

# NOTES

## Breaking Bad: Fail-Safes to the Hague Judgments Convention

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*The underlying and optimistic premise of the 2019 Hague Judgments Convention is that a state's transparent and impartial judicial system at the time that it becomes party to the Convention will not deteriorate. The Convention ignores the possibility of a State Party's judicial system "breaking bad." This Note explores the modalities available to the United States as a party if the judicial system of one of its co-contracting parties declines below a minimum standard. Beginning with the legal framework proposed by the Convention as compared to existing U.S. law on the recognition and enforcement of foreign judgments, this Note explores the avenues under the Convention and other instruments in international law by which the United States might extricate itself from its treaty obligations to a compromised State Party. While this Note supports U.S. adherence to the Convention, it recommends that the United States consider making a reservation to the Convention addressing the contingency of a state whose judicial system breaks bad.*

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#### INTRODUCTION

The 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Judgments Convention) rests on the premise that, in 2020, “the number of countries in which litigation may ‘belong’ but in whose courts the quality of the judicial process would make us uneasy is small.”<sup>1</sup> The objectives of the Judgments Convention are to ease the enforcement of foreign civil judgments between States Parties and to harmonize those few restrictions that are retained.<sup>2</sup> If the Convention were in force between two States Parties, a civil judgment rendered by one state’s judiciary that falls within the scope of the Judgments Convention would have to be recognized by the court of the other state, unless one of the narrow grounds for nonrecognition applied.<sup>3</sup> Implicit in that premise is that worldwide judicial systems are continually improving and that, in courts across nations, a historical arc is bending toward a convergence with regard to the values of equity and transparency. That

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1. Adrian Briggs, *Which Foreign Judgments Should We Recognise Today?*, 36 INT’L & COMP. L.Q. 240, 258 (1987). The author made this statement in 1987 in reference to the focus of English courts on jurisdiction rather than on choice of law when deliberating on recognition proceedings for foreign judgments. However, the statement equally captures the underlying premise of the 2019 Hague Judgments Convention open for signature today. See Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters pmbll., *opened for signature* July 2, 2019, <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf> [<https://perma.cc/3VHW-DB4W>] [hereinafter 2019 Hague Judgments Convention].

2. See FRANCISCO J. GARCIMARTÍN ALFÉREZ & GENEVIÈVE SAUMIER, HAGUE CONFERENCE ON PRIVATE INT’L LAW, JUDGMENTS CONVENTION: REVISED PRELIMINARY EXPLANATORY REPORT 5 (2018), <https://assets.hcch.net/docs/7cd8bc44-e2e5-46c2-8865-a151ce55e1b2.pdf> [<https://perma.cc/G4SR-76KU>].

3. See 2019 Hague Judgments Convention art. 4, *supra* note 1.

historical process is irreversible. Politics—good, bad, and ugly—will not disrupt it. So, if we trust that a civil suit can be fairly heard in almost any court in the world, there is little need for one of our courts to review the merits of a case or vet the judicial process of a foreign state before recognizing and enforcing a judgment rendered therein.

The Judgments Convention's optimism about the global advance of civil justice is not Panglossian. Where a state contemplating adhering to the Convention entertains doubts about another state's institutional quality, the Judgments Convention provides an escape hatch: an opt-out provision tucked into Article 29.<sup>4</sup> Under this Article, a State Party could, upon ratification of the Judgments Convention, suspend treaty relations between itself and another contracting state.<sup>5</sup> In addition, a party would have a year following notification of the ratification or accession of a new party to the Judgments Convention to suspend the treaty's operation between itself and the new party.<sup>6</sup> In either case, the Judgments Convention allows the party to resume treaty relations with the other state later by withdrawing its opt-out notification.<sup>7</sup> However, the opt-out privilege is confined to these designated periods. Beyond these parameters, the Judgments Convention provides no opportunity to suspend the treaty obligations owed to any of the other States Parties.

This Note explores a contingency that is neither acknowledged nor addressed by the Judgments Convention: a marked deterioration in the judiciary of a party following the expiration of the twelve-month suspension period. When a state obligates itself, under the terms of the Judgments Convention, to enforce the civil and commercial judgments of another State Party, it does so with confidence in the quality of the judicial culture of that other state, including the degree of fairness and judicial transparency with which cases are prosecuted. However, the integrity of the judiciary is not necessarily enduring, nor is it immune to the effects of political change in the state. Suppose that a State Party whose judicial culture was judged fair and transparent at the time of ratification or accession experiences internal change, leading to a sudden or a gradual alteration in its judicial culture, which causes concerns for some of the other treaty partners.<sup>8</sup> As drafted, the Judgments Convention would oblige the other States Parties to continue to

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4. *Id.* art. 29.

5. *Id.* art. 29, ¶ 3.

6. *Id.* art. 29, ¶ 2.

7. *Id.* art. 29, ¶ 4.

8. This scenario is well within the realm of possibility as demonstrated by recent troubling developments in the Polish judiciary. In February 2020, President of Poland Andrzej Duda signed into law legislation that opponents criticize as a “muzzle law” compromising judicial independence. Furthermore, under the Brussels I Regulation (Recast), EU member states are required to recognize and to enforce civil and commercial judgments issued by Polish courts barring narrow grounds for nonrecognition. Therefore, EU member states confronted with recognition proceedings for Polish civil and commercial judgments may find themselves in scenarios similar to those posited in this Note. See Monique Hazelhorst, *Mutual Trust Under Pressure: Civil Justice Cooperation in the EU and the Rule of Law*, 65 NETH. INT'L L. REV. 103, 104, 107–08 (2018); *Poland: Bill Allowing Judges to Be Punished Signed into Law*, ASSOCIATED PRESS (Feb. 4, 2020), <https://apnews.com/article/37a98e202264c3756c2cd058b3d8cdee>; Zosia Wanat, *Commission Launches 4th Infringement*

perform their treaty obligations to that State Party. Herein lies the conundrum of the Judgments Convention: It relies on the assumption that its parties' quality of justice is stable over time such that their private law judgments should be enforced on a fast track<sup>9</sup> in each other's courts. Should the quality of one state's justice system later decline, litigants contesting enforcement of one of that state's civil judgments would have the burden of conforming their objections to the Judgments Convention's narrow grounds for nonrecognition.<sup>10</sup> Other States Parties would find themselves in the position of recognizing and enforcing problematic civil judgments issued from the compromised State Party.

