

UNDERSTANDING THE OBSTACLES TO THE  
RECOGNITION AND ENFORCEMENT OF  
U.S. JUDGMENTS ABROAD

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I.	INTRODUCTION .....	965
II.	CONCERNS FOR THE NATIONAL SOVEREIGNTY OF THE RECOGNITION STATE .....	969
III.	PUBLIC INTEREST .....	975
IV.	SUBTLE CHANGES TO RECOGNITION DOCTRINE IN RESPONSE TO U.S. LITIGATION .....	978
	1. <i>State Power</i> .....	981
	2. <i>Fundamental Differences in Procedural Systems and Information Asymmetries</i> .....	987
	3. <i>Preferences of Individuals and Groups</i> .....	990
V.	CONCLUSION .....	998

I. INTRODUCTION

Questions of recognition and enforcement of foreign judgments have entered center stage. Recent empirical work suggests that there has been a marked increase in the frequency with which U.S. courts are asked to recognize and enforce foreign judgments.<sup>1</sup> The U.S. litigation surrounding a multibillion-dollar Ecuadoran judgment against Chevron indicates that the stakes in some of these cases can be very high indeed.<sup>2</sup> Conversely, we learn that U.S. injunctions in patent

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1. Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 Sw. J. INT'L L. 31, 35–36 (2011).

2. *See, e.g.*, Patton Boggs LLP v. Chevron Corp., 683 F.3d 397 (D.C. Cir. 2012) (upholding district court's decision, among others, that Ecuadoran plaintiffs' U.S. firm had failed to state a claim with regard to its allegation that defendant's counsel had tortuously interfered with its contractual relationship with the plaintiffs); *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012) (reversing the district court's injunction against Ecuadoran judgment holders preventing them from enforcing their judgment anywhere outside the Republic of Ecuador); *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235 (S.D.N.Y. 2012) (granting partial summary

cases, an area where enforcement abroad is likely to be particularly tricky, nevertheless include a substantial number of cases in which U.S. judgments will need to be recognized and enforced abroad to be effective.<sup>3</sup> Although we do not know for sure, the same may well be true of U.S. judgments in subject-matter areas other than patent law. This rising importance of questions of judgments recognition has not been lost on lawmakers. In November of 2011, the Subcommittee on Courts, Commercial and Administrative Law of the U.S. House of Representatives' Judiciary Committee held hearings on whether to adopt federal legislation on the question of recognizing and enforcing foreign judgments in the United States.<sup>4</sup> And at the Hague Conference of Private International Law, the project to enter into a world-wide convention on the recognition of foreign judgments—begun in the 1990s and later shelved—has just been put on the agenda for further study.<sup>5</sup>

One of the central questions in determining the relevant U.S. interests in support of (or in opposition to) both a federal

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judgment for Chevron on its complaint based on RICO and other fraud causes of action against the Ecuadoran lead plaintiffs and their attorneys and dismissing affirmative defenses based on *res judicata* and collateral estoppel of the Ecuadoran judgment).

3. See Marketa Trimble, *Cross-Border Injunctions in U.S. Patent Cases and Their Enforcement Abroad*, 13 MARQ. INTELL. PROP. L. REV. 331, 335–45 (2009).

4. 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. (2011), *available at* [http://judiciary.house.gov/hearings/hear\\_11152011\\_2.html](http://judiciary.house.gov/hearings/hear_11152011_2.html). A year earlier, Congress entered the area for the narrow purpose of “prohibit[ing] recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services” in U.S. courts unless certain minimum requirements are met. Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (codified as amended in 28 U.S.C. ch. 181).

5. Council on General Affairs and Pol’y of the Conference, Hague Conference on Private Int’l Law, Conclusions and Recommendations Adopted by the Council 3 (Apr. 17–20, 2012), [http://www.hcch.net/upload/wop/gap2012concl\\_en.pdf](http://www.hcch.net/upload/wop/gap2012concl_en.pdf) (“the Council decided to establish a Working Group whose initial task shall be to prepare proposals for consideration by a Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters.”). The earlier effort to negotiate a world-wide treaty on jurisdiction and the recognition of judgments did, however, produce a treaty with a much narrower scope. Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

judgments project and the negotiations at The Hague is how U.S. judgments are currently treated abroad. The answer is simply: It depends. On the one hand, there are jurisdictions that liberally recognize and enforce U.S. judgments coming their way, at least as a general matter. At the other end of the spectrum, there are a number of countries where U.S. judgments are for the most part given no effect. In addition, the prospect of recognizing and enforcing a U.S. judgment abroad may depend on the domicile or the nationality of the defendant, the subject matter of the suit, the type of damages awarded, and the way the proceedings leading to the U.S. judgment were conducted.<sup>6</sup>

In this Article, I focus on the major obstacles U.S. judgment holders have encountered abroad as a matter of foreign recognition doctrine and analyze the reasons underlying these obstacles. Focusing on doctrinal obstacles is not, of course, a substitute for careful empirical study. However, it provides a good basis for understanding what types of problems U.S. judgment holders are likely to encounter and why. I propose that we distinguish those obstacles on the basis both of the purposes they are meant to serve and the way in which they have developed. Doing so, I think, represents an important step toward understanding how the effectiveness of U.S. judgments abroad can potentially be improved, whether through negotiations at The Hague or in other ways. Thus, I submit that the doctrinal obstacles identified pursue three distinct purposes: the protection of the sovereignty of the recognition state, the protection of other public interests of the recognition state, and the protection of the party against whom the U.S. judgment is to be used from what the recognition state views as substandard legal norms or procedural treatment.<sup>7</sup>

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6. See Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173 (2008) (examining enforcement of U.S. judgments abroad and the factors that impact foreign enforcement); see also Linda J. Silberman, *Some Judgments on Judgments: A View from America*, 19 KING'S L.J. 235 (2008) (discussing a proposal by the American Law Institute as well as policy and process considerations that may impact foreign enforcement).

7. For a more general discussion of some of the interests a jurisdiction may need to balance in crafting its recognition regime see, for example, I/2 REINHOLD GEIMER & ROLF A. SCHÜTZE, INTERNATIONALE URTEILSANERKENNUNG 1367–79 (1984); Arthur T. von Mehren & Donald T. Trautman, *Recog-*

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

I further suggest that we separate the doctrinal obstacles encountered by U.S. judgments holders abroad into two categories on the basis of how they have developed. The first category is the more obvious one. It consists of doctrines that were set in place some time ago and that apply to all judgments from jurisdictions with which the relevant country does not have a recognition treaty, including the United States. The second category is more subtle. It consists of slight changes to existing recognition doctrine that some foreign jurisdictions have adopted specifically in reaction to litigation in the United States. As we shall see, it is difficult to cleanly separate these two categories because reactions to U.S. litigation have not

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*tion of Foreign Adjudications: A Survey and A Suggested Approach*, 81 HARV. L. REV. 1601, 1603-05 (1968).

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

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only led to the second category of doctrinal obstacles, they have also influenced the interpretation of the first. But the realization that this second category exists leads one to question why foreign courts would occasionally interpret existing recognition requirements so as to generate new pockets of doctrine that prevent the recognition and enforcement of U.S. judgments in certain circumstances. The reason, I argue, is that recognition law is influenced, as is all law applicable to transnational litigation,<sup>9</sup> by four factors that tend to have implications beyond the interests of the parties in a particular case: power politics; domestic legal and procedural culture; the preferences of groups and individuals inside and outside the state apparatus; and relevant information asymmetries. In what follows, I address these matters in turn. My expertise is with the recognition of U.S. judgments in Europe, but I will add occasional references to other countries to the extent that I am knowledgeable about them.

## II. CONCERNS FOR THE NATIONAL SOVEREIGNTY OF THE RECOGNITION STATE

Concerns for the national sovereignty of the recognition state are the primary reason why countries today have rules on the recognition and enforcement of foreign judgments in the first place. With the advent of the nation state in the 17th century, the view quickly spread that judicial judgments are manifestations of state power, the effects of which stop at water's edge.<sup>10</sup> Consequently, in order for a judgment to have any effect outside the rendering state's territory, foreign states must first grant the judgment effect on their respective territories. The Dutch comity doctrine of the 17th century, which strongly influenced recognition practice in the United States,<sup>11</sup> softened this approach with a general policy (although not an obligation) in favor of recognizing foreign judgments. However, 19th century European nationalism strengthened the view that

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9. Cf. Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1371–78 (2004) (identifying factors distinguishing transnational from domestic litigation).

10. See, e.g., Dieter Martiny, *Anerkennung ausländischer Entscheidungen nach autonomen Recht*, in III/1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 14–16 (1984).

