognition and enforcement of foreign judgments under the mirror image rule. The implications of this trend for the Hague Judgments Project are grim, and “any real progress on judgments will not be easy” until the United States reverses.<sup>113</sup>

One example of this troubling potential is *Pure Fishing, Inc. v. Silver Star Co.*, in which the U.S. District Court for the Northern District of Iowa ultimately dismissed without prejudice a creditor’s request for summary enforcement of an Australian judgment.<sup>114</sup> The court reasoned that it could not discern from the factual record “whether the Australian court’s personal jurisdiction over Silver Star met the requirements of . . . the due process clause of the United States Constitution.”<sup>115</sup> Still, the court expressed an uncertain tone in arriving at this answer. Noting first the dearth of interpretive precedent for Iowa’s version of the Uniform Act,<sup>116</sup> the court then relied on

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<sup>110</sup> *Nippon Emo-Trans Co. v. Emo-Trans, Inc.*, 744 F. Supp. 1215, 1222 (E.D.N.Y. 1990). Of course, this rule will not be of much help where the foreign factual record is insufficient to determine U.S.-style personal jurisdiction, presumably because the foreign court did not need to base its own jurisdiction on the same type of factual findings that a U.S. court would have needed to rely on. This is apparently what happened in *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905, 917 (N.D. Iowa 2002), discussed *infra* notes 114–17 and accompanying text.

<sup>111</sup> See Brand, *supra* note 18, at 99 (noting that “specific/special jurisdiction in tort cases . . . has moved farther apart, not closer together in the United States and Europe” in recent years).

<sup>112</sup> See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J., dissenting) (“[W]ithin the European Union . . . the jurisdiction New Jersey would have exercised is not at all exceptional.”).

<sup>113</sup> Brand, *supra* note 18, at 99.

<sup>114</sup> *Pure Fishing*, 202 F. Supp. 2d at 917.

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

<sup>116</sup> *Id.* at 909 (“There is scant law interpreting Iowa’s version of the [Uniform Act], and none addressing the issue before the court.”). Recall that one major problem with regulating foreign judgments under state law is that state courts rarely hear Uniform Act cases, which are usually filed in or removed to federal court on the basis of diversity jurisdiction, and thus federal court interpretations of the Act are often nothing more than best guesses as to what a state court would have done under the circumstances. *Supra* notes 91–94 and accompanying text.

out-of-state precedent as a proxy for the Iowa judiciary's instruction, noting that “[c]ourts of other jurisdictions” have applied the mirror image rule.<sup>117</sup> But the court cited no constitutional *requirement* to follow this rule, and indeed did not even examine the text of the Iowa Uniform Act in arriving at this answer. The dismissal of the *Pure Fishing* judgment creditor's motion for summary judgment suggests the declining enforceability of foreign judgments as U.S. personal jurisdiction jurisprudence becomes progressively narrower.

Because few published U.S. cases decline to enforce a foreign tort judgment on the basis of lack of personal jurisdiction alone, one might ask why it is so critical for the United States to clarify the constitutional parameters of jurisdictional filters. First, published cases are not the best barometer of what is actually happening in the courts, since most judgment enforcement cases are decided at the summary judgment stage and presumably do not result in published decisions.<sup>118</sup> Second, even if such cases do not often appear currently, they could become more common as U.S. tort jurisdiction practices become increasingly narrow compared to dominant international practices.<sup>119</sup> And third, even if the problem remains theoretical, it will nonetheless be a theoretical problem that, if left unresolved, could impede the successful negotiation of the proposed judgments treaty.<sup>120</sup>

### C. Review of Foreign Court Procedure Under Section 4(a)(1): International Due Process

This subsection advances the development of the international due process doctrine in Section 4(a)(1) cases (which review foreign due process) as a counterpoint to the mirror image rule applied in Section 4(a)(2) cases (which review foreign court jurisdiction). Under the international due process test, American courts ask only whether foreign procedures conformed to international norms of “basic fairness”<sup>121</sup>—as opposed to asking whether those procedures were compatible with Fourteenth Amendment due process strictures—to determine whether a foreign judgment is enforceable.

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<sup>117</sup> 202 F. Supp. 2d at 914.

<sup>118</sup> See LOWENFELD, *supra* note 4, at 472–73 (“In the absence of a treaty, enforcement in F-2 of a judgment of F-1 generally requires an action, often by some form of summary proceeding.”).

<sup>119</sup> Cf. *supra* notes 31–33 and accompanying text (discussing the differences between U.S. and European tort jurisdiction prior to the *McIntyre* decision).

<sup>120</sup> *Supra* notes 76–81 and accompanying text.

<sup>121</sup> See *Soc'y of Lloyds v. Webb*, 156 F. Supp. 2d 632, 640 (N.D. Texas 2001) (citing *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000), for the proposition that basic fairness is a necessary element of compatibility when assessing foreign procedures).