The United States was active in the negotiation of the Judgments Convention, and the negotiators certainly appreciated the advantages that the prospective treaty potentially holds for U.S. litigants seeking enforcement of their judgments abroad.<sup>11</sup> States, including the United States, must now determine whether to become parties to the Judgments Convention, and one issue that will confront them is whether the Judgments Convention's opt-out provision is sufficient for dealing with the eventuality of a contracting state whose judicial system deteriorates.<sup>12</sup> This Note addresses that issue as it applies to the United States. Section I compares the text of the Judgments Convention and current U.S. law on the recognition of foreign judgments to identify what parts of U.S. law the Judgments Convention would modify. Sections II and III then examine a scenario that the Judgments Convention does not address: the deterioration of a State Party's judiciary after becoming party to the Judgments Convention. The Note argues that the Judgments Convention's intentionally narrow grounds for nonrecognition—although adequate at screening judgments emanating from fair and transparent judiciaries—fail to adequately screen for “corrupted judgments” from a judiciary afflicted by a systemic lack of due process.<sup>13</sup> Thus, the Judgments Convention will deny defendants in the United States the mechanisms afforded by current U.S. law to resist the enforcement of corrupted, foreign judgments. Finally, Section IV of this Note assesses the avenues available under international law by which a party to the Judgments Convention might extricate itself from obligations to another State Party whose judicial system deteriorates after becoming a party.

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*Procedure over Poland's Rule of Law*, POLITICO EU (Apr. 29, 2020, 3:38 PM), <https://www.politico.eu/article/brussels-launches-4th-infringement-procedure-over-polands-rule-of-law> [<https://perma.cc/P9SL-AHYP>].

9. See 2019 Hague Judgments Convention art. 13, *supra* note 1.

10. See *Id.* art. 7. For a further discussion of the Judgments Convention's grounds for nonrecognition, see *infra* Section I.A.

11. David Goddard, *The Judgments Convention—The Current State of Play*, 29 DUKE J. COMP. & INT'L L. 473, 473–74 (2019).

12. The Judgments Convention opened for signature on July 2, 2019 and is not yet in force. At the time of writing, the Judgments Convention has only two signatories: Ukraine, Uruguay, and Israel. *Status Table: 41: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, HCCH (Mar. 3, 2021), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> [<https://perma.cc/9EGV-RUET>].

13. Not quite under the umbrella of a systemic lack of due process is systemic *bias* against the United States or U.S. litigants in certain foreign courts. In such instances, U.S. litigants may be disadvantaged even without any clear manifestation of fraud or deprivation of rights. This issue would be more difficult and is not tackled in this Note.

Of the available avenues, this Note recommends that the United States file a reservation to the Judgments Convention.

### I. TRANSITION TO THE HAGUE FRAMEWORK

Following the failure of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the 1971 Judgments Convention)<sup>14</sup> to win meaningful adoption, the United States initiated the “Judgments Project.”<sup>15</sup> The United States submitted a proposal “to develop a broad instrument governing both the exercise of jurisdiction and the enforcement of judgments in civil and commercial matters” to the Hague Conference on Private International Law (HCCH) in the 1990s.<sup>16</sup> Ultimately, these objectives were pursued in two separate instruments: the Hague Choice of Court Convention and the Judgments Convention.<sup>17</sup>

Although the United States is relatively liberal in its recognition and enforcement of foreign civil judgments, other states are not.<sup>18</sup> It is comparatively difficult for U.S. litigants to have their judgments enforced abroad.<sup>19</sup> The Judgments Convention would benefit U.S. litigants abroad by limiting the “myriad of substantive, procedural, and practical hurdles” posed by foreign courts.<sup>20</sup>

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14. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 258.

15. Goddard, *supra* note 11; see *The Originating Proposal*, HCCH, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6837&dtid=61> [<https://perma.cc/95SV-PSC6>] (last visited Feb. 4, 2021). See generally Yoav Oestreicher, “We’re on a Road to Nowhere”—Reasons for the Continuing Failure to Regulate Recognition and Enforcement of Foreign Judgments, 42 INT’L LAW. 59 (2008) (suggesting reasons that earlier attempts at a judgments convention failed). Although the 1971 Judgments Convention is currently in force, it has only five parties: Albania, Cyprus, Kuwait, the Netherlands, and Portugal. *Status Table: 16: Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, HCCH (Nov. 10, 2010), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=78> [<https://perma.cc/4XZ8-659M>].

16. Goddard, *supra* note 11. The HCCH is an international organizational composed of eighty-four member states and the European Union whose objective is the “progressive unification” of “private international law’ rules.” See *About HCCH*, HCCH, <https://www.hcch.net/en/about> [<https://perma.cc/UDB5-E3YW>] (last visited Feb. 4, 2021). The HCCH has successfully adopted several conventions on subject matters ranging from “commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.” *Id.* The 2019 Hague Judgments Convention is the HCCH’s most recent adoption. *Id.* For background on the Judgments Project, see *Overview of the Judgments Project*, HCCH, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6843> [<https://perma.cc/3JJ4-5FVQ>] (last visited Feb. 4, 2021), as well as Andrea Bonomi, *Courage or Caution? A Critical Overview of the Hague Preliminary Draft on Judgments*, 17 Y.B. PRIV. INT’L L. 1, 2–3 (2016), and Ronald A. Brand, *The Circulation of Judgments Under the Draft Hague Judgments Convention* 7–10 (Univ. of Pittsburgh Legal Studies Research Paper No. 2019-02, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3334647](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334647) [<https://perma.cc/EAR8-S92T>].

17. Goddard, *supra* note 11, at 474–76.

18. See Sarah E. Coco, Note, *The Value of a New Judgments Convention for U.S. Litigants*, 94 N.Y.U. L. REV. 1209, 1210–13 (2019); H. L. Ho, Note, *Policies Underlying the Enforcement of Foreign Commercial Judgments*, 46 INT’L & COMP. L.Q. 443, 455 (1997).

19. See Coco, *supra* note 18; Ho, *supra* note 18.

20. Comm. on Foreign & Comparative Law, Ass’n of the Bar of the City of N.Y., *Survey on Foreign Recognition of U.S. Money Judgments*, 56 REC. ASS’N B. CITY N.Y. 378, 410 (2001); see also Coco,

However, the tradeoff is that the United States—to benefit from the advantages offered by the Judgments Convention—would have to sacrifice some of its own procedural safeguards that operate to deny recognition and enforcement to, among other things, a corrupted foreign civil judgment. To illustrate this point, this Section presents (A) state obligations under the Judgments Convention as compared to those under (B) the existing U.S. framework on foreign judgments recognition. The analysis concentrates on the grounds for nonrecognition because those form the crux of the analysis in the following Section.