11. See *Hilton v. Guyot*, 159 U.S. 113, 163–66 (1895) (discussing the obligations of comity).

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the decision whether or not to grant foreign judgments any effect was entirely in the hands of the recognition state.<sup>12</sup> Thus, many of the continental European jurisdictions adopted a general rule of not recognizing foreign judgments while dealing with the practical difficulties arising from this rule by negotiating more liberal approaches in bilateral, and later multilateral, treaties with most of their trading partners.<sup>13</sup> In a number of nations, this is still the general approach today. However, since the United States has not concluded any treaties in this area, U.S. judgments for the most part are not recognized in these countries. This is true, among others, in Austria, China, Denmark, Finland, Norway, Sweden, and, to a lesser extent, in the Netherlands and Russia.<sup>14</sup>

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12. See, e.g., Martiny, *supra* note 10, at 16–21, 26–27 (discussing the recognition of foreign judgments in the territories that formerly belonged to the Holy Roman Empire after its dissolution in 1806). As a result, Italy, for instance, made recognition more difficult to obtain in the late 19th century, whereas Norway dropped its recognition-friendly code provision soon thereafter in favor of a general rule of non-recognition, still in force today. *Id.* at 27 n.161.

13. E.g., *id.* at 16–18; SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS: TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION 54–55 (2003) .

14. See, e.g., Michael J. Moser, *People's Republic of China*, in DISPUTE RESOLUTION IN ASIA 85, 94 (Michael Pryles ed., 2006) (stating that in absence of a treaty, the party needs to commence proceedings in a Chinese court); Gerhard Walter & Samuel P. Baumgartner, *General Report: The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS [hereinafter RECOGNITION AND ENFORCEMENT] 1, 9–10 &17–18 (Gerhard Walter & Samuel P. Baumgartner eds., 2000) (discussing recognition and enforcement in Austria, Denmark, Finland, the Netherlands, Norway, and Sweden). In many of these countries, the rule against recognizing foreign judgments has softened over the years. For instance, almost all of them will recognize and enforce foreign judgments in certain matters of family law; the Netherlands and Sweden will recognize judgments from courts that based their jurisdiction on a forum selection agreement between the parties; Finnish courts will recognize judgments in cases that could not have been brought in Finland for lack of personal jurisdiction or that pertain to property rights on immovable property located abroad; and the Dutch courts have interpreted their respective statute to proscribe the enforcement, but not the recognition, of foreign judgments, in addition to permitting enforcement in certain family law matters and in cases in which the defendant accepted the rendering court's jurisdiction. Walter & Baumgartner, *supra*. In Russia, the rule against recognizing and enforcing foreign judgments outside a treaty obligation to

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

The primary purpose of the requirement of proper service, for instance, is the same everywhere: to ensure that the defendant had adequate notice and an opportunity to defend.<sup>16</sup> However, service of process has also been viewed in continental Europe, at least since the 17th century, as an exercise of governmental power.<sup>17</sup> It contains, after all, an order to the defendant to participate in proceedings against him in a court of law or face serious consequences. In the United States, we may have lost sight of this aspect of service after de-

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the contrary has more recently been overcome in a number of courts if reciprocity is otherwise established. Dmitry Kurochkin, *Russia*, in 2 ENFORCEMENT OF FOREIGN JUDGMENTS, at 5–6 (Louis Garb & Julian Lew eds., 2011).

15. At least in Europe, a preference rule in case of inconsistent adjudications in the same matter by tribunals from different states is also usually cast in terms of a recognition requirement. On all of these conditions for recognition, see, for example, Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 13–26, 31–37 (1988); von Mehren & Trautman, *supra* note 7, at 1610–65; Walter & Baumgartner, *supra* note 14, at 21–35. Note that the French *Cour de cassation* abolished the French choice of law test in a 2007 decision involving the recognition of a U.S. judgment. *Cour de cassation* [Cass.] [supreme court for judicial matters] 1e civ., Feb. 20, 2007, Bull. Civ. I, No. 222 (Fr.); see *infra* note 44 and accompanying text.

16. *E.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §482(2)(b) (1987); Juenger, *supra* note 15, at 20; Walter & Baumgartner, *supra* note 14, at 24–25.

17. *E.g.*, THOMAS BISCHOFF, DIE ZUSTELLUNG IM INTERNATIONALEN RECHTSVERKEHR IN ZIVIL- ODER HANDELS SACHEN 174–75 (1997); JÖRG PAUL MÜLLER & LUZIUS WILDHABER, PRAXIS DES VÖLKERRECHTS 282 (2d ed. 1982).

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acades of revisions to the Federal Rules of Civil Procedure and their state counterparts permitting and then prioritizing service by private parties and by mail.<sup>18</sup> But in other countries, the assertion of governmental power has remained an important aspect of service, and the rule against exercising governmental power on the territory of another state without that state's consent is indirectly enforced at the recognition stage. As a result, service of process abroad by officials or private individuals from the United States or other nations, whether in person, by mail, or by electronic means, often results in the non-recognition of the resulting judgment where this is not an accepted form of service in the recognition state, be it by virtue of the Hague Service Convention and applicable reservations to it,<sup>19</sup> or according to the domestic law of the recognition state where the Hague Service Convention does not apply.<sup>20</sup>

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

19. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

20. See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 2, 1992, 120 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN* [BGHZ] 305 (Ger.) (upholding decision below that service by international mail on the German defendant in violation of the Hague Service Convention rendered the resulting South Carolina judgment non-recognizable, even though the documents adequately informed the defendant of the proceedings in South Carolina in sufficient time to defend); Bundesgericht [BGer] [Federal Supreme Court] Apr. 6, 2009, 135 *ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS* [BGE] III 623 (Switz.) (reversing lower court's decision to recognize an Italian judgment as against Art. 27(2) of the Lugano Convention and the Swiss reservation to Article 10(a) of the Hague Service Convention because the Italian court had served the Swiss defendant by sending summons and complaint through international mail, even though the defendant had actually received the served documents in a timely manner). *But see* Bundesgericht [BGer] [Federal Supreme Court] Oct. 31, 1996, 122 *ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS* [BGE] III 439 (Switz.) (holding that lower court's granting of enforcement of U.S. judgment was not arbitrary, despite service in violation of applicable international treaty, since defendant had entered general appearance and had been properly represented by counsel).

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Similar problems can arise with regard to activities related to discovery. U.S.-style discovery may be unknown abroad, but the gathering of evidence in civil litigation is not.<sup>21</sup> In civil law countries, however, the decision as to what evidence must be gathered and how is made by the court, upon request by the attorneys. The court—in some countries, a court-appointed official—also questions the witnesses.<sup>22</sup> This active role of the court in the evidence-gathering process long ago led to the view that the taking of evidence represents the exercise of sovereign power that cannot be extended to the territory of a foreign sovereign without that sovereign's consent.<sup>23</sup> Such consent has traditionally been given in response to a letter rogatory or through the means identified in an applicable international treaty, such as the Hague Evidence Convention.<sup>24</sup>

The fact that the conduct of discovery has largely been delegated to the attorneys in the U.S. discovery process has not been viewed abroad as rendering discovery any less of a governmental act. After all, unjustified non-compliance with discovery requests will result in an order to compel and in sanctions from the court if the order is not complied with.<sup>25</sup> Judgments emanating from proceedings involving discovery from or on foreign territory may thus be refused to be recognized as well.<sup>26</sup> The difficulty, of course, is in knowing which precise

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21. *See, e.g.*, UGO A. MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW 756–809 (7th ed. 2009) (comparing discovery proceedings in U.S. courts with evidence gathering in other jurisdictions).

22. *Id.* at 786–95.

23. *E.g.*, BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 351 (4th ed. 2006); GERHARD WALTER & TANJA DOMEJ, INTERNATIONALES ZIVILPROZESSRECHT DER SCHWEIZ: EIN LEHRBUCH 358–59 (5th ed. 2012); Hans-Jürgen Ahrens, § 363, in 2 ZIVILPROZESSORDNUNG UND NEBENGESETZE 85, 91 (Bernhard Wiecek & Rolf A. Schütze eds., 3d ed. 2010). On the history of this view see, for example, BAUMGARTNER, *supra* note 13, at 50–52, 60–61.

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

25. *E.g.*, FED. R. CIV. P. 37(a)–(b).

26. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 118 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 312, 323–24 (Ger.) (dictum); *see also* ADRIAN DÖRIG, ANERKENNUNG UND VOLLSTRECKUNG US-AMERIKANISCHER ENTSCHIEDUNGEN IN DER SCHWEIZ 428 (1998) (arguing that discovery in violation of Swiss sovereignty should lead to non-recognition of the resulting judgment in Switzerland).

acts in the process of discovering evidence located abroad are considered to represent the exercise of a sovereign act on foreign territory and thus may have adverse consequences for the recognition of a resulting judgment. Such acts certainly include the actual conducting of depositions and inspections on foreign territory, but they may also include requests and orders directed at nonparties from abroad to appear for depositions in the United States and to bring along documents for inspection. In some instances, even the direction of such requests and orders at foreign parties in U.S. litigation may be seen as an exercise of a governmental act on the territory of the state of the parties' domicile.<sup>27</sup>

In sum, the concern for the protection of national sovereignty is alive and well. This concern continues to serve as a pillar of the law on the recognition on foreign judgments in a number of foreign countries, especially in the civil law world, lurking in areas where U.S. lawyers may not have anticipated. The national views on sovereignty identified here have a long history and are often strongly held. Thus, the suspicion frequently heard in the United States that sovereignty-based objections to the recognition of judgments are no more than attempts to protect the recognition state's nationals from litigation in the United States is unfounded to the extent that the sovereignty doctrine has long been used abroad to delimit appropriate spheres for the exercise of state power. Such suspicions are also counterproductive if taken as a basis unilaterally to force the relevant countries to abandon their views.<sup>28</sup> The reaction to such unilateral attempts has often been the

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27. See *infra* notes 61–66 and accompanying text.

28. Cf., e.g., BORN & RUTLEDGE, *supra* note 18, at 917 (“Why is it that foreign states object to unilateral extraterritorial U.S. discovery of evidence located on their territory? Is it simply because they want to protect local companies and nationals from liability to foreign plaintiffs?”); ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS* 229 (1996) (“I have long wondered how the concept of sovereignty crept into the subjects here discussed. . . . [I]s it really pertinent to . . . the procurement of evidence for purposes of discovery or trial?”); Brief for the United States and the Securities and Exchange Commission as Amici Curiae Supporting Respondents, at 37, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1986) (No. 85-1695) (suggesting that assertions of judicial sovereignty “often have an abstract quality and do little, in and of themselves, to elucidate the substantive foreign interests at stake” and thus that “assertions of judicial sover-

strengthening of the foreign country's views on sovereignty and their adamant enforcement at the recognition stage.<sup>29</sup> At the same time, however, there is indeed evidence that the sovereignty doctrine has more recently been extended in its coverage with regard to discovery of materials in the hands of foreign parties involved in U.S. proceedings so as to afford those parties more extensive protection from U.S. litigation as well as to protect domestic sovereignty from U.S. power, a matter to which I shall return shortly.<sup>30</sup>

### III. PUBLIC INTEREST

The discussion of recognition requirements both in the cases and in the academic literature of most nations today focuses primarily on the purpose of protecting the losing party in the foreign litigation from the application of laws and procedures that fail to meet a minimum threshold of fairness.<sup>31</sup> Upon closer examination, however, there is also a concern for the protection of a broader public interest that may play a significant role both in fashioning recognition requirements and in their practical application. The sovereignty concerns discussed above can be seen as a distinct and important subpart of this multifaceted public interest to be protected by recognition law.

The most obvious manifestation of such a public interest can be found in recognition requirements that were adopted precisely for the purpose of furthering or protecting a public interest. For instance, where it is still in place, the only intended purpose of the reciprocity requirement is to force foreign jurisdictions with less liberal recognition regimes to change their ways.<sup>32</sup> Any benefits that accrue to the party opposing recognition are purely incidental to this public interest

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eignty' may simply illustrate a foreign nation's desire to protect its nationals from liability").

29. See, e.g., Baumgartner, *supra* note 9, at 1334, 1338–40.

30. See *infra* text accompanying notes 67–68.

31. See *supra*, note 8 and accompanying text; GEIMER & SCHÜTZE, *supra* note 7, at 1367–79 (discussing the competing state interests involved in award recognition abroad).

32. AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE §7 cmt. b (Proposed Final Draft 2005); Martiny, *supra* note 10, at 537. Whether, in fact, the reciprocity requirement has been able to serve that purpose in the two centuries or

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

The public interests pursued by recognition law may also include a policy of providing parties from the recognition state with special protection from litigation abroad. In some countries, this policy is at least partly traceable to 19th-century nationalism, which reinvigorated the concept that individuals should have both the privilege and the obligation to be subject to the laws and procedures of the country of which they are nationals, no matter where they may travel.<sup>36</sup> In other nations, the idea is much older.<sup>37</sup> The purpose, however, remains the

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more that it has been on the books in some countries is an empirical question that still needs to be answered. *E.g.*, Martiny, *supra* note 10, at 575.

33. The reciprocity requirement consequently may end up protecting the foreign, rather than the domestic party of the recognition state in a particular case. *See, e.g.*, Rolf A. Schütze, § 328, in 2 *ZIVILPROZESSORDNUNG UND NEBENGESETZE* 450, 478 (Bernhard Wiezcorek & Rolf A. Schütze eds., 2d ed. 2007).

34. *E.g.*, Martiny, *supra* note 10, at 456–58.

35. *See, e.g.*, Kammergericht München [KG] [Munich High Court], Dec. 6, 1955, reproduced in 7 *WIRTSCHAFT UND WETTBEWERB* 261 (1957) (Ger.) (stating that a violation of currency exchange regulations could provide grounds for the finding of a public policy violation); Reichsgericht [RG] [Supreme Court of the German Empire], Jan. 25, 1921, reproduced in 14 *WARN. RESPR.* 34 (1921) (Ger.). *See also* WALTER & DOMEJ, *supra* note 23, at 433 (referring to a foreign judgment enforcing a contract for the delivery of war weaponry in violation of Switzerland's weapons control legislation as an example of a clear violation of Swiss public policy).

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

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

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same: As opposed to recognition requirements that are in place to protect the litigants from substandard foreign proceedings or substantive laws, the idea here is to protect the domestic party from litigation abroad or from the application of foreign law irrespective of fairness in a given case.

Special protection of domestic parties is particularly evident in the area of personal jurisdiction. In France, for example, the Code Civil of 1804 contains both a provision that was soon interpreted to permit French nationals to sue foreigners in France in most cases and a provision that was interpreted to permit any French defendant in foreign litigation to oppose the recognition of the ensuing foreign judgment in France unless the defendant had either consented to the foreign court's jurisdiction in advance or entered a general appearance.<sup>38</sup> The *Cour de cassation* finally abandoned the latter interpretation in a 2006 case,<sup>39</sup> finally permitting the enforcement of foreign (including U.S.) judgments against French nationals on the same jurisdictional grounds as foreign judgments against foreigners—that is, when there was a significant connection between the litigation and the rendering state.<sup>40</sup> However, similar limitations are still in place in England and Switzerland. In England, foreign *in personam* judgments can generally be recognized only when the defendant was present within the rendering state at the time of service or if it agreed to the court's jurisdiction.<sup>41</sup> In Switzerland, foreign *in personam* judgments against Swiss domiciliaries are recognized only if the de-

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38. CODE CIVIL [C. CIV.] arts. 14–15 (Fr.); Catherine Kessedjian, *La reconnaissance et l'exécution des jugements étrangers en France – hors les Conventions de Bruxelles et de Lugano*, in RECOGNITION AND ENFORCEMENT, *supra* note 14, at 185, 193–94; see also Kevin M. Clermont & John R.B. Palmer, *French Article 14 Jurisdiction, Viewed from the United States*, in DE TOUS HORIZONS: MÉLANGES XAVIER BLANC-JOUVAN 473, 480–83 (2005) (discussing the history of Articles 14 & 15 of the French Code Civil).

39. See *Cour de cassation* [Cass.] [supreme court for judicial matters] 1e civ., May 23, 2006, Bull. civ. I, No. 857 (Fr.) (ruling that absent fraud, the foreign court had jurisdiction to render a divorce decree in this instance).

40. Gilles Cuniberti, *The Liberalization of the French Law of Foreign Judgments*, 56 INT'L & COMP. L.Q. 931, 933, 935–36 (2007).

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

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defendant consented to jurisdiction, although there are a number of exceptions.<sup>42</sup>

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

#### IV. SUBTLE CHANGES TO RECOGNITION DOCTRINE IN RESPONSE TO U.S. LITIGATION

While these rather blatant forms of protection for domestic litigants have very slowly tended to disappear from recognition law, other, more subtle, attempts to protect domestic litigants, national sovereignty, and the domestic legal system have emerged specifically in response to litigation in the United States. Litigation in the United States has long been viewed

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42. See BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [PRIVATE INTERNATIONAL LAW ACT], Dec. 18, 1987, SR 291, art. 149 (Switz.). The exceptions include judgments based on counterclaims by Swiss domiciliaries; claims arising from the operation of a Swiss business's branch office in the rendering state; claims by consumers domiciled in the rendering state who had bought the Swiss domiciliary's product there or on the basis of advertising in the rendering state; as well as a number of claims in the areas of family law and successions. *Id.*, arts. 26(d), 50, 58, 65, 70, 73, 84, 96, 120(1), 149(2).