## 1. Statutory Basis of the Doctrine

The principal justification for the international due process test is comity,<sup>122</sup> which is important not only as a matter of foreign relations but also as “one of practice, convenience, and expediency.”<sup>123</sup> In other words, the goal is to avoid needless waste in transnational litigation. The Uniform Act drafters were cognizant of this goal. The drafters sought not only to increase the enforceability of foreign judgments in U.S. courts, but also to make it easier to enforce U.S. judgments abroad,<sup>124</sup> since reciprocity governs judgment enforcement in many legal systems.<sup>125</sup> With this objective in mind, Section 4(a)(1) of the Uniform Act mandates nonrecognition of “judgment[s] . . . rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law . . . .”<sup>126</sup> The word “system” indicates that foreign judgments ought not to be rejected for failure to conform to the exact procedural minutiae of U.S. constitutional due process.<sup>127</sup> This provision ultimately led courts to develop the doctrine of international due process.<sup>128</sup>

## 2. Judicial Elaboration of the Doctrine

The notion that U.S. courts need not hold foreign courts to the exact contours of American procedural standards has been long accepted. As early as 1895, the Supreme Court in *Hilton v. Guyot* announced that foreign judgments that are rendered “under a system

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<sup>122</sup> E.g., *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) (“Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance. However, the tribal court proceedings must afford the defendant the *basic tenets* of due process or the judgment will not be recognized by the United States.” (emphasis added)). Although *Wilson* does not use the language “international due process,” the “basic tenets” idea in enforcing tribal judgments is the same.

<sup>123</sup> *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971).

<sup>124</sup> See Unif. Foreign Money-Judgments Recognition Act, 13 U.L.A. pt. II at 1 (2005) (Prefatory Note), available at <http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf>.

<sup>125</sup> LOWENFELD, *supra* note 4, at 531 (“Many countries require a showing of reciprocity as a condition for recognizing or enforcing foreign judgments, but reciprocity is defined in a variety of ways.”).

<sup>126</sup> UFMJRA § 4(a)(1) (1962) (emphasis added); see also UFCMJRA § 4(b)(1).

<sup>127</sup> See *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476 (7th Cir. 2000) (arguing that the Uniform Act does not require foreign legal systems to “conform [their] procedural doctrines to the latest twist and turn of our courts” regarding due process).

<sup>128</sup> See, e.g., *id.* at 476–77 (“[W]e interpret ‘due process’ in the [Uniform Act] to refer to a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers.”).

of jurisprudence likely to secure an impartial administration of justice” have a generally preclusive effect.<sup>129</sup>

Since the turn of the millennium, globalization and the concurrent boom in international litigation have led courts to elaborate upon and expand the rule announced long ago in *Hilton*. The international due process test has evolved to review the acceptability of foreign procedures in the judgment enforcement context.<sup>130</sup> International due process is “less stringent” than the due process standards required by U.S. law: U.S. courts look only to the “basic fairness” of foreign procedure to determine the enforceability of a foreign judgment.<sup>131</sup> Indeed, many courts have acknowledged that if American courts were to scrutinize every foreign proceeding under the lens of U.S. constitutional “due process,” it is likely that no foreign judgment would be enforceable at all.<sup>132</sup> As explained by Judge Posner, the doctrine acknowledges that we should not “bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of our courts regarding” what constitutes procedural fairness.<sup>133</sup> Therefore, U.S. courts review foreign procedures according to internationally recognized standards of basic procedural fairness, rather than according to the specific requirements of Fourteenth Amendment due process.

The international due process doctrine matured over the course of the *Lloyd’s* litigation, a series of judgment enforcement cases in the early 2000s. By way of background, these cases all arose out of a single “insurance scandal of international proportions”<sup>134</sup> over the course of which *Lloyd’s* of London solicited thousands of wealthy American investors to sign off as “Names.”<sup>135</sup> The solicitation of Americans was no accident—at the time these new Names were recruited, *Lloyd’s* already knew that the impending asbestos crisis was

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<sup>129</sup> 159 U.S. 113, 202 (1895).

<sup>130</sup> See generally Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1160 (2007) (explaining the “international due process” analysis as a means for courts to review foreign judgments).

<sup>131</sup> See *Soc’y of Lloyds v. Webb*, 156 F. Supp. 2d 632, 640–41 (N.D. Tex. 2001) (referring to the “basic fairness” of foreign procedures as the litmus test used in assessing foreign judgments).

<sup>132</sup> See *id.* at 643 (emphasizing that requiring foreign remedies to duplicate those available under American law would “render all forum selection clauses worthless”) (citing *Haynsworth v. The Corp.*, 121 F.3d 956, 969 (5th Cir. 1997)).

<sup>133</sup> *Ashenden*, 233 F.3d at 476.

<sup>134</sup> Courtland H. Peterson, *Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd’s of London Cases*, 60 LA. L. REV. 1259, 1261 (2000).