#### A. STATE OBLIGATIONS UNDER THE JUDGMENTS CONVENTION

The Judgments Convention comprises four chapters containing a total of thirty-two Articles.<sup>21</sup> Chapter I (Articles 1–3) clarifies the scope of the Judgments Convention.<sup>22</sup> Chapter II (Articles 4–15) lays out the parties' core obligations;<sup>23</sup> determines the bases of recognition,<sup>24</sup> including the Judgments Convention's indirect jurisdictional requirements;<sup>25</sup> and the bases for nonrecognition.<sup>26</sup> Chapter II also touches on several narrow issues, including preliminary questions,<sup>27</sup> non-compensatory damages,<sup>28</sup> and judicial settlements.<sup>29</sup> It further prescribes the procedure for the recognition and enforcement of foreign judgments in contracting states.<sup>30</sup> Chapter III (Articles 16–23) sets out the general clauses concerning the operation of the Judgments Convention, including its interpretation as well as its relationship with other instruments of international law.<sup>31</sup> Chapter IV (Articles 24–32) provides the final clauses, including the procedures for joining the Judgments Convention,<sup>32</sup> denouncing it,<sup>33</sup> and the opt-out procedure referred to in the Introduction of this Note.<sup>34</sup>

The substantive obligations of States Parties under the Judgments Convention are pertinent to the scenario posited in this Note, as are the means of limiting those obligations or withdrawing from the Judgments Convention.

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*supra* note 18, at 1212–13 (discussing the advantages of the Judgments Conventions for U.S. litigants abroad).

21. 2019 Hague Judgments Convention, *supra* note 1.

22. *Id.* arts. 1–3.

23. *Id.* art. 4.

24. *Id.* art. 5.

25. *Id.* art. 5, ¶ 1; David P. Stewart, *Current Developments: The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, 113 AM. J. INT'L L. 772, 777–78 (2019).

26. 2019 Hague Judgments Convention art. 7, *supra* note 1.

27. *Id.* art. 8.

28. *Id.* art. 10.

29. *Id.* art. 11.

30. *Id.* arts. 12–14.

31. *Id.* arts. 20, 23.

32. *Id.* art. 24.

33. *Id.* art. 31.

34. *Id.* art. 29.

## 1. Substantive Obligations

The Judgments Convention applies to all civil and commercial judgments with certain categories of exceptions including, among other things, family matters, defamation and privacy, intellectual property, and transboundary marine pollution.<sup>35</sup>

The core obligation of the Judgments Convention is stated in Article 4:

A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State). . . . Recognition or enforcement may be refused only on the grounds specified in this Convention [under Article 7]. There shall be no review of the merits of the judgment in the requested State.<sup>36</sup>

Article 4 thereby displaces the grounds for nonrecognition and nonenforcement in a state's domestic law, which may be more expansive or accord greater discretion to the enforcing court. The grounds for nonrecognition referenced in Article 4 are specified—and limited to those—in Article 7. A foreign judgment may be refused recognition if:

- (a) [there was insufficient notice to the defendant;]
- (b) the judgment was obtained by fraud;
- (c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;
- (d) [the judgment is contrary to a choice of forum agreement; or]
- ...
- (f) [the judgment conflicts with prior judgments rendered in a dispute between the same parties].<sup>37</sup>

These grounds are discretionary and pertain primarily to the proceedings in the foreign court for the judgment in question.<sup>38</sup>

## 2. The Regulation of Treaty Relations with Other States Parties

Contrary to the “opt-in” approach of the failed 1971 Judgments Convention, the 2019 Judgments Convention considers a State Party bound by the terms of the treaty toward every other State Party, unless a State Party expressly *opts out* of its treaty

35. *Id.* art. 2; see Stewart, *supra* note 25, at 776–77 (discussing why certain subject areas were excluded from the scope of the Judgments Convention); see also Cristina M. Mariottini, *The Exclusion of Defamation and Privacy from the Scope of The Hague Draft Convention on Judgments*, 19 Y.B. PRIV. INT'L L. 475, 476 (2018); Cara North, *The Exclusion of Privacy Matters from the Judgments Convention*, 67 NETH. INT'L L. REV. 33, 34 (2020).

36. 2019 Hague Judgments Convention art. 4, ¶¶ 1–2, *supra* note 1.

37. *Id.* art. 7, ¶ 1.

38. See *id.*

relations with another State Party at a designated moment or within a designated period of time.<sup>39</sup> Under Article 29, if the state wishing to suspend relations joins the Judgments Convention *after* the target state has done so, it must notify the depositary upon deposit of its instrument of ratification, acceptance, approval, or accession.<sup>40</sup> If the state wishing to suspend relations is already party to the Judgments Convention *prior* to the target state, the state has twelve months following the notification by the depositary of the ratification, acceptance, approval, or accession of the target state to opt out of treaty relations with the target state.<sup>41</sup> The Judgments Convention further provides that a State Party that has opted out with respect to a target state may later withdraw its opt-out notification and resume its treaty relation with the target state.<sup>42</sup> The Judgments Convention provides no further means of suspending treaty relations with specified States Parties.

The other option under the Judgments Convention by which a State Party may extricate itself from treaty relations with the target state is the complete withdrawal from the Judgments Convention under Article 31.<sup>43</sup> The withdrawal is applied toward all States Parties such that the withdrawing state is no longer bound by the Judgments Convention or entitled to its benefits twelve months after giving written notice to the depositary.<sup>44</sup>

The Judgments Convention does not contain an explicit provision with regard to reservations.<sup>45</sup> The informal working group on final clauses observed that “[t]his means that reservations are permitted, subject to the normal rules of customary international law (as reflected in . . . the Vienna Convention of 1969).”<sup>46</sup> As this Note argues later, a reservation is an option that states contemplating adherence to the Judgments Convention should well consider.<sup>47</sup>

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39. *Id.* art. 29. The 1971 Judgments Convention relied on an opt-in model, whereby states joined the Convention and then entered into separate supplementary agreements with individual States Parties to initiate treaty relations. The opt-in provision is considered one of the primary reasons why the 1971 Convention failed; the use of bilateral agreements defeated the value of a multilateral convention. Louise Ellen Teitz, *Another Hague Judgments Convention? Bucking the Past to Provide for the Future*, 29 DUKE J. COMP. & INT’L L. 491, 492–93 (2019); see Michael Douglas, *The Culmination of the Judgments Project: The HCCH Judgments Convention*, OXFORD BUS. L. BLOG (Aug. 16, 2019), <https://www.law.ox.ac.uk/business-law-blog/blog/2019/08/culmination-judgments-project-hcch-judgments-convention> [<https://perma.cc/8ELM-4RDY>].

40. 2019 Hague Judgments Convention art. 29, ¶ 3, *supra* note 1; CHAIR OF THE INFORMAL WORKING GRP. ON GEN. & FINAL CLAUSES, HAGUE CONFERENCE ON PRIVATE INT’L LAW, NON-PAPER ON ARTICLE 29, at 91 (2019).

41. 2019 Hague Judgments Convention art. 29, ¶ 2, *supra* note 1; CHAIR OF THE INFORMAL WORKING GRP. ON GEN. & FINAL CLAUSES, *supra* note 40.

42. 2019 Hague Judgments Convention art. 29, ¶ 4, *supra* note 1.