43. See, e.g., Walter & Baumgartner, *supra* note 14, at 32 (discussing choice-of-law test).

44. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 20, 2007, Bull. Civ. I, No. 222 (Fr.); Cuniberti, *supra* note 40, at 937–39.

45. Technically, judgments against Portuguese nationals that did not apply more favorable Portuguese law even though Portuguese choice of law rules would have so required, are subjected to a review on the merits. See, e.g., Carlos Manuel Ferreira Da Silva, *De la reconnaissance et de l'exécution de jugements étrangers au Portugal (hors du cadre de l'application des conventions de Bruxelles et de Lugano)*, in RECOGNITION AND ENFORCEMENT, *supra* note 14, at 465, 480–81 (discussing recognition of foreign judgments in Portugal).

abroad as a dangerously costly and widely unpredictable proposition.<sup>46</sup> Some damage awards can reach many multiples of what would be available elsewhere.<sup>47</sup> Discovery can be considerably more extensive, intrusive, and expensive.<sup>48</sup> The power of judges, including their power to sanction, is breathtaking from a civil law perspective.<sup>49</sup> The availability of class actions and comparatively modest pleading requirements appear to encourage lawsuits that need not be well supported by existing law. The rarity of trials can lead to settlements based on a shadow of a shadow, or, more succinctly, on the perceived views of the judge and the negotiating savvy of the relevant attorneys.<sup>50</sup> And the American rule of costs ensures that the resulting costs are incurred no matter what the merits of the

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46. As Lord Denning famously quipped, “[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can get his case into their courts, he stands to win a fortune.” *Smith Kline v. Bloch*, [1983] 1 W.L.R. 730, 733 (Lord Denning) (Eng.). See also Baumgartner, *supra* note 9, at 1320–21 (reporting that “the published reports of three [U.S.] cases [in Germany] between 1978 and 1981 brought home to a larger audience of German lawyers the perceived realities of some aspects of U.S. law that in-house counsel of German companies had long lamented: large, from German standards virtually inconceivable, damage awards handed down by unpredictable juries; expensive, party-driven discovery with comparatively immense scope and scant protection of trade and business secrets; and a willingness of at least some U.S. courts to enforce their procedural rules transnationally in the face of sovereignty objections by the foreign governments involved”) (internal citations omitted).

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

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

49. See, e.g., BAUMGARTNER, *supra* note 13, at 85–86 (comparing the scope of judicial power in the American and German systems); HAIMO SCHACK, *INTERNATIONALES ZIVILVERFAHRENSRECHT* 321 (3d ed. 2002) (speaking of “draconian sanctions”).

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

claim. In recent cases the U.S. Supreme Court has pulled the rug from under some of the doctrines giving rise to these views by imposing a plausibility requirement on pleadings,<sup>51</sup> rendering class certification considerably more difficult,<sup>52</sup> and outlawing so-called foreign-cubed securities class actions,<sup>53</sup> among other things.<sup>54</sup> But in this context, perception is more important than reality.

Thus, it should not be surprising that foreign defendants caught in U.S. litigation would attempt to get their home courts to consider any resulting judgment to be non-recognizable. What is perhaps more surprising is that courts in countries with otherwise relatively liberal recognition regimes have occasionally complied, and have done so not only with case-specific decisions, but also with subtle changes in recognition doctrine that tend to negatively affect certain types of U.S. judgments. One might be tempted to think that this is just another manifestation of the parochialism that led to the outright protection of nationals or domiciliaries discussed above.<sup>55</sup> However, I suggest that the reasons for these developments are more complicated and need to be understood by those in the United States who consider the adoption of federal legislation on the recognition of foreign judgments as well as by those who consider further treaty negotiations at The Hague.

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51. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–84 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–63 (2007).

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

53. *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010). The term “foreign cubed” refers to class actions brought by foreigners against a foreign corporation over shares of stock bought on a foreign exchange. *Id.* at 2894 n.11 (Stevens, J., concurring).

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

55. *See supra* notes 36–45 and accompanying text.

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If we look more closely, four principal reasons emerge to explain why foreign courts have sometimes adopted broader interpretations of their recognition requirements to protect domestic litigants, national sovereignty, and the domestic legal system from the effects of litigation in the United States: power politics—or the perception thereof; significant differences in legal and procedural culture; information asymmetries regarding those differences; and the expressed preferences of relevant individuals and groups.

### 1. *State Power*

The United States is a powerful country, economically as well as militarily. Thus, U.S. courts have not had occasion to worry too much about potential international repercussions of their decisions in transnational litigation; and where they have worried, the real concerns have usually been federalism and separation of powers.<sup>56</sup> Similarly, in reforming the provisions on transnational service of process and discovery in 1963 and 1994, the drafters of the Federal Rules of Civil Procedure were more interested in providing U.S. litigants with the flexibility of means they may need to proceed in transnational cases than in taking foreign sovereignty concerns seriously.<sup>57</sup> There are, of course, other ways to explain this behavior, and U.S. power may not even be on the minds of most U.S. judges who decide cases involving parties, witnesses, or evidence from abroad.<sup>58</sup> However, it is important to note that the decisions of U.S.

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56. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–28 (2004); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420–29 (2003); *Zschernig v. Miller*, 389 U.S. 429, 432–41 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416–37 (1964).

57. See, e.g., Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 *LAW & CONTEMP. PROBS.* 103, 103, 112–24 (1994) (discussing the history of the revisions).

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

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courts in this area have sometimes been viewed abroad as an outgrowth of the United States' political power.<sup>59</sup>

If one combines the political power of the United States with the power of U.S. judges and the effect of the costs of litigation in this country (which, from a foreign perspective, are enormous), it should be possible to understand why foreigners have viewed U.S. decisions in transnational litigation that celebrate U.S. law and U.S. justice over foreign sovereignty concerns as yet another instance in which the United States is flexing its muscle.<sup>60</sup> This perceived assertion of power does not come without costs, however. I have elsewhere explored how decisions by lower U.S. courts in the late 1970s and early 1980s that paid little attention to German sovereignty concerns changed the attitude of German courts, commentators, and government officials from one unreceptive to German industry requests for protection from the effects of U.S. litigation, to one favoring protection not only of German industry but also of German sovereignty and the German legal system itself.<sup>61</sup> The recognition of U.S. judgments is an area where such a perceived need for protection can be given effect, and there is evidence that this is indeed what has happened.<sup>62</sup>

Thus, for example, the German *Bundesgerichtshof* has indicated in dictum, and commentators in other countries have suggested, that U.S. discovery in violation of the recognition

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

60. Not surprisingly, foreign resentment has been particularly strong where litigation in U.S. courts has been combined with actual pressure from the federal and state governments against the foreign defendants involved. See, e.g., Baumgartner, *supra* note 50, at 846–49 (discussing the sentiment surrounding Swiss bank litigation).

61. Baumgartner, *supra* note 9, at 1318–38; see also *infra* text accompanying notes 92–93.

62. Baumgartner, *supra* note 9, at 1338–44.

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

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63. See *supra* note 26 and accompanying text.

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

65. In Switzerland, the Supreme Court has held that this includes a lawyer interviewing persons on Swiss territory for purposes of drawing up an affidavit upon information and belief for use in a foreign (in this case an Australian) proceeding. Acting in this way not only represents a violation of national sovereignty but also a federal felony under Article 271(1) of the Swiss Criminal Code, Schweizerisches STRAFGESETZBUCH [StGB] [CRIMINAL CODE] Dec. 21, 1937, SR 757 (1938), as amended by Gesetz, Oct. 4, 1991, AS 2465 (1992), art. 271(1) (Switz). Bundesgericht [BGer] [Federal Supreme Court] Sept. 30, 1988, 114 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] IV 128 (Switz).

66. E.g., DIETER LEIPOLD, LEX FORI, SOUVERÄNITÄT, DISCOVERY: GRUNDFRAGEN DES INTERNATIONALEN ZIVILPROZESSRECHTS 63–64 (1989).

67. Brief for the Federal Republic of Germany as Amicus Curiae Supporting Petitioners, at 2–3, 13–14, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1986) (No. 85-1695); Brief of the Government of Switzerland as Amicus Curiae Support-

stretches the traditional understanding of judicial sovereignty in these countries, it is less than obvious that their courts would refuse to recognize a U.S. judgment merely because such a discovery request to a foreign party was not processed through the proper Hague Evidence Convention channels.<sup>68</sup> Nevertheless, the concern about the power, including the judicial power, of the United States should be clear.