<sup>135</sup> *Id.* at 1261–62. In *Lloyd’s* parlance, “Names” are essentially unlimited-liability investors in a certain reinsurance pool or “syndicate.” *Id.* at 1262.

going to require a vastly greater pool of assets.<sup>136</sup> The eventual fallout resulted in a series of English judgments for Lloyd's.<sup>137</sup>

Lloyd's proceeded to seek enforcement of the English judgments in several American jurisdictions—and succeeded magnificently.<sup>138</sup> Indeed, by 2005 these cases were so numerous that one judge on the Southern District of New York wrote that “[a]t least fourteen federal and state courts have reviewed judgments for Lloyd's against other Names and have enforced them under state laws substantially similar to New York's Recognition Act.”<sup>139</sup>

The most influential decision in this series of cases—and the one that would crystallize the international due process doctrine—is *Society of Lloyd's v. Ashenden*,<sup>140</sup> decided by the Seventh Circuit in 2000. *Ashenden* concerned a challenge by the American judgment debtors to the fairness of the English proceedings under Illinois's version of the Uniform Act,<sup>141</sup> which provides for nonrecognition of judgments rendered under a system that does not provide procedures compatible with due process.<sup>142</sup>

In a unanimous opinion, Judge Posner dismissed the defendants' claim that the English court system did not provide procedures com-

<sup>136</sup> Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 988–89 (10th Cir. 2005) (quoting *Webb*, 156 F. Supp. 2d at 634–36).

<sup>137</sup> The “General Undertaking Agreement” between Lloyd's and the Names provided for dispute resolution in the English court system and under English law, including the Lloyd's Act of 1982 which granted certain immunities to the Lloyd's Corporation and gave it sweeping bylaw-making powers. *Id.* at 988. When the English courts decided that Lloyd's was able to use those powers to essentially excuse itself from liability amounting to £1 billion, as well as to appoint agents to bind Names to a settlement plan without their express consent, Lloyd's sued those Names who had refused to comply with the settlement. The English courts found for Lloyd's despite claims by the investors of fraud and the lack of a binding legal obligation on their part. *Id.* at 990–91 (citing English cases).

<sup>138</sup> E.g., Soc'y of Lloyd's v. Siemon-Netto, 457 F.3d 94 (D.C. Cir. 2006); Soc'y of Lloyds v. Blackwell, 127 F. App'x 961 (9th Cir. 2005); Soc'y of Lloyds v. Borgers, 127 F. App'x 959 (9th Cir. 2005); *Reinhart*, 402 F.3d 982; Soc'y of Lloyd's v. Collins, 284 F.3d 727 (7th Cir. 2002); Soc'y of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002); Soc'y of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000); Tropf v. Corp. of Lloyd's, No. 07 Civ. 414 (NRB), 2008 WL 5758763 (S.D.N.Y. Mar. 26, 2008), *aff'd*, 385 F. App'x 36 (2d Cir. 2010); Soc'y of Lloyd's v. Hamilton, 501 F. Supp. 2d 248 (D. Mass. 2007); Soc'y of Lloyd's v. Sumerel, No. 2:06-cv-329-FtM-29DNF, 2007 WL 2114381 (M.D. Fla. July 20, 2007); Soc'y of Lloyd's v. Edelman, No. 03 Civ.4921 (WHP), 2005 WL 639412 (S.D.N.Y. Mar. 21, 2005); Soc'y of Lloyd's v. Abramson, No. 303MC001-P, 2004 WL 690878 (N.D. Tex. 2004); Soc'y of Lloyd's v. Mullin, 255 F. Supp. 2d 468 (E.D. Pa. 2003), *aff'd*, 96 F. App'x 100 (3d. Cir. 2004); *Webb*, 156 F. Supp. 2d 632.

<sup>139</sup> *Edelman*, 2005 WL 639412, at \*4.

<sup>140</sup> *Ashenden*, 233 F.3d 473.

<sup>141</sup> *Id.* at 476.

<sup>142</sup> The Illinois Act's provisions for inconclusiveness of judgments are an exact copy of the Uniform Act's. See 735 ILL. COMP. STAT. ANN. 5/12-621 (West 1982); Uniform Act § 4.

patible with due process as “border[ing] on the risible.”<sup>143</sup> According to the Seventh Circuit, what was important was *not* whether the English courts adhered to the exact requirements of U.S. due process jurisprudence, but rather whether the English courts adhered to *international* notions of procedural fairness.<sup>144</sup> Citing *Hilton*, Posner held that foreign judgments must only be scrutinized under “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations.”<sup>145</sup> He proclaimed that “[w]e’ll call this the ‘international concept of due process’ to distinguish it from the complex concept that has emerged from American case law.”<sup>146</sup>