43. *Id.* art. 31.

44. *Id.* art. 29, ¶ 2.

45. See Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (stating that a state is permitted to make a reservation when ratifying or acceding to a treaty so long as the treaty does not expressly prohibit reservations, and the proposed reservation is compatible with the object and purpose of the treaty).

46. CHAIR OF THE INFORMAL WORKING GRP. ON GEN. & FINAL CLAUSES, *supra* note 40.

47. See *infra* Section IV.C, Conclusion.

Finally, like the Hague Choice of Court Agreements Convention,<sup>48</sup> the Judgments Convention does not provide a dispute resolution mechanism.<sup>49</sup>

#### B. CURRENT U.S. LAW ON FOREIGN JUDGMENTS RECOGNITION

Relative to those in other nations, courts in the United States are largely deferential to foreign civil judgments, and U.S. law imposes few barriers to their enforcement.<sup>50</sup> The procedure for the recognition and enforcement of foreign judgments is regulated on a state-by-state basis.<sup>51</sup> In 2005, the American Law Institute (ALI) proposed a federal statute on the recognition and enforcement of foreign judgments (ALI Proposed Statute).<sup>52</sup> Proponents of the ALI Proposed Statute argue that foreign judgments recognition is subject to the jurisdiction of the federal government under the Interstate and Foreign Commerce Clauses.<sup>53</sup> Critics, on the other hand, see no issue with the state-by-state approach and contend that the ALI Proposed Statute's pro-enforcement bias may restrict U.S. litigants' ability to defend against the enforcement of corrupted foreign judgments in U.S. courts.<sup>54</sup> Although the ALI Proposed Statute remains under consideration, scholars estimate that it will be a while before Congress adopts any federal legislation on foreign judgments recognition.<sup>55</sup> The substantive law in the United States on foreign judgments remains a patchwork of uniform acts and common law loosely descended from the 1895 U.S. Supreme Court decision in *Hilton v. Guyot*.<sup>56</sup>

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48. Hague Convention on Choice of Court Agreements, *opened for signature* June 30, 2005, 44 I.L.M. 1294.

49. Any dispute between the United States and another contracting party concerning the operation of the Judgments Convention would be resolved informally through diplomatic channels or during the periodic review of the Judgments Convention organized by the Secretary General of the Hague Conference on Private International Law. See 2019 Hague Judgments Convention art. 21, *supra* note 1 (providing for a periodic review of the operation of the Judgments Convention).

50. Coco, *supra* note 18, at 1212; Ho, *supra* note 18.

51. Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491, 500 (2013).

52. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (AM. LAW INST. 2006). See generally Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 101 (Paul B. Stephan ed., 2014) (arguing that a federal statute is necessary to recognize and to enforce foreign judgments according to a uniform national standard); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45 (2014) (evaluating the ALI Proposed Statute's likelihood of improving the U.S. approach to recognition and enforcement of foreign judgments).

53. See U.S. CONST. art. I, § 8, cl. 3; Brand, *supra* note 51, at 529.

54. Strong, *supra* note 52, at 142–43. For a critique of the ALI Proposed Statute, see generally Robert L. McFarland, *Federalism, Finality, and Foreign Judgments: Examining the ALI Judgments Project's Proposed Federal Foreign Judgments Statute*, 45 NEW ENG. L. REV. 63 (2010).

55. See Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 231 (2001); Strong, *supra* note 52, at 142. If the United States signs the Judgments Convention, the debate on a federal statute will revive because Congress will have to consider implementing legislation. There has already been similar debate concerning the implementation of the Hague Choice of Court Agreements Convention. See Peter D. Trooboff, *Proposed Principles for United States Implementation of the New Hague Convention on Choice of Court Agreements*, 42 N.Y.U. J. INT'L L. & POL. 237, 245–49 (2009).

56. See 159 U.S. 113, 113–20 (1895); Brand, *supra* note 51, at 494–97.

## 1. The Legacy of *Hilton v. Guyot*

*Hilton v. Guyot* involved a defendant, in a New York federal court, contesting the enforcement of a money judgment rendered by a French commercial court a year prior.<sup>57</sup> In its opinion, the Supreme Court clarified that:

[A foreign judgment] should be held conclusive upon the merits tried in the foreign court, *unless some special ground is shown for impeaching the judgment*, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.<sup>58</sup>

In its decision, the Court stipulated that the merits of a case issuing from a foreign court should not—in principle—be relitigated. Nonetheless, the Court acknowledged that there are grounds for refusing to enforce a foreign judgment.

Since *Hilton*, U.S. states have clarified the grounds for the nonrecognition of foreign judgments. Most states have adopted either the 1962 or the 2005 Uniform Foreign Money Judgments Recognition Act.<sup>59</sup> Other states rely on the common law, as stated in Sections 483 and 484 of the Restatement (Fourth) of Foreign Relations Law.<sup>60</sup> The substantive rules across state and common law sources of foreign judgment law are largely similar, particularly with respect to the grounds for nonrecognition.<sup>61</sup>

## 2. The Grounds for Nonrecognition of Foreign Judgments

The Recognition Acts and the Restatement specify mandatory grounds for nonrecognition of a foreign judgment: a lack of systemic due process in the court system of the state of origin, a lack of subject matter jurisdiction of the court of origin, and a lack of personal jurisdiction by the issuing court over the defendant.<sup>62</sup> The Restatement further forbids recognition if the foreign judgment “rested on a claim of defamation and the SPEECH Act forbids its recognition or

57. *Hilton*, 159 U.S. at 113–20.

58. *Id.* at 206 (emphasis added).

59. See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2005) [hereinafter 2005 RECOGNITION ACT]; UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1962) [hereinafter 1962 RECOGNITION ACT]; Brand, *supra* note 51, at 500–04; *1962 Foreign Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=9c11b007-83b2-4bf2-a08e-74f642c840bc> [<https://perma.cc/XM7B-GZGV>] (last visited Feb. 5, 2021); *2005 Foreign-Country Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=ae280c30-094a-4d8f-b722-8dcd614a8f3e> [<https://perma.cc/J8DE-QMM3>] (last visited Feb. 5, 2021).

60. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW §§ 483–484 (AM. LAW INST. 2018); Brand, *supra* note 51, at 500–02.