However, expanding their traditional view of when the extraterritorial taking of evidence violates their national sovereignty is not the only way in which some countries have responded to the refusal of U.S. courts to take their traditional sovereignty concerns seriously in the context of transnational litigation. Upon closer examination, one may also wonder why so many countries have continued to abide by their traditional views on sovereignty with regard to service of process and the gathering of evidence abroad in the first place, especially since commentators in some of these countries have noted that the letter rogatory process is slow and not always certain to yield the needed evidence for their own courts,<sup>69</sup> and that the no-

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ing Petitioners, at 2–3, 8, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1986) (No. 85-1695); Brief of the Republic of France as Amicus Curiae Supporting Petitioners at 3, 14–16, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1986) (No. 85-1695).

68. See, e.g., SCHACK, *supra* note 49, at 310–11 (noting that, contrary to the views the German government has expressed in U.S. litigation, the forum court, including a German court in a proceeding pending in Germany, can order a foreign party to appear in the forum state to testify and arguing that an order to a foreign party to produce documents for inspection in the forum state is unproblematic under international law). *But see* PETER SCHLOSSER, *DER JUSTIZKONFLIKT ZWISCHEN DEN USA UND EUROPA* 25 (1985) (suggesting that far-reaching discovery requests into the blue go beyond violating merely violating comity); Stürner, *supra* note 59, at 26 (arguing that the sheer intensity of discovery requested from a party could trigger German sovereignty concerns); LEIPOLD, *supra* note 66, at 64–66 (arguing that discovery orders directed at German parties implicate German sovereignty if backed by impending criminal sanctions, including criminal contempt sanctions).

69. E.g., SCHACK, *supra* note 49, at 313–14; WALTER & DOMEJ, *supra* note 23, at 359–60. Within the European Union, these concerns have led to some improvements on the traditional letter interrogatory process. First, rather than requesting the taking of evidence by a court in another E.U. member state through a central authority, a court in an E.U. member state can directly request its counterpart to take the needed evidence. Council Regulation 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the

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tion of service of process as a governmental act that needs the consent of the requested state to be effective there ill serves defendants from the requested state if foreign courts then resort to constructive service or service on an imaginary agent of the defendant in the forum state to be able to proceed with the litigation.<sup>70</sup> To the lawmakers and judges in these countries, apparently, retaining their traditional views on sovereignty has been important to counteract U.S. power in transnational litigation.

Note that my argument is not that the Supreme Court got the treaty interpretation wrong in the *Aérospatiale* and *Schlunk* decisions,<sup>71</sup> nor that these decisions (and many more by lower

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Member States in the Taking of Evidence in Civil or Commercial Matters, arts. 2, 17, 2001 O.J. (L 174) 1 (EC). If it is not against fundamental principles of the requested state, the forum court can also request to travel to the requested state to take the evidence itself as long as it does not need to use coercive measures to do so. *Id.*

70. See, e.g., SCHACK, *supra* note 49, at 257–59; WALTER & DOMEJ, *supra* note 23, at 361–62. Not surprisingly, then, the European Union’s new Service Regulation permits service of process within the European Union not only by a streamlined letter of request procedure, but also by registered mail with acknowledgment of receipt and by direct service from “[a]ny person interested in a judicial proceeding” to the “judicial officers, officials or other competent persons of the Member State addressed, where such direct service is permitted under the law of that Member State.” Regulation 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service of Documents), and repealing Council Regulation (EC) No. 1348/2000, arts. 4, 14, 15, 2007 O.J. (L 324) 79. The version of this Regulation that was passed seven years earlier had still permitted Member states to declare that they would not allow service by mail and direct service under Articles 14 & 15, and a number of Member States had made such declarations. Council Regulation 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, arts 14, 15, O.J. (L 160) 37 (EC); Consolidated Version, Information Communicated by Member States Under Article 23 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, available at [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/pdf/vers\\_consolide\\_en\\_1348.pdf](http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/vers_consolide_en_1348.pdf).

71. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988); *Aérospatiale*, 482 U.S. at 522; Cf. PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE SERVICE CONVENTION 16–21 (3d ed. 2006) (concluding that the *Schlunk* decision’s interpretation of Article 1 of the Hague Service Convention that the question of when a judicial or extrajudicial document

U.S. courts) did not involve difficult questions relating to the authority of treaties and customary international law vis-à-vis domestic statutes, court-made rules, and common law—both state and federal—under the U.S. Constitution, the Rules Enabling Act,<sup>72</sup> and the Rules of Decision Act.<sup>73</sup> Instead, my point is that when U.S. courts and lawmakers refuse to incur sovereignty costs to the United States by seriously considering the sovereignty concerns of other nations in cross-border cases, they may often assume, perhaps because of U.S. power, that this can be done without consequences. Courts indulging in such an assumption forget that power is a two-edged sword, and that by ignoring foreign sovereignty concerns, they unwittingly impose costs on future litigants who attempt to enforce U.S. judgments abroad. For example, in her opinion in *Schlunk*, Justice O'Connor correctly noted that service of process outside of the channels of the Hague Service Convention may render the judgment in that particular case unenforceable abroad.<sup>74</sup> What Justice Stevens and the *Aerospatiale* majority may not have realized, however, is that by not engaging the foreign claim that certain discovery requests outside the channels of the Hague Evidence Convention violate their sovereignty, and thus customary international law, the Court's opinion might make the future recognition of *all* U.S. judgments more difficult in some countries.<sup>75</sup>

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needs to be served abroad is to be determined by the law of the requesting state is supported by the negotiating history of the Convention, the practice of courts in several member states, and by the views of the delegates of most member states).

72. 28 U.S.C. §§ 2072–74 (2006).

73. 28 U.S.C. § 1652 (2006). See, e.g., Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1478–97 (1991) (reviewing GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* (1989)) (discussing the *Schlunk* case).

74. See *Schlunk*, 486 U.S. at 706 (“[P]arties that comply with the Convention ultimately may find it easier to enforce their judgements abroad.”).

75. Similarly, the academics chiefly responsible for the 1963 amendments to the Federal Rules of Civil Procedure and parallel 1964 federal legislation recognized that, by permitting plaintiffs to serve process in violation of the law of the receiving state, the recognition and enforcement of an ensuing U.S. judgment may be put in danger. E.g., Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-63*, 77 HARV. L. REV. 601, 635–36 (1964). But rather than realizing that this might cause trouble for all U.S. litigants down the road, these academics assumed that, to the contrary, the foreign states in question would ultimately see the light and follow the

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

This discussion of foreign sovereignty concerns brings me to the next two factors I suggest have influenced the development of foreign doctrine on the recognition of U.S. judgments: fundamental differences between the legal systems of the United States and other countries and lack of sufficient understanding of these differences among many of the relevant players in transnational litigation. To the extent they are known to the recognition court, the differences between U.S. law, both substantive and procedural, and the laws of other countries may seem to be overwhelming.<sup>76</sup> For instance, as Professor Lowenfeld noted some time ago with regard to discovery, “[t]he rest of the world . . . thinks U.S. lawyers . . . start lawsuits . . . on minimal bases, and rely on their adversaries . . . to build their cases for them,” while

Americans . . . have sometimes tended to think of the rest of the world as engaged in a massive conspiracy of concealment masquerading as privacy . . . and secrecy laws intended to draw corporate and sovereign veils over all kinds of evil, from drug dealing to tax evasion to commercial fraud to manufacture of defective products.<sup>77</sup>

Foreign recognition courts may be tempted to conclude that some of these differences amount to a public policy violation, although many foreign authorities correctly point out that these differences alone are not sufficient to refuse to accord a U.S. judgment recognition.<sup>78</sup>

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lead of the United States. Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1018–19 (1965).

76. See *supra* text accompanying notes 46–54.

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

78. Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 118 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES ZIVILSACHEN [BGHZ] 312 (323) (Ger.) (holding that the presence of U.S. discovery alone does not render a U.S. judgment unenforceable in Germany); SCHACK, *supra* note 49, at 371 (stating that, though unknown in Germany, U.S. discovery does not automatically violate German public policy); JOACHIM ZEKOLL, US-AMERIKANISCHES PRODUKTHAFTPFLICHTRECHT VOR DEUTSCHEN GERICHTEN 137–41 (1987).

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Most importantly, a lack of knowledge about many of these differences and underlying assumptions can lead to frustrated expectations. For instance, the view that orders directing foreign non-parties to appear in the forum state to testify or to provide documents for inspection there implicate the foreign country's sovereignty and therefore must proceed through diplomatic channels or the channels provided for by an applicable treaty was relatively unproblematic as long as continental European countries with similar views applied the rule primarily among themselves. However, in the 1970s and 1980s, when European businesses increasingly found themselves to be defendants in U.S. litigation, it became clear that U.S. courts had little patience for these traditional European views of sovereignty.