The trend caught on. In subsequent cases recognizing the English judgments, U.S. courts declared that, for example, “the foreign proceedings need not comply with the traditional rigors of American due process to meet the requirements of enforceability” under the Texas Recognition Act;<sup>147</sup> that “[t]he procedures the English courts afford need not be identical to ours, they must only be compatible in that they do not offend the notion of basic fairness”;<sup>148</sup> and that the “numerous [English] proceedings . . . [afforded] ample opportunities for hearings and appeals.”<sup>149</sup> The English procedures in the *Lloyd’s* cases were approved unanimously in all the district and circuit courts of appeal in which they had been litigated.<sup>150</sup>

The *Lloyd’s* cases demonstrate that the Fourteenth Amendment does not categorically prohibit recognition and enforcement of foreign judgments rendered according to procedures that would have been due process violations under the technicalities of U.S. law,<sup>151</sup> even when the judgment debtor is American.<sup>152</sup> Yet, as discussed above,

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<sup>143</sup> *Ashenden*, 233 F.3d at 476.

<sup>144</sup> *Id.* at 476–77 (emphasis added).

<sup>145</sup> *Id.* at 477 (citing *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895)) (interpreting due process as a simple concept of fair procedure).

<sup>146</sup> *Id.*

<sup>147</sup> *Soc’y of Lloyd’s v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002).

<sup>148</sup> *Soc’y of Lloyd’s v. Reinhart*, 402 F.3d 982, 994 (10th Cir. 2005).

<sup>149</sup> *Soc’y of Lloyds v. Webb*, 156 F. Supp. 2d 632, 642 (N.D. Tex. 2001).

<sup>150</sup> See *Soc’y of Lloyd’s v. Blackwell*, 127 F. App’x at 961, 962 (9th Cir. 2005) (holding that the English judgments are enforceable under California law and noting that “[o]ur sister circuits have reached the same conclusions in materially similar cases”); *Soc’y of Lloyd’s v. Hamilton*, 501 F. Supp. 2d 248, 253 (D. Mass. 2007) (noting that no American court that has ruled on the issue has found that the English proceedings during the Lloyd’s litigations were not conducted in accordance with due process).

<sup>151</sup> For instance, the *Ashenden* court called its own finding that the challenged English procedures would not have violated U.S. due process standards “unnecessary[ly]” to the ultimate determination of whether to enforce the English judgments. *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 479 (7th Cir. 2000).

<sup>152</sup> Because “the idea that foreign nationals acting in foreign countries can claim U.S. constitutional rights is both highly controversial and contrary to other Supreme Court

U.S. courts treat review of foreign jurisdiction differently. Whereas *international* standards of due process govern review of foreign court procedures, *domestic* due process standards continue to control review of foreign jurisdiction.<sup>153</sup> This is despite the fact that personal jurisdiction is also regulated by the Fourteenth Amendment's Due Process Clause.<sup>154</sup> It also ignores the fact that, because of the messy state of specific jurisdiction law, whether or not a foreign court in any given case "happen[s] to conform" to American due process norms will similarly "be sheer accident."<sup>155</sup> The remainder of this Note suggests that American courts could liberalize jurisdictional filters while remaining within constitutional bounds by extending the international due process doctrine to review of jurisdiction.

### III

#### CONSIDERING AN ALTERNATE RULE FOR REVIEW OF FOREIGN COURT JURISDICTION

The rationale that drove the development of the international due process doctrine—that foreign judgments “would never be enforced in the United States”<sup>156</sup> if courts reviewed foreign court procedure under U.S. due process standards—applies equally to review of foreign jurisdiction.

Subpart A reiterates that there is no compelling statutory or constitutional reason to prevent U.S. courts from discarding the mirror

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precedent,” Lea Brilmayer and Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 617, 633 (2012), one might argue that there is no reason for U.S. courts to refuse recognition and enforcement of a foreign judgment on jurisdictional grounds when the party resisting enforcement is a foreigner. The ALI reporters alluded to this idea in their commentary to the draft federal legislation on recognition and enforcement of foreign judgments: The draft envisioned that “any given assertion of jurisdiction could be subject to challenge as ‘unreasonable or unfair’ . . . in consideration of the nature of the claim *and the identity of the parties.*” AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 6 cmt. c (emphasis added). For a general discussion of the ALI Project, see *supra* note 82. Although this more limited rule would presumably result in an increased rate of recognition of foreign judgments, it would also seriously disadvantage foreign litigants compared to their U.S. counterparts.

<sup>153</sup> Compare *Ashenden*, 233 F.3d at 477 (applying international standards to review foreign due process), with *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905, 917 (N.D. Iowa 2002) (applying domestic standards to review of foreign court jurisdiction).

<sup>154</sup> E.g., *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (under the Fourteenth Amendment, “the validity of . . . judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law”).

<sup>155</sup> *Ashenden*, 233 F.3d at 478.

<sup>156</sup> *Soc'y of Lloyds v. Webb*, 156 F. Supp. 2d 632, 641 (N.D. Tex. 2001).

image rule and substituting international norms as the standard for reviewing foreign court jurisdiction. It then suggests that such a rule could easily be applied via reference to the firmly-established international consensus regarding “exorbitant” bases of jurisdiction.<sup>157</sup> Sub-part B explains how such a rule could foster success in the ongoing attempts to negotiate an international convention regulating the circulation of judgments.