61. See Brand, *supra* note 51, at 509–24.

62. 2005 RECOGNITION ACT, *supra* note 59, § 4(b); 1962 RECOGNITION ACT, *supra* note 59, § 4(a); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 483. For a table comparing the grounds for nonrecognition across all three sources of law, see Brand, *supra* note 51, at 536–37. However, note that Brand uses an earlier version of the Restatement in his table.

enforcement.”<sup>63</sup> The Recognition Acts and the Restatement also specify grounds for nonrecognition that a court may invoke at its discretion.<sup>64</sup> These grounds include insufficient notice to the defendant, fraud in the proceedings, a violation of public policy, conflicting judgments, and a seriously inconvenient forum in the issuing court.<sup>65</sup>

In U.S. courts, fraud in the proceedings and a lack of systemic due process would be the most appropriate grounds on which to contest recognition of a corrupted foreign judgment. In either instance, the party contesting recognition of the foreign judgment bears the burden of proving the ground for nonrecognition.<sup>66</sup> However, as argued below, the burden of proof in a fraud defense is more onerous on the defendant than in a systemic inadequacy defense. As such, it is more difficult for a defendant to prevail in a fraud defense.

### 3. Fraud in the Proceedings

As regards fraud in the proceedings, courts have the discretion to refuse recognition of a judgment tainted by extrinsic fraud, such as bribery of a judge or juror or prevention of another party’s witness from appearing in court.<sup>67</sup> In practice, it is difficult for defendants to prevail on the fraud defense because of the heavy burden of production and the high threshold as to what constitutes extrinsic fraud.<sup>68</sup> As James George observed, “[t]he fraud defense is difficult to satisfy—not one of the case annotations in the model UFCMJRA [the 1962 and 2005 Recognition Acts] allowed the defense.”<sup>69</sup>

Minor procedural irregularities that the court does not perceive as having meaningfully impacted the outcome of the dispute are not sufficient to prevail in a

63. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 483(c); *see also* Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, 28 U.S.C. §§ 4101–4105 (2018). The SPEECH Act is a federal response to “libel tourism,” which is forum shopping for plaintiff-friendly libel laws. In order for a plaintiff to enforce a foreign judgment for libel in a U.S. court, the plaintiff must meet certain requirements stipulated in the Act, including compliance with the First Amendment and Section 230 of the Communications Act of 1934, 47 U.S.C. § 230 (2018). *See* EMILY C. BARBOUR, CONG. RESEARCH SERV., THE SPEECH ACT: THE FEDERAL RESPONSE TO “LIBEL TOURISM” 1–2 (2010).

64. 2005 RECOGNITION ACT, *supra* note 59, § 4(c); 1962 RECOGNITION ACT, *supra* note 59, § 4(b); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 484.

65. 2005 RECOGNITION ACT, *supra* note 59, § 4(c); 1962 RECOGNITION ACT, *supra* note 59, § 4(b); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 484.

66. *E.g.*, 2005 RECOGNITION ACT, *supra* note 59, § 4(d).

67. Brand, *supra* note 51, at 518–19; *see, e.g.*, United States v. Throckmorton, 98 U.S. 61, 65–66 (1878); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440–42 (3d Cir. 1971); Laufer v. Westminster Brokers, Ltd., 532 A.2d 130, 133–34 (D.C. 1987); Ellett v. Ellett, 542 S.E.2d 816, 818 (Va. Ct. App. 2001).

68. *See, e.g.*, Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610, 615 (S.D.N.Y. 1979); Fiske, Emery & Assocs. v. Ajello, 577 A.2d 1139, 1143 (Conn. Super. Ct. 1989); Kam-Tech Sys. Ltd. v. Yardeni, 774 A.2d 644, 654 (N.J. Super. Ct. App. Div. 2001); Tonga Air Servs., Ltd. v. Fowler, 826 P.2d 204, 210–11 (Wash. 1992) (en banc); Bank of N.S. v. Tschabold Equip. Ltd., 754 P.2d 1290, 1295 (Wash. Ct. App. 1988); *see also* James P. George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. TEX. L. REV. 399, 434 n.186 (2009).

69. George, *supra* note 68.

fraud defense. For example, in *Norkan Lodge Co. v. Gillum*, the defendant alleged that a Canadian judgment was tainted by fraud because the plaintiff's counsel presented a portion of the defendant's deposition to the Canadian court without reading other excerpts of the deposition into the record.<sup>70</sup> The district court noted that the full deposition was nonetheless available to the Canadian court. The defendant also argued that a witness had changed their testimony between their deposition and the trial. The court responded that this variability was not evidence of fraud but simply went to the credibility of the witness. Similarly, in *Fiske, Emery & Associates v. Ajello*, the defendant raised a fraud defense to a Quebec judgment affirming an arbitration award.<sup>71</sup> The Superior Court of Connecticut rejected the defendant's claim that a deposit was never made as security for the arbitration hearing as a "bogus issue" that failed to show fraud.<sup>72</sup>

The burden of production in a fraud defense is also a steep challenge in all but those cases in which a well-heeled defendant and unusually good luck converge. In *Chevron Corp. v. Donziger*, for example, Chevron persuasively argued fraud by presenting the district court with a proverbial smoking gun.<sup>73</sup> In an Ecuadorian court, attorney Steven Donziger had secured \$9.5 billion in damages on behalf of indigenous plaintiffs against Chevron for environmental and social harm in the Ecuadorian Amazon allegedly resulting from Chevron's crude oil production in the region.<sup>74</sup> Chevron alleged fraud, among several other claims, while contesting enforcement of the Ecuadorian judgment.<sup>75</sup> As part of his media strategy, Donziger had requested that a documentary filmmaker produce a documentary about the Ecuadorian litigation.<sup>76</sup> The film crew had captured over 600 hours of footage of plaintiff's counsel during the litigation, which Chevron subpoenaed during the enforcement proceeding.<sup>77</sup> This footage provided incontrovertible evidence of fraud and judicial impropriety during the Ecuadorian litigation.<sup>78</sup> There was footage of the plaintiff's lawyers meeting with a court-appointed damages

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70. 587 F. Supp. 1457, 1460 (N.D. Tex. 1984).

71. 577 A.2d at 1142–43.

72. *Id.* at 1143.

73. 768 F. Supp. 2d 581, 633 (S.D.N.Y. 2011), *rev'd sub nom.* *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012). Although the Second Circuit later vacated the district court's preliminary injunction, it did so on procedural grounds. *Naranjo*, 667 F.3d at 240. Chevron, a potential judgment debtor, was attempting to *preemptively* defend against the enforcement of a foreign judgment by the judgment creditor. The Second Circuit clarified that the "sections [of the Recognition Act] on which Chevron relies provide *exceptions* from the circumstances in which a holder of a foreign judgment can obtain enforcement of that judgment in New York; they do not create an affirmative cause of action to declare foreign judgments void and enjoin their enforcement." *Id.* Nonetheless, *Donziger* illustrates what would likely have been a successful fraud defense under the Recognition Acts.

74. See *Donziger*, 768 F. Supp. 2d at 594; *Ecuador Lawsuit: The Facts About Chevron and Texaco in Ecuador*, CHEVRON, <https://www.chevron.com/ecuador> [<https://perma.cc/KN3G-HNJ2>] (last visited Feb. 6, 2021).