This lack of patience among U.S. courts was not solely attributable to a failure to sufficiently comprehend the fundamental differences between the U.S. and continental European views of sovereignty. To some degree, the mechanics and underlying purposes of U.S. discovery are incompatible with continental European notions of sovereignty, which lead to the application of the requested state's procedural law in executing a letter rogatory or, where applicable, a letter of request under the Hague Evidence Convention.<sup>79</sup> Worse, Article 23 of the Hague Evidence Convention permits a member state to "declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."<sup>80</sup> Many of the Convention's member states have indeed made such a reservation,<sup>81</sup>

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79. Hague Evidence Convention, *supra* note 24, art. 9. At least under the Hague Evidence Convention, the requesting state can request the use of "a special method or procedure [to] be followed, unless this is incompatible with the internal law of the State of execution" and the executing state has to use the methods of compulsion available in internal proceedings. *Id.* arts. 9, 10. But application of the law of the requested state may mean that the witnesses will be questioned by the judge upon questions previously suggested by the attorneys and that the requested state's much broader privileges may apply. *See, e.g.*, Baumgartner, *supra* note 9, at 1324–25 (discussing instances where German judges refused to pursue a line of questioning that was not narrow enough).

80. Hague Evidence Convention, *supra* note 24, art. 23.

81. Of the 57 member states of the Convention, all but 15 currently maintain a reservation or declaration pertaining to Article 23. *Status Table, Convention of 18 March, 1970 on the Taking of Evidence Abroad in Civil and Com-*

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although some have since narrowed its scope.<sup>82</sup> They have made Article 23 reservations because many of the relevant players in the respective civil law countries were unfamiliar with the U.S. separation of what in their civil law jurisdictions is a single process of producing evidence during the main hearing into a pretrial evidence-gathering process (discovery) and a process of presenting the unearthed evidence to the trier of fact (trial).<sup>83</sup> These individuals simply assumed that an Article 23 reservation would limit wide-ranging discovery requests while allowing U.S. courts to make more particularized requests for evidence from their territory once trial was underway and the scope of the evidentiary inquiry was more focused. Of course, this view failed to take into account both the fact that discovery in the United States is conducted by the parties' attorneys before trial and the reality that the need for a concentrated trial would make interruptions of the trial to obtain evidence from abroad impracticable.<sup>84</sup>

Lawmakers, judges, and academics from reserving countries, making assumptions on the basis of the judge-centered evidence-gathering process employed in their respective juris-

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*mercial Matters*, HAGUE CONFERENCE ON PRIVATE INT'L LAW (Aug. 28, 2012), [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=82](http://www.hcch.net/index_en.php?act=conventions.status&cid=82).

82. Of the 42 member states with Article 23 reservations or declarations, fifteen (China, Cyprus, Estonia, France, India, Korea, Mexico, The Netherlands, Norway, Romania, Singapore, Sweden, Switzerland, the United Kingdom, and Venezuela) limit their reservations to certain aspects of document discovery, mostly to what they consider fishing expeditions. *Id.* Thus, for example the reservation of the United Kingdom is limited to letters of request that

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

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

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

84. *Id.*; *see also* VON MEHREN & MURRAY, *supra* note 48, at 172 (discussing continuous and discontinuous trials).

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dictions,<sup>85</sup> thus failed to realize for quite some time—and some of them still do not understand today—that their approach to responding to U.S. letters of request under the Hague Evidence Convention has very considerably limited the usefulness of the Convention's letter-of-request procedure for litigants in the United States.<sup>86</sup> Thus, lack of knowledge about the significant differences between the U.S. and continental European litigation systems and the respective assumptions underlying them not only led U.S. judges to dismiss foreign sovereignty concerns a bit too cavalierly,<sup>87</sup> but also produced wrong assumptions in continental Europe about how U.S. courts would deal with transnational service and discovery. Hence, what has appeared abroad as an exercise of U.S. power politics is, to some degree, a sensible reaction to unrealistic European expectations. However, as described above, this has not prevented these frustrated expectations from becoming the source of limitations to the recognition of U.S. judgments.<sup>88</sup>

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

The final factor that has helped shape recognition doctrine with regard to U.S. judgments is the expressed preference of individuals and groups. I am not referring here to the efforts that judgment debtors inevitably undertake to prevent a U.S. or other judgment against them to be recognized and enforced abroad in a particular case. Instead, I suggest that there have been more general efforts by individuals and groups to change recognition doctrine so as to render the recognition and enforcement of U.S. judgments more difficult.

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85. Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1020–22 (1998); *see also supra* text accompanying note 22.

86. BORN & RUTLEDGE, *supra* note 18, at 967 (“Article 23 severely limits the value of the Convention to U.S. litigants”); *cf. also* Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, at 536–37 (1986) (surmising that “[s]urely, if the Convention had been intended to replace completely the broad discovery powers that the common-law courts in the United States previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common-law contracting Parties to agree to Article 23. . . .”).

87. *Cf. supra* text accompanying notes 27–29.

88. *See supra* text accompanying notes 62–67.

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An important portion of this consists of pressure by interest groups. In particular, foreign manufacturers exporting their products to the U.S. market seem to be taken aback at times by the very different law and litigation system they inevitably encounter in the United States. As a result, they have repeatedly tried to achieve protection from U.S. litigation at home through trade groups and by other means.<sup>89</sup> To the extent that law makers, government officials, and judges in their home countries tend to have little knowledge about the U.S. litigation system, these industry groups have been able to utilize the shock value of horror stories about litigation in the United States based on cases both real and imagined.<sup>90</sup> Thus, this is also another case of asymmetric information leading to subtle changes in recognition law. Businesses selling their products in the United States and their attorneys are able to use their superior knowledge of U.S. law and practice to obtain changes to the domestic recognition regime that would perhaps not be possible if their country's policy makers had a better sense of the true picture of the litigation landscape in the United States.

Where such efforts to obtain protection from U.S. litigation combine with perceptions that U.S. courts and lawmakers are using litigation procedure as a source of power politics,<sup>91</sup> they fall on particularly fertile ground. For example, I have elsewhere described German industry representatives' efforts in the late 1970s and early 1980s to gain the German government's and courts' protection from U.S. litigation.<sup>92</sup> Initially, industry complaints were not taken very seriously, presumably because those who operate in the U.S. market should not be surprised that U.S. law and procedure might be brought to bear on their activities, as well as on the assumption that U.S. law and procedure could not possibly be as bad as industry groups described. Industry lobbying efforts remained without success until government officials, judges, and one particularly

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

90. See, e.g., Baumgartner, *supra* note 9, at 1320–21 (discussing German reactions to certain U.S. judgments awarded against German corporations).

91. See *supra* text accompanying notes 56–74.

92. Baumgartner, *supra* note 9, at 1318.

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influential group in the German legal system—law professors—began to perceive a problem for the country, its legal system, and its sovereignty that went beyond simple industry interests.<sup>93</sup> When a number of high-profile cases illustrated to a larger German audience just how different U.S. law and procedure can be and it became clear that a number of U.S. courts were unwilling to seriously consider the German sovereignty concerns regarding service of process and discovery discussed above, German policy makers finally began to take industry complaints seriously. Thus, industry groups are not the only actors potentially influencing doctrine in this context. The preferences of other important players in the making and application of the relevant law, such as law professors, judges, and government officials also play an important role.

As an area where preferences of groups and individuals have affected recognition doctrine in favor of local industry, consider punitive damages. Traditionally, there is no parallel to punitive damages in the legal systems of continental Europe. Continental legal scholarship prides itself on having been able to untangle the civil aspects of tort and contract law from the criminal sanctions they entailed in Roman law during the Enlightenment period. Thus, the law of damages in contracts, torts, and other aspects of private law today is based on compensation and restitution, while criminal law addresses punishment and deterrence.<sup>94</sup> To the continental legal mind, this approach is considerably more sophisticated than the Roman law approach from which it sprang. In some countries there is an additional concern that awards of punitive damages implicate constitutional protections against the imposition of criminal punishment, such as the rule that the crime be clearly defined by statute ahead of time and the rule against double jeopardy.<sup>95</sup>

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93. *Id.* at 1318–44.

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

95. *E.g.*, Jansen & Rademacher, *supra* note 94, at 76.