#### *A. Applying International Due Process to Review of Foreign Court Jurisdiction*

While it may seem anomalous for U.S. courts to require foreign courts’ adherence to U.S. due process standards in some areas but not in others, several possible reasons may explain this discrepancy.

First is the wording and structure of the Uniform Act, which separates review of foreign procedure and review of foreign jurisdiction.<sup>158</sup> Recall that while courts have read Section 4(a)(1)’s reference to foreign judicial “system[s]” to require the application of international rather than domestic due process norms,<sup>159</sup> no comparable language in Section 4(a)(2) indicates which standard should govern review of foreign court jurisdiction.<sup>160</sup> Courts have generally read 4(a)(2) to require application of domestic rules.<sup>161</sup> Yet Section 4(a)(2) may be amenable to a more flexible interpretation.

Recall that Section 5(b) of the Act allows courts to “recognize other bases of jurisdiction” of the rendering court not enumerated in Section 5(a). The intent of subsection (b) is to “make[ ] clear that the Act does not prevent the courts in the enacting state from recognizing foreign judgments rendered on the bases of jurisdiction not mentioned in the Act.”<sup>162</sup> There is therefore broad statutory leeway for courts to interpret Section 5 more liberally than they have in the past—that is, to conclude that the permitted bases of foreign jurisdiction under the Uniform Act are *broader* than what the mirror image rule would suggest. Nor would a broader rule necessarily be, in itself, a violation of the Fourteenth Amendment; the *Lloyd’s* cases suggest that recogni-

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<sup>157</sup> Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474 (2006); *see also infra* notes 169–76 and accompanying text.

<sup>158</sup> Compare UFMJRA § (4)(a)(1) (1962) (“A foreign judgment is not conclusive if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law . . . .”), *with* UFCMJRA § 4(b)(2) (2005) (stating that a foreign judgment is not conclusive if “the foreign court did not have personal jurisdiction over the defendant”).

<sup>159</sup> *Supra* notes 128–33 and accompanying text.

<sup>160</sup> See Uniform Act § 4(a)(2).

<sup>161</sup> *Supra* notes 96–107 and accompanying text.

<sup>162</sup> Uniform Act § 5(b) cmt.

tion should not be denied solely on the basis that the same judgment would have been unconstitutional had it been rendered by a U.S. court.<sup>163</sup>

Second, the international due process doctrine purports to apply to review of the fairness of the foreign *system* as a whole, rather than the particular procedures.<sup>164</sup> Under this conception of the international due process doctrine, it might seem excessive to rubber stamp foreign jurisdiction just because U.S. courts think that a foreign legal system is overall a fair one. Given the continued existence of “exorbitant bases” of jurisdiction in countries with otherwise respected judicial systems,<sup>165</sup> such a rule would allow for enforcement of judgments

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<sup>163</sup> *Supra* notes 151–55 and accompanying text. Note that under current law, there is at least one area in which the mirror image rule is statutorily mandated: foreign libel judgments. As a response to the perceived problem of “libel tourism,” Congress in 2010 adopted the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), Pub. L. No. 111-223, 124 Stat. 2380 (2010) (codified at 28 U.S.C. §§ 4101–4105 (2012)), the main effect of which is to prohibit the recognition and enforcement of foreign libel judgments absent a showing that the judgment debtor would have been subject to defamation liability under U.S. First Amendment law. 28 U.S.C. § 4102(a)(1)(B) (“[A] domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that . . . the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation [under U.S. First Amendment law] . . . .”). The SPEECH Act also expressly mandates the mirror image rule in the foreign libel judgment context. 28 U.S.C. § 4102(b) (requiring that “the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States”). The SPEECH Act’s mirror image rule has been criticized as “parochial[ ]” due to its failure to “credit the possibility that other countries might instantiate constitutional limits on adjudicatory jurisdiction in defensibly different ways than the United States.” Mark D. Rosen, *The SPEECH Act’s Unfortunate Parochialism: Of Libel Tourism and Legitimate Pluralism*, 53 VA. J. INT’L L. 99, 106 (2012). However, the SPEECH Act is expressly limited to the area of libel judgments, which would most likely be excluded from the scope of any Hague Judgments Convention. See *Annotated Checklist*, *supra* note 16, at 16 (envisioning that a judgments convention could “include a specific exclusion from scope [of defamation judgments]” or otherwise allow limitations on their enforcement on public policy grounds (quotation marks omitted)).

<sup>164</sup> See, e.g., Soc’y of Lloyd’s v. Ashenden, 233 F.3d 473, 476–78 (7th Cir. 2000) (distinguishing an attack on a foreign “legal system *en gross*” from attacking specific proceedings under “the requirements of due process of law,” and concluding that the Uniform Act under review, “with its reference to ‘system,’ does not support” the latter approach).