75. *Donziger*, 768 F. Supp. 2d at 633.

76. *In re Chevron Corp.*, 749 F. Supp. 2d 141, 146 (S.D.N.Y. 2010), *aff'd sub nom.* *Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App'x 393 (2d Cir. 2010).

77. Theodore J. Boutros, Jr., *Ten Lessons from the Chevron Litigation: The Defense Perspective*, 1 STAN. J. COMPLEX LITIG. 219, 222 (2013).

78. See *In re Chevron Corp.*, 749 F. Supp. 2d at 146.

expert to plan damages two weeks before the court even appointed an expert.<sup>79</sup> In another outtake, Donziger said to the camera, “The only language I believe this judge is going to understand is one of pressure, intimidation, and humiliation. And that’s what we’re doing today.”<sup>80</sup> In this instance, the high-profile nature of the dispute and the resources available to the parties allowed for the assembly of documentary evidence of the entire foreign proceeding sufficient to prove fraud.

In less exceptional circumstances, defendants will be hard-pressed to meet their burden of production. In an unusual case, *Transportes Aereos Pegaso v. Bell Helicopter Textron*, the district court conceded that the defendant had raised troubling suspicion of fraud in prior Mexican litigation, but the court did not pronounce whether the defendant had proved fraud by clear and convincing evidence.<sup>81</sup> Nonetheless, the court refused recognition to the Mexican judgment.<sup>82</sup> Under Mexican procedural law, court-appointed experts were to be appointed strictly in alphabetical order.<sup>83</sup> However, in this proceeding, the Mexican judge appointed an expert out of order, did not record the appointment in the court’s internal records, and then resumed appointing experts in alphabetical order.<sup>84</sup> In addition, the appointed expert solicited a bribe from the defendant’s counsel and then confessed to the defendant’s counsel that the judge was exerting pressure on him to find for the plaintiff.<sup>85</sup> Furthermore, a criminal investigation of the Mexican judge in the case was underway in Mexico at the time of the enforcement proceeding.<sup>86</sup> In support of their allegations, the defendant relied primarily on testimony from its Mexican counsel and Mexican legal experts.<sup>87</sup> Scholars have remarked that the court in fact declined to impose the full evidentiary burden on the defendant, adopting—in this case—“a less stringent test, refusing recognition on the basis of evidence that left it unsatisfied that fraud had *not* occurred.”<sup>88</sup> From one perspective, *Bell Helicopter* is the exception that proves the rule: under the standard set by most U.S. courts, the defendant must meet a heavy, occasionally insurmountable burden of production to prevail on a fraud defense. These cases illustrate the difficulty of mounting a persuasive fraud defense in a foreign judgments recognition proceeding.

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79. Boutrous, Jr., *supra* note 77, at 223.

80. *Id.*

81. See 623 F. Supp. 2d 518, 537–38 (D. Del. 2009).

82. *Id.* at 538.

83. *Id.* at 537–38.

84. *Id.*

85. *Id.* at 538.

86. *Id.*

87. Timothy G. Nelson, *Down in Flames: Three U.S. Courts Decline Recognition to Judgments from Mexico, Citing Corruption*, 44 INT’L LAW. 897, 906–07 (2010).

88. *Id.* at 907.

#### 4. Systemic Lack of Due Process

As compared to the fraud defense, a defense of systemic lack of due process imposes a lower burden of production.<sup>89</sup> If the defendant raises systemic inadequacy as a ground for the nonrecognition of a foreign judgment, the court looks for evidence of “clear partiality or a clear lack of evidence of partiality on the part of the foreign legal system.”<sup>90</sup> There is no “clear threshold that separates what is sufficient to produce nonrecognition from what is not sufficient.”<sup>91</sup> Courts consider whether the principles of due process are enshrined in the foreign constitution, in the analysis of the U.S. State Department Country Reports on Human Rights Practices, and in the perspectives of legal experts in the foreign judicial system.<sup>92</sup> These are resources readily accessible to most defendants.

Courts have placed particular stock in U.S. State Department records.<sup>93</sup> In *Bridgeway Corp. v. Citibank*, Bridgeway sought enforcement of a money judgment rendered against Citibank by the Supreme Court of Liberia in 1995 when Liberia was in the midst of civil war.<sup>94</sup> The defendant raised systemic inadequacy as a ground for nonrecognition, citing the U.S. State Department Country Reports for Liberia that indicated rampant corruption in the judicial system during this period.<sup>95</sup> For its part, the creditor submitted affidavits from two Liberian legal experts, one of whom was the former Vice President of the Liberian National Bar Association, testifying to the integrity of the Liberian judicial system.<sup>96</sup> The Second Circuit was persuaded by the State Department’s assessment of the Liberian judicial system:

[State Department Human Rights Practices] Reports are submitted annually, and are therefore investigated in a timely manner. They are prepared by area specialists at the State Department. And nothing in the record or in Bridgeway’s briefs indicates any motive for misrepresenting the facts concerning Liberia’s civil war or its effect on the judicial system there.<sup>97</sup>

Similarly, in *Bank Melli Iran v. Pahlavi*, Bank Melli Iran and Bank Mellat sought enforcement of Iranian money judgments rendered in 1982 and 1986

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89. See, e.g., *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000) (affirming denial of recognition to a foreign judgment rendered in Liberian courts during the Liberian Civil War); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (denying recognition to a foreign judgment rendered in Iran after the revolution against the older sister of the Shah because of prejudice to persons associated with the monarchy); *S.C. Chimexim S.A. v. Velco Enters. Ltd.*, 36 F. Supp. 2d 206, 214 (S.D.N.Y. 1999).

90. Brand, *supra* note 51, at 510.

91. *Id.*

92. *Id.* at 510–14.

93. See Bureau of Democracy, Human Rights, & Labor, U.S. Dep’t of State, *2019 Country Reports on Human Rights Practices*, U.S. DEP’T STATE (Mar. 11, 2020), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices> [<https://perma.cc/9SX2-GJCK>].

94. 201 F.3d at 138.

95. *Id.* at 138–39.

96. *Id.* at 142.

97. *Id.* at 143–44.

against Princess Shams Pahlavi, the Shah's older sister.<sup>98</sup> The Ninth Circuit considered the State Department Reports on Human Rights Practices, consular travel warnings, a 1991 State Department terrorism report, and a State Department official's 1990 declaration relating to Iran.<sup>99</sup> On the basis of these records, the Ninth Circuit concluded that a person with ties to the Shah's regime, in the years immediately following the Iranian Revolution, would not have been likely to receive a fair trial in an Iranian court.<sup>100</sup>

These cases and more contemporary disputes concerning foreign judgments recognition suggest that due process concerns are more likely to prevail when raised with regard to the entire judicial system, rather than a specific proceeding.<sup>101</sup> It is possible that the higher success rate is due to U.S. courts' reliance on publicly available information in systemic inadequacy defenses, which lowers the defendant's burden of production.