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Does this mean that the imposition of punitive damages in the United States is so repugnant from the point of view of continental doctrine as to amount to a public policy violation? The problem with this line of argument is that penal elements have not been as clearly absent from continental doctrines of private law as some would have it. For example, continental European legal systems have frequently allowed for the parties to a contract to agree to a sum of money to be paid as punishment in case of a breach.<sup>96</sup> And courts in a number of countries consider the defendant's culpability when assessing damages for pain and suffering.<sup>97</sup> Moreover, punitive damages may cover costs in the United States, such as attorney's fees, that the defendant would have to pay in the continental system as a result of the loser-pays rule. Indeed, the prospect of punitive damages may make a claim economically viable to a U.S. attorney operating under a contingency fee arrangement while economic viability is not an issue for a plaintiff with a solid claim looking for an attorney in a system with a loser-pays rule. Partly for these reasons and because, as Justice Cardozo famously put it, "[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home,"<sup>98</sup> early evaluations in Germany, for example, cautiously concluded that U.S. punitive damage awards do not automatically violate German public policy.<sup>99</sup>

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

97. *E.g.*, Bundesgericht [BGer] [Federal Supreme Court] Nov. 11, 1999, 125 *ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS* [BGE] III 412, 417 (Switz.); MÜLLER, *supra* note 96, at 259–76. Indeed, until 1975, Germany had a few provisions on the books that permitted the victim of a few select crimes to ask for the imposition of a fine to be paid to her in addition to the conviction of the defendant. *See* MÜLLER, *supra* note 96, at 49–53.

98. *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 201 (N.Y. 1918).

99. *See, e.g.*, Martiny, *supra* note 10, at 471 (suggesting that it is not a violation of German public policy for life and health to be valued in higher monetary terms abroad); Friedrich Graf von Westphalen, "Punitive Damages" in *US-amerikanischen Produkthaftungsklagen und der Vorbehalt des Art. 12 EGBGB*, 27 *RECHT DER INTERNATIONALEN WIRTSCHAFT* 141, 148–49 (1981) (concluding that there are certainly cases where punitive damages would not be con-

This assessment changed as German industry groups increased their attempts to achieve protection from U.S. judgments, pointing to several outsized jury awards of punitive damages. The assessment also changed as a result of an increasing realization in German legal circles that U.S. courts did not seem to take German sovereignty concerns with regard to service of process and discovery very seriously. Academic commentary thus increasingly argued that U.S. punitive damage awards violate German public policy, at least to the extent they do not include compensation for matters that would be covered by a German judgment in a similar case.<sup>100</sup>

In 1992, the German *Bundesgerichtshof* held that punitive damages “of not insignificant size” violated German public policy and that the punitive portion of a U.S. judgment thus could not be enforced in the country.<sup>101</sup> Similar arguments were made in other European countries and considered by their courts. In 1982, for instance, a court in the Swiss canton of St. Gallen refused to enforce an entire U.S. judgment because it included a punitive award.<sup>102</sup> On the other hand, the

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sidered to be against German public policy in the choice of law context (where a public policy violation tends to be more easily found than in the context of recognition of foreign judgments)). *See also* Eike von Hippel, *Schadensersatzklagen gegen deutsche Produzenten in den Vereinigten Staaten*, 17 *AUSSENWIRTSCHAFTSDIENST* 61, 64–65 (1971) (concluding that U.S. products liability judgments against German manufacturers will usually be recognizable in Germany (without, however, specifically discussing punitive damages)). *But see* Martiny, *supra* note 10, at 236 (noting that the purposes of penalization and general deterrence might so strongly dominate an award of punitive damages as to make that award effectively a criminal judgment, rather than a civil one, and thus no longer enforceable under German law but stressing, at the same time, that increasing product safety is a legitimate objective to pursue in German law).

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

101. Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 118 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN* [BGHZ] 312 (334–45) (Ger.). For a discussion of this case in English, see, for example, Peter Hay, Comment, *The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 *AM. J. COMP. L.* 729 (1992).

102. Jens Drolshammer & Heinz Schärer, *Die Verletzung des materiellen ordres public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen „punitive damages-Urteils“* (*Urteilsanmerkung*), 82 *SCHWEIZERISCHE JURISTEN-ZEITUNG*

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

German academic commentary on punitive damages and concerns for local industry became influential in other countries as well, both inside and outside of continental Europe. The matter was also discussed at length during the negotiations for a world-wide convention on jurisdiction and the recognition of judgments at The Hague throughout the 1990s.<sup>104</sup> This discussion resulted in Article 11 of the Hague Convention on Choice of Court Agreements of 2005, which provides that “[r]ecognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary and punitive damages, that do not compensate a party for actual loss or harm suffered.”<sup>105</sup> In 1997, the Supreme Court of Japan followed the German Supreme Court in holding a U.S. punitive award to be in violation of Japanese public policy.<sup>106</sup> The highest civil court in Italy, the *Corte di Cassazione*, followed suit in a 2007 product liability case against an Italian manufacturer of motorcycle helmets involving a million-dollar award.<sup>107</sup> And, most recently, the same French *Cour*

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309, 310–11 (1986) (discussing and excerpting Bezirksgericht Sargans, Oct. 1, 1982). As an additional reason against enforcement, the court apparently considered the improper service of process. *Id.* at 310.

103. Urteil des Zivilgerichts (Basel Stadt), Feb. 2, 1989, reproduced in 1991 BASLER JURISTISCHE MITTEILUNGEN 31 (Switz.). On this decision, see, for example, Baumgartner, *supra* note 6, at 220–21.

104. Commission II, Hague Conference on Private Int’l Law, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, art. 33 (June 6–20, 2001).

105. Hague Convention on Choice of Court Agreements, *supra* note 5, art. 11(1). Article 11(2) of the Convention continues: “The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses related to the proceedings.” *Id.*

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

107. Cass., sez. terza, 19 gennaio 2007, n. 1183, (P.J. v. Fimez SPA) Giur. it. 2007, 4, 497 (It.). On this decision, see, for example, Francesco Quarta,

*de cassation* that has lately been instrumental in considerably liberalizing French recognition practice (including the recognition of U.S. judgments),<sup>108</sup> held that a punitive award of \$ 1,460,000 was disproportionate to the damage actually sustained and the contractual obligations breached and thus violated French public policy.<sup>109</sup> However, the Court did note in dictum that “an award of punitive damages is not per se contrary to [French] public policy.”<sup>110</sup> All of this has happened while some commentators in Europe have pointed out that the case against punitive damages has not been as clearly established as some would have it and that courts have increasingly permitted punitive elements to play a role in certain aspects of determining damages,<sup>111</sup> and while France, Germany, and the European Union have considered adopting punitive damages in limited settings.<sup>112</sup>

The changes in doctrine that may come about as a result of the expressed preferences of groups and individuals in favor of protecting domestic law and domestic parties from litigation in the United States are frequently subtle. This is demonstrated by another example from Germany. Under German law, a foreign judgment can be recognized only if the rendering court had jurisdiction according to German rules of personal jurisdiction. If the foreign action was based on a tort

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*Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto*, 31 HASTINGS INT'L & COMP. L. REV. 753 (2008).

108. See *supra* text accompanying notes 38–40, 44.

109. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, No. 1090, D. 2011 A.J. 423. The Court's conclusion that the punitive award was disproportionate to the damage actually sustained is somewhat surprising given that the compensatory damages awarded by the California court of \$ 1,391,650.12 were only slightly smaller than the punitive award of \$ 1,460,000.

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

111. MÜLLER, *supra* note 96, at 101–289; Borghetti, *supra* note 94, at 56–73; Felix Dasser, *Punitive Damages: Vom “fremden Fötzel” zum “Miteidgenoss?”*, 96 SCHWEIZERISCHE JURISTEN-ZEITUNG 101, 105–07 (2000).

112. *E.g.*, MÜLLER, *supra* note 96, at 290–95 “(discussing proposals in Germany and the European Union); Janke & Licari, *supra* note 110, at 796 (regarding punitive damages in France); Bernhard A. Koch, *Punitive Damages in European Law*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 197, 197–209, *supra* note 94 (on the European Union).

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claim, the German rules of personal jurisdiction establish a basis for the rendering court's jurisdiction if the defendant committed the alleged tort in the rendering state or if the alleged tort had its effects there. The factual question of whether the defendant had indeed committed a tort thus becomes doubly relevant, for the decision on the merits as well as for the decision whether the rendering court had jurisdiction according to the relevant German jurisdictional rules so as to permit the recognition and enforcement of its judgment in Germany. Hence, when deciding whether to grant recognition, should the German recognition court be able to revisit the question of whether a tort had in fact been committed?