<sup>165</sup> See *infra* notes 173–81 and accompanying text for a discussion of exorbitant bases of jurisdiction and how they might be employed in forming an international due process–like rule for the review of foreign court jurisdiction. One example of exorbitant jurisdiction is the French courts’ willingness to assert personal jurisdiction on the basis of plaintiff nationality. Clermont & Palmer, *supra* note 157, at 474. The United States itself exercises several bases of jurisdiction that the international community would deem exorbitant including “general jurisdiction based solely on transient physical presence, the attachment of property, or extensive business activities unrelated to the cause of action.” *Id.*

rendered on bases of jurisdiction widely deemed excessive among the international community.

Yet, a closer look at what courts are actually doing in international due process cases suggests that they are not simply looking at the foreign “system,” but rather are giving much more weight to the specific foreign procedures that led to the judgment at issue. For example, the *Ashenden* court first dismissed the judgment debtors’ attacks on the specific English law in question as a “retail approach” to review of foreign due process.<sup>166</sup> But the court then spent several pages “for the sake of completeness apply[ing] [the international concept of due process] to the particulars of these judgments.”<sup>167</sup> Ultimately, the Seventh Circuit concluded that the English court’s determinations were “not so unreasonable that it could be thought [of as] a denial of international due process even if international due process had a substantive component.”<sup>168</sup>

The same pattern of examining the specifics of foreign proceedings—rather than attempting to evaluate the fairness of foreign judicial systems as a whole—can be found in cases *denying* enforcement based on Section 4(a)(1) of the Uniform Act. For example, the Southern District of Florida in *Osorio v. Dole Food Co.*<sup>169</sup> seems not to have applied 4(a)(1)’s “system” language in reviewing procedural due process.<sup>170</sup> Rather, it spent most of the opinion considering the

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<sup>166</sup> 233 F.3d at 477.

<sup>167</sup> *Id.* at 478–81.

<sup>168</sup> *Id.* at 480–81.

<sup>169</sup> 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

<sup>170</sup> It did, however, apply the systemic test to reviewing the fairness of Nicaraguan tribunals, concluding that “Nicaragua lacks impartial tribunals” despite professing discomfort about “sitting in judgment of another nation’s judicial system.” *Id.* at 1347. Recall that Section 4(a)(1) denies preclusive effect to judgments “rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.” As the Southern District of Florida’s discomfort in evaluating the Nicaraguan legal system suggests, perhaps another argument in favor of explicitly exchanging the international due process test for review of procedures in each individual case could be that the current framing of the doctrine essentially asks courts “to label countries [as] ‘civilized’ and ‘uncivilized,’” which is a decision fraught with political consequences. See *Carodine*, *supra* note 130, at 1160 (arguing that the current international due process analysis requires judges to make foreign policy when determining whether a foreign court system is fundamentally fair); cf. *Osorio*, 665 F. Supp. 2d at 1345 (“[C]ivilized nations simply do not subject foreign defendants to the type of discriminatory laws and procedures mandated by [the Nicaraguan statute under review] . . .”). Because it took a systemic view of reviewing the Nicaraguan judicial system and a piecemeal view of reviewing Nicaraguan due process, the court in *Osorio* seems to have read the word “system” in the Florida equivalent of Section 4(a)(1) as modifying the phrase “which does not provide impartial tribunals,” but not as modifying the phrase “under . . . procedures compatible with the requirements of due process of law.” Indeed, the language of Section 4(a)(1) itself is ambiguous regarding this point.

"compatibility with the 'international concept of due process'" of a specific Nicaraguan statute.<sup>171</sup>

This Note thus assumes that courts applying an international due process-type rule in reviewing foreign court jurisdiction would look to the specific exercise of jurisdiction in a given case and determine whether it accorded with international standards. They would not attempt to pass any determination on the foreign legal system as a whole.

The logical next question is how such a test might be applied in practice. Of course, the difficulty of discerning what exactly falls under the "concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations" has not impeded the development of the international due process doctrine itself.<sup>172</sup> However, to answer this question courts may find extant international treaties on recognition and enforcement of foreign judgments helpful, along with the preparatory documents of the Hague Judgments Project itself.

One way to ascertain accepted principles of jurisdiction is by examining principles that fail to qualify. The international community has broadly outlined the contours of "exorbitant jurisdiction," or "jurisdiction exercised validly under a country's rules that nevertheless appears unreasonable," and thus is "condemn[ed] [] as inappropriate from an international standpoint."<sup>173</sup> In general, a judgment rendered on an exorbitant jurisdictional basis will be refused recognition and enforcement outside of the rendering country.<sup>174</sup> Extant regional and bilateral treaties on jurisdiction and judgments include prohibited bases of jurisdiction, thus indicating some of the jurisdictional bases deemed exorbitant by the international community. For instance, Article 3 of the European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters named particular domestic-law bases of jurisdiction that the Convention rendered impermissible.<sup>175</sup> Articles 14 and 15 of the

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<sup>171</sup> *Osorio*, 665 F. Supp. 2d at 1326–27 (explaining that "[a] foreign judgment cannot be recognized in Florida if it was 'rendered under a system which does not provide . . . procedures compatible with the requirements of due process of law'" and applying the "'international concept of due process' [to] evaluate the provisions of [the foreign statute under review]" (internal citations omitted)); *see id.* at 1326–45 (analyzing whether the Nicaraguan statute conforms to the requirements of international due process).