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The United States' adherence to the Judgments Convention would entail changes to U.S. foreign judgments recognition law—at least with regard to judgments issued by the courts of certain co-contracting states. The fraud defense would remain: the fraud defense under the Recognition Acts and Restatement has a clear analogue in Article 7, paragraph 1(b) of the Judgments Convention. However, systemic inadequacy is not one of the grounds for nonrecognition permitted under Article 7 of the Convention. Therefore, defendants in these disputes would not be permitted to invoke the systemic inadequacy defense. This change to U.S. law could have repercussions if the scenario addressed below were to occur.

## II. THE SCENARIO: THE JUDICIARY OF A CONTRACTING STATE DETERIORATES

If the United States were to ratify the Judgments Convention, a systemic lack of due process would no longer be permissible grounds for refusing recognition of a foreign judgment issued by certain other contracting states. In that event, a defendant contesting enforcement of the judgment in another contracting state—and believing it had not received a fair trial in the court of origin—would have to plead one of the narrow grounds for nonrecognition under Article 7.<sup>102</sup>

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98. 58 F.3d 1406, 1407–08 (9th Cir. 1995).

99. Brand, *supra* note 51, at 513.

100. *Bank Melli Iran*, 58 F.3d at 1411–13.

101. *See, e.g., DeJoria v. Maghreb Petroleum Expl., S.A.*, 804 F.3d 373, 380–84 (5th Cir. 2015) (considering the state of due process in the Moroccan judicial system); *Iraq Middle Mkt. Dev. Found. v. Harmoosh*, 175 F. Supp. 3d 567, 574–75 (D. Md. 2016) (considering the state of the Iraqi judicial system after the Iraq War); *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 633 (S.D.N.Y. 2011) (“[T]here is abundant evidence before the Court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law, at least in the time period relevant here, especially in cases such as this.”).

102. The most applicable grounds would be the Article 7, paragraph 1(b) fraud exception or the Article 7, paragraph 1(c) public policy exception under the 2019 Hague Judgments Convention.

In a contracting state with a robust judicial system, the Judgments Convention's grounds for nonrecognition would be sufficient to screen for those rare judgments that are tainted by corruption. As the vast majority of decisions rendered by the foreign courts would be fair, a U.S. court hearing an enforcement proceeding could safely presume that the decision before it was also rendered fairly—unless presented with evidence of foul play in the specific proceeding. However, the Judgments Convention's narrow grounds for nonrecognition may not effectively screen judgments issued by a system with rampant corruption or a systemic lack of due process.

Consider the following scenario. A state accedes to the Judgments Convention. At the time of accession, the state in question is a stable, functioning democracy and is well regarded in the world community with a fair and transparent judiciary. None of the other contracting states invoke Article 29 of the Judgments Convention to suspend treaty relations with the new State Party. After the grace period provided by Article 29 has expired, there is a marked change—for the worse—in the judicial order of the acceded state.

Suppose that an authoritarian party rises to power in the acceded state, capturing seats in the parliament and finally all branches of government. The new regime does not alter the state's constitution and alters few of the existing laws. However, there is evidence that the courts under the regime are often tainted by “telephone justice” whereby a discreet call from a government official determines the outcome of criminal and civil disputes.<sup>103</sup> Even if there is no “telephone justice,” in the political culture under the new regime, a court will know which outcomes the regime expects.<sup>104</sup> This melancholy state of affairs is confirmed by the U.S. State Department's Human Rights Practice reports.

A judgment creditor from that compromised state then seeks enforcement of a judgment covered by the Judgments Convention in the United States. Looking objectively, a U.S. court could reasonably doubt whether all litigants received due process in the foreign judicial system, but the Convention precludes the judge from acting on it. The defendant is required to prove fraud or lack of due process in the specific proceeding.<sup>105</sup>

However, few litigants would be able to bring persuasive evidence of fraud or lack of due process in a *specific* proceeding. First, as demonstrated by *Bell*

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103. See generally Alena Ledeneva, *Telephone Justice in Russia*, 24 POST-SOVIET AFF. 324 (2008) (discussing how to assess the pervasiveness of *telefonnoye pravo* or “telephone justice,” and using Russia as a case study).

104. As an illustration of this scenario, consider, for example, the recent troubling developments in the Polish judiciary. See *supra* note 8 and accompanying text. Another example to consider is Slovakia. In 2018, journalists Pavla Holcová, Arpád Soltész, and Eva Kubaniova investigated the rampant corruption of judges and prosecutors in Slovakia as well as the murder of their friend and colleague while he was reporting on corruption in the country. See Pavla Holcová & Arpád Soltész, *Kočner's World*, ORGANIZED CRIME & CORRUPTION REPORTING PROJECT (Feb. 21, 2020), <https://www.occrp.org/en/a-journalists-undying-legacy/kocners-world> [<https://perma.cc/R9Y9W-QKNE>]. Slovakia was once “touted as a poster child for successful transition . . . to European rule of law.” *Id.*

105. See 2019 Hague Judgments Convention art. 7, ¶ 1(b)–(c), *supra* note 1.

*Helicopter* and *Chevron*, the defendant's burden of production in a fraud defense is heavy.<sup>106</sup> Under the scenario posited above, it would be difficult for a defendant to adduce first-person testimony from someone privy to the fraud or due process violation in the foreign litigation.<sup>107</sup> Any person residing in the foreign state that testified for the defendant or aided the defendant in the investigation might risk their career, reputation, or safety. The cost alone of such an investigation might be beyond the resources of many defendants. Second, where the political culture compels the courts to reach certain outcomes favored by the government, it would be difficult to provide any proof of fraud because there may not have been any exchange of money or instruction by a government official to the court. For example, in *Pahlavi*, it would be unlikely that an Iranian judge, recently installed by the new regime, would have required express instruction from the government to find in favor of the plaintiff.<sup>108</sup> The court would have implicitly understood that the sister of the dethroned Shah was not to prevail in the dispute. A case such as this may simply involve a deprivation of rights favored by a higher authority.

In such a situation, defendants contesting enforcement will prove unable to meet the burden of production required by a U.S. court to prove fraud or an absence of due process in the foreign court proceeding. Many defendants would fail to mount persuasive defenses under the nonrecognition grounds prescribed by the Judgments Convention. As a result, courts in the contracting states might find themselves obliged to enforce tainted civil judgments rendered in the compromised state.

### III. THE NONSTARTERS: OPTIONS THAT COMPROMISE U.S. INTERESTS

The Judgments Convention presumes that the political and legal culture of States Parties will remain stable. From the time a state becomes a party to the Convention, it is obliged to comply with the terms of the Judgments Convention with regard to all other States Parties, excepting the opt-outs permitted under Article 29.<sup>109</sup> To create stability, the Judgments Convention does not permit a State Party to suspend treaty relations with another state outside the parameters defined by Article 29.<sup>110</sup> Within the four corners of the Judgments Convention, a state is locked into its obligations under the Convention.