In a 1993 case involving the recognition of a default judgment from Washington state, the German *Bundesgerichtshof* held that the facts of a case may be open for reconsideration at the recognition stage if the original court issued a default judgment.<sup>113</sup> The Court reasoned that the opposite rule would force German defendants to defend against lawsuits abroad under any circumstances.<sup>114</sup> That, in turn, would give plaintiffs an incentive to bring cases in favorable fora based on trumped-up charges, in the hope that the defendant would not be able to mount an effective defense.<sup>115</sup> The Court also reasoned that it was perfectly legitimate for the defendant to try to avoid the high costs of litigation in the United States.<sup>116</sup>

This reasoning reflects views which were by then widespread among German lawyers, brought about at least partly by industry stories about U.S. litigation: that in the United States personal jurisdiction is easy to obtain, strike suits are widespread, and that even a meritorious defense is an unreasonably expensive proposition. To be sure, the Court's decision adopted a doctrinal approach that had been urged by a number of academic writers for all foreign judgments (not just for judgments from the United States), and was issued before concerns about the involvement of German industry in U.S.

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113. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 25, 1992, 124 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 237 (Ger.).

114. *Id.* at 242–43.

115. *Id.* at 244.

116. *Id.* at 246.

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litigation had become an issue.<sup>117</sup> But given the Court's reasoning, it is likely that efforts to protect German industry from U.S. litigation played a role in the Court's decision to adopt this approach.

## V. CONCLUSION

With all the focus in this article on problems that U.S. judgment holders may encounter abroad, it is easy to lose sight of the fact that there are a number of countries that quite liberally recognize and enforce judgments from the United States. These countries include Germany,<sup>118</sup> Italy,<sup>119</sup> and, most recently, France<sup>120</sup> – countries which this article puts in the spotlight. Even in Switzerland, where foreign judgments rendered against a Swiss domiciliary cannot generally be recognized (though there are a number of significant exceptions), the Swiss Supreme Court has been quite liberal in dealing with certain aspects of recognition doctrine affecting judgments from the United States.<sup>121</sup> I also hasten to add that the changes in recognition doctrine resulting from efforts to protect national sovereignty, the domestic legal system, and domestic parties in response to U.S. power, the perceived pathologies of the U.S. litigation system, and interest group pressure have been subtle and relatively circumspect where, and to the extent, they have taken place.

My purpose here has not been, however, to generally assess how U.S. judgments fare abroad. Instead, I have intentionally focused on the parts of recognition doctrine that have generated problems for U.S. judgment holders, attempting to analyze the reasons for these problems. Indeed, my finding that many of these problems arise from doctrines that attempt to protect the sovereignty and the public interest of the recognition state more generally may, in the not-so-distant future, turn out to be of only historical interest. These doctrines and their underlying concerns date back to the 19th Century or

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117. *E.g.*, REINHOLD GEIMER, ZUR PRÜFUNG DER GERICHTSBARKEIT UND DER INTERNATIONALEN ZUSTÄNDIGKEIT BEI DER ANERKENNUNG AUSLÄNDISCHER URTEILE 102, 163–64 (1966); Martiny, *supra* note 10, at 357.

118. Baumgartner, *supra* note 6, at 200–14.

119. *Id.* at 214–19.

120. On France, see *supra* text accompanying notes 38–44.

121. *See, e.g.*, Baumgartner, *supra* note 6, at 219–27.

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earlier, and many countries have since abandoned some or all of them.<sup>122</sup>

Perhaps even doctrinal changes that have been adopted specifically in reaction to litigation in the United States may be cast aside under certain conditions in the future. For instance, since the German *Bundesgerichtshof* declared punitive damages awards to be against German public policy in 1992, a number of German scholars have argued that the case against punitive damages is not as clear-cut as the Court made it out to be and that awards of such damages should be recognized in principle, although perhaps not beyond a certain size.<sup>123</sup> As the limited use of punitive damages gains currency within the European Union,<sup>124</sup> the *Bundesgerichtshof* may change its jurisprudence on this matter.

More likely, however, things will remain the same for some time. Countries have been very slow to move away from doctrines limiting the recognition and enforcement of U.S. judgments. In the current transnational litigation landscape, there appears to be no incentive to liberalize the relevant recognition regime. Countries in Europe and elsewhere have entered into extensive networks of bilateral and multilateral treaties providing for the reciprocal and liberalized recognition and enforcement of judgments with their most important trad-

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122. See *supra* text accompanying notes 10–45.

123. E.g., DIRK BROCKMEIER, PUNITIVE DAMAGES, MULTIPLE DAMAGES UND DEUTSCHER ORDRE PUBLIC: UNTER BESONDERER BERÜCKSICHTIGUNG DES RICO-ACT 88–130 (1999) (discussing the compatibility of punitive damage awards with German law and public order, and suggesting that the two are not necessarily in conflict); INA EBERT, PÖNALE ELEMENTE IM DEUTSCHEN PRIVATRECHT 525–31 (2004) (considering the arguments against and the justifications for punitive damages and the use of punitive damages in certain cases, like those of gender discrimination); MÜLLER, *supra* note 96, at 101–289; JOACHIM ROSENGARTEN, PUNITIVE DAMAGES UND IHRE ANERKENNUNG UND VOLLSTRECKUNG IN DER BUNDESREPUBLIK DEUTSCHLAND 147–208 (1994); Dagmar Coester-Waltjen, *Deutsches internationales Zivilverfahrensrecht und die punitive damages nach US-amerikanischem Recht*, in HERAUSFORDERUNGEN DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 15, 25–34 (Andreas Heldrich & Toshiyuki Kono eds., 1994) (examining the differences between German and U.S. conceptions of potential damage award characterizations and comparing German treatment of the American litigation costs rule to German treatment of American-awarded damages).

124. See *supra* note 112 and accompanying text.

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ing partners.<sup>125</sup> Since the United States has long chosen to stay away from such treaties, the rules applicable to judgments from the United States are the same rules that apply to judgments from far-away countries with which the recognition state has limited trading relationships and the fairness of the legal systems of which tends to be more doubtful than that of the recognition state's treaty partners.<sup>126</sup> Thus, since relationships with most of their important trading partners are already covered by more liberal treaties, many countries have no pressing reason to change their recognition regime for non-treaty partners. I also suspect that the rules applicable to the recognition of judgments from non-treaty partners may have often been happily used to block the effects of U.S. judgments.

Since many of the doctrinal problems encountered by U.S. judgment holders are based on a public interest of the recognition state, however,<sup>127</sup> negotiating these problems away is likely to be more challenging than if it were merely a matter of reaching agreement on what represents fair treatment of the litigants in the rendering state. Thus, obtaining a mutually agreeable treaty text will require negotiators to engage their underlying jurisprudential assumptions about the proper procedures for litigation in general and transnational litigation in particular. The U.S. delegation may also do well to engage foreign fears about litigation in the United States. Indeed, treaty negotiations represent an excellent opportunity to overcome the information asymmetries discussed above and to set up mechanisms for future information exchanges.<sup>128</sup> On the

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

126. Baumgartner, *supra* note 6, at 182.

127. *See supra* text accompanying notes 10–45.

128. For a discussion on overcoming information deficits, see, for example, BAUMGARTNER, *supra* note 13, at 120–25. *See also* Burbank, *supra* note 73, at 1477. (“Differences of opinion are more likely between [than within] signatory states, because mutually agreed upon language masks fundamental assumptions about law and society that may not derive from a shared tradition, [ ] and no tribunal can impose a uniform interpretation. But . . . the

other hand, the discussion above should also make clear that attempts to achieve better recognition and enforcement of U.S. judgments abroad through unilateral displays of U.S. power, such as by Congressional legislation or court decisions, are likely to have the opposite effect.<sup>129</sup>

Finally, it bears noting that this article focuses on aspects of substantive recognition doctrine, that is, on the requirements that must be met for a judgment to be recognizable or enforceable. For those interested in other potential problems faced by U.S. judgment holders, another fruitful avenue of research will be to look at the specific procedures applicable to obtaining a declaration of recognizability or enforceability.<sup>130</sup> Indications are that countries vary widely with regard to questions such as how much such a proceeding costs, who has to pay for it, how simple or complicated it is, how long it lasts, and whether preliminary enforcement measures are available.<sup>131</sup>

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framework for dialogue that an international convention establishes—perhaps its most enduring contribution—may help to resolve conflicts that stem not so much from ambiguous language as from differences in those fundamental assumptions.”)

129. See *supra* text accompanying notes 56–75.

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

131. BURKHARD HESS, THOMAS PFEIFFER & PETER SCHLOSSER, REPRECHT-KARLS-UNIVERSITÄT HEIDELBERG, REPORT ON THE APPLICATION OF REGULATION BRUSSELS I IN THE MEMBER STATES 226–33, 259–71, (Sept. 2007), [http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf); see also, Walter & Baumgartner, *supra* note 14, at 37–39 (discussing concerns about the duration and cost of recognition proceedings).

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