<sup>172</sup> *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000); *see also supra* notes 145–49 and accompanying text (discussing the international due process doctrine).

<sup>173</sup> *Clermont & Palmer*, *supra* note 157, at 476.

<sup>174</sup> *Id.* at 475.

<sup>175</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 3, 1972 O.J. (L 229) 32 (EC), available at <http://curia.europa.eu/common/reddoc/convention/en/c-textes/brux-idx.htm>.

French Civil Code, which permit personal jurisdiction over any defendant so long as the plaintiff is a French domiciliary,<sup>176</sup> and the United Kingdom's common law "tag jurisdiction" rule,<sup>177</sup> were included in the list.

Perhaps the best indicator of international consensus regarding acceptable jurisdictional bases, however, can be found in the Hague Conference's 2001 Preliminary Draft Convention on Jurisdiction and Foreign Judgments.<sup>178</sup> American participation suggests that the draft reflects a transcontinental discussion about the acceptable bases of jurisdiction in the international context, rather than just a regional consensus.<sup>179</sup> Article 18 of that instrument defines a "prohibited ground[ ] of jurisdiction" as one that does not require a "substantial connection between [a contracting] State and the dispute."<sup>180</sup> It then identifies specific prohibited bases, including tag jurisdiction, plaintiff nationality, and "the unilateral designation of the forum by the plaintiff."<sup>181</sup>

In addition to the restricted bases found in Article 18, the Draft Convention provided for specific tort jurisdiction *only* where either the defendant committed a tortious act or omission in the forum or the defendant acted outside the forum but could "reasonably have foreseen that the act or omission could result in an injury of the same nature in that State."<sup>182</sup> This provision was likely a capitulation to the Americans,<sup>183</sup> who regarded a pure place of injury test "as being too severe on the person who is alleged to be responsible."<sup>184</sup> Although such a rule does not capture the exact contours of cases like *Asahi* and *McIntyre*, it does reflect an international attempt to accommodate the American concern about fairness to defendants. Under a rule that fol-

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<sup>176</sup> *Id.* (citing CODE CIVIL [C. Civ.] arts. 14–15 (Fr.)).

<sup>177</sup> *Id.* Tag jurisdiction, also called "transient jurisdiction," is the common law rule that personal jurisdiction may be premised solely on service of process upon the defendant while he is physically present in the state. *See generally* *Burnham v. Superior Court*, 495 U.S. 604, 610–17 (1990) (discussing the historical roots of transient jurisdiction). In *Burnham*, the U.S. Supreme Court upheld the continued practice of tag jurisdiction in the United States in the face of a due process challenge. *Id.* at 628 ("[T]he Due Process Clause does not prohibit [state] courts from exercising jurisdiction over [a defendant] based on the fact of in-state service of process . . . .").

<sup>178</sup> *Preliminary Draft Convention*, *supra* note 59. For historical context on the Draft Convention, see *supra* notes 38–40 and accompanying text.

<sup>179</sup> *See supra* notes 55–60 and accompanying text (discussing concessions made to address American concerns in the Preliminary Draft Convention).

<sup>180</sup> *Preliminary Draft Convention*, *supra* note 59, at 9.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 7.

<sup>183</sup> *See Silberman, supra* note 37, at 330 (explaining that article 10(1)(b) "may fall short of U.S. constitutional requirements").

<sup>184</sup> *Preliminary Draft Convention*, *supra* note 59, at 61.

lowed the guidance of the Preliminary Draft Convention, therefore, U.S. courts would be capable of recognizing and enforcing the hypothetical “reverse-*McIntyre*” case, in which the defendant reasonably could have foreseen that an injury would take place in the forum.<sup>185</sup> However, U.S. courts would be under no obligation to recognize and enforce the E.U. *Bier B.V.* case, which permitted jurisdiction at the place where the tort occurred, regardless of whether the defendant could have foreseen such occurrence.<sup>186</sup>

### *B. How International Due Process Could Facilitate Future Treaty Negotiations*

By applying international standards of fairness as jurisdictional filters, U.S. courts could remove the roadblock of constitutional uncertainty from the judgments treaty negotiations. Thus far, uncertainty regarding the constitutional bounds of jurisdictional filters has prevented American diplomats from confidently endorsing previous iterations of the Hague Judgments Project.<sup>187</sup> However, with clear instructions from U.S. courts that the Fourteenth Amendment does not mandate the mirror image rule, the current American delegation to the Hague will not face the same problem. To the contrary, the delegation will be able to confidently promise broader enforcement of foreign tort judgments, which was the *quid pro quo* that was missing in past negotiations.<sup>188</sup>

Just as the United States would be unable to enter into a treaty requiring the passage of a constitutionally prohibited *ex post facto* law,<sup>189</sup> the United States cannot realistically sign a judgment enforcement treaty including jurisdictional filters provisions that violate due process.<sup>190</sup> An international judgments treaty would contain jurisdictional filters provisions reflecting international consensus.<sup>191</sup> But if the mirror image rule is constitutionally mandated, and if using broader international standards as jurisdictional filters is therefore unconstitu-

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<sup>185</sup> This hypothetical scenario is elaborated *supra* notes 74–75 and accompanying text.

<sup>186</sup> The *Bier* case is discussed *supra* notes 34–35 and accompanying text.

<sup>187</sup> See *supra* Part II.B (discussing how constitutional uncertainty played into past Hague negotiations).

<sup>188</sup> *Supra* notes 77–81 and accompanying text.

<sup>189</sup> See *Reid v. Covert*, 354 U.S. 1, 16 (1957) (“[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”).

<sup>190</sup> See *supra* Part I.B (explaining why the United States would be unlikely to join such a convention).

<sup>191</sup> *Preliminary Draft Convention*, *supra* note 59 (incorporating international consensus in its provisions for direct jurisdiction and jurisdictional filters); see *supra* notes 59–62 and accompanying text.

tional, then realistically the United States will never be able to approve such jurisdictional filters provisions.<sup>192</sup> The treaty-making power is not an avenue for the U.S. government to circumvent its own constitutional limitations.<sup>193</sup>

Yet it has been constitutional uncertainty, and not constitutional prohibition *per se*, that has plagued the Hague Judgments negotiations thus far.<sup>194</sup> It is impossible to say whether U.S. courts believe that the mirror image rule is constitutionally required.<sup>195</sup> Recall the reverse-*McIntyre* hypothetical,<sup>196</sup> in which a U.S. court is asked to enforce a Dutch tort judgment rendered on facts insufficient to support personal jurisdiction under U.S. law. The U.S. court would likely apply the prevailing mirror image rule, declining to recognize and enforce the Dutch judgment. However, like its counterparts in cases such as *Pure Fishing*, the U.S. court would be unlikely to adequately articulate a statutory or constitutional basis for such refusal.<sup>197</sup>

What is the present U.S. delegation to the Hague supposed to do in the face of such vague instructions from U.S. courts? Given that “[t]he mere possibility of a due process violation” has been “sufficient to prevent the United States from being constitutionally able to be a party to a convention,”<sup>198</sup> the United States is unlikely to enter into any judgments treaty before this jurisprudence changes.

On the other hand, if the U.S. court in “reverse-*McIntyre*” were to follow the prescription provided in this Note, replacing the mirror image rule with an international due process-type test for jurisdictional filters, this problem would disappear. The rule could easily be treatified, because the delegates would be confident that it does not amount to a constitutional violation. With such instructions in hand, the American delegations would be able to fully support the outcome of the Hague Judgments Project.

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<sup>192</sup> *Supra* notes 77–81 and accompanying text; cf. Stanley E. Cox, *Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 ALB. L. REV. 1177, 1190 (1998) (noting that most federal courts have found that the mirror image rule is constitutionally required).

<sup>193</sup> *Reid*, 354 U.S. at 16.

<sup>194</sup> *Supra* Part I.B.

<sup>195</sup> See *supra* notes 95–106 and accompanying text (discussing cases in which U.S. courts applied the mirror image rule but did not articulate a constitutional basis for doing so).

<sup>196</sup> This hypothetical scenario is elaborated *supra* notes 74–75 and accompanying text.

<sup>197</sup> See *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905, 914, 917 (N.D. Iowa 2002) (applying the mirror image rule without engaging in independent statutory or constitutional analysis because “[c]ourts of other jurisdictions . . . have” required that rule, and denying recognition and enforcement of an Australian judgment for lack of personal jurisdiction).

<sup>198</sup> Brand, *Hague Conference*, *supra* note 65, at 705.

## CONCLUSION

It is unlikely that the United States will be a party to successful negotiation of an international judgments convention until the standard for reviewing foreign court jurisdiction is clarified, liberalized, and made uniform. Until the United States clarifies whether and to what extent there are constitutional limits on jurisdictional filters, any attempts to negotiate an international convention regulating recognition and enforcement of judgments would run into constitutional trouble. By adapting the international due process rule to the review of foreign court jurisdiction, U.S. judges can make the delegates' objectives much easier to accomplish. This rule will not only facilitate the negotiation of a multilateral judgments convention, but will also generally serve the interests of comity and more closely align U.S. judgment recognition standards with those of the international community.