There are four exit strategies that should be discouraged. First, the United States could use the opt-out provision liberally and restrict its treaty relations to a close-knit circle of allies. However, this would arguably defeat the core objective that the Judgments Convention seeks to achieve, which is the harmonization of states' foreign judgments recognition law.<sup>111</sup> Second, in practice, the United

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106. See *supra* Section I.B.3 for a discussion of the fraud defense in prior U.S. case law.

107. See *supra* Section I.B.3.

108. See *supra* text accompanying notes 98–100 for a discussion of *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995).

109. See 2019 Hague Judgments Convention art. 29, *supra* note 1.

110. See *id.*

111. See *id.* pmb1.

States would never be permanently locked into its obligations under the Judgments Convention inasmuch as Article 31 allows a party to denounce the treaty and withdraw twelve months after notice is given to the depositary.<sup>112</sup> But this would cost twelve months of Judgments Convention-required enforcement of corrupted judgments.<sup>113</sup> Moreover, in denouncing the treaty, the United States would be cutting off its nose to spite its face, as denunciation would deprive the United States of the Judgments Convention's benefits with all of the other States Parties.

Third, the United States, as a powerful state, would be able to selectively violate the Judgments Convention. Thus, the Judgments Convention notwithstanding, the U.S. State Department might issue a "suggestion" to the courts to refuse to enforce the judgments of the target State Party.<sup>114</sup> However, this seemingly low-cost solution actually comes with a high price tag. As an actor committed to a rules-based international system, the United States, more than any other actor, has an investment in the rule of *pacta sunt servanda*.<sup>115</sup> Each unilateral treaty violation undercuts it and a violation by the United States itself eviscerates it.

Finally, Article 7, paragraph 1(c) of the Convention, which was considered earlier, is also a risky option.<sup>116</sup> Article 7, paragraph 1(c) allows a court of a State Party to refuse to enforce a judgment of another contracting state on "public policy" grounds where "recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State."<sup>117</sup> Given the generality of the concept of public policy, this provision would seem to allow a State Party to achieve the effect of unilateral refusal to enforce without the appearance of a

112. *See id.* art. 31.

113. *See id.*

114. This would be similar to the "suggestions of immunity" issued by the U.S. State Department in foreign sovereign immunity cases. Under 28 U.S.C. § 517 (2018), "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States." There, the United States may submit to the court a "suggestion" by the U.S. State Department as to whether a defendant is entitled to foreign sovereign immunity. For example, in *Lafontant v. Aristide*, 844 F. Supp. 128, 131 (E.D.N.Y. 1994), the State Department submitted a statement that read:

The United States has an interest and concern in this action against President Aristide insofar as the action involves the question of immunity from the Court's jurisdiction of the head-of-state of a friendly foreign state. The United States' interest arises from a determination by the Executive Branch of the Government of the United States, in the implementation of its foreign policy and in the conduct of its international relations, that permitting this action to proceed against President Aristide would be incompatible with the United States' foreign policy interests.

The district court subsequently dismissed the action. *Id.* at 140.

115. *Pacta Sunt Servanda*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The rule that agreements and stipulations, esp. those contained in treaties, must be observed . . .").

116. *See supra* text accompanying notes 37–38.

117. 2019 Hague Judgments Convention art. 7, ¶ 1(c), *supra* note 1.

violation of the Judgments Convention.<sup>118</sup> However, like the burden of proving fraud, the criterion of incompatibility with “fundamental principles of procedural fairness” imposes a burden on the defendant that is difficult to discharge in an adversarial process with respect to a State Party whose judicial system has deteriorated. Moreover, public policy is “an unruly horse,”<sup>119</sup> which like the length of a “Chancellor’s foot,” varies from court to court.<sup>120</sup> Reliance on Article 7, paragraph 1(c) as a safety valve for states whose judicial systems have deteriorated could well produce a chaotic jurisprudence. Nonetheless, it could moderate the unilaterality of a reservation.<sup>121</sup>

#### IV. THE SOLUTIONS: DEROGATIONS PERMITTED UNDER INTERNATIONAL LAW

International law provides tools by which a State Party may lawfully deprive a compromised State Party of the benefits of the Judgments Convention without sacrificing the integrity of the whole treaty. This Section considers three possible methods: (A) a Chapter VII Resolution by the United Nations Security Council, (B) an invocation of Article 62 of the Vienna Convention on the Law of Treaties, and (C) a reservation to the Judgments Convention.

##### A. A CHAPTER VII RESOLUTION BY THE UNITED NATIONS SECURITY COUNCIL

A Chapter VII Resolution is one method that would allow the United States to lawfully extricate itself from its obligations toward another contracting state under the Judgments Convention without sacrificing the treaty in its entirety. Although theoretically possible, this option is unlikely to be viable.

Under Article 103 of the U.N. Charter, Charter obligations take precedence over all other international agreements.<sup>122</sup> Therefore, there might be a rare situation in which compliance with the Judgments Convention in regard to one specific party would be inconsistent with a Chapter VII Resolution of the Security Council. Article 41 of the Charter further provides, “[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United

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118. For an analysis of the public policy exception to the Judgments Convention, see generally Junhyok Jang, *The Public Policy Exception Under the New 2019 HCCH Judgments Convention*, 67 NETH. INT’L L. REV. 97 (2020).

119. *Richardson v. Mellish* (1824) 130 Eng. Rep. 294, 303; 2 Bing. 229, 252 (“[P]ublic policy . . . is a very unruly horse, and when once you get astride it you never know where it will carry you.”).

120. *See, e.g., Gee v. Pritchard* (1818) 36 Eng. Rep. 670, 674; 2 Swans. 408, 413 (Lord Eldon) (“The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor’s foot.”).

121. *See infra* Section IV.C.

122. U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

Nations to apply such measures.”<sup>123</sup>

It is entirely within the discretion of the Security Council to determine what acts constitute a breach of or threat to the peace and to determine the mechanism by which it calls on states to remedy that breach or threat.<sup>124</sup> Furthermore, a Chapter VII breach of or threat to the peace has been interpreted liberally by the Security Council—and that right to interpret liberally has been upheld by the International Court of Justice (ICJ).<sup>125</sup> A “threat to the peace” may include acts that do not breach firm international laws or even go beyond a state’s borders.<sup>126</sup> In terms of the mechanisms at its disposal, the Security Council can compel, for example, suspension of diplomatic relations, the imposition of economic sanctions, or the use of force.<sup>127</sup> Therefore, if the Security Council perceived a threat to or breach of the peace by the target state *in any form*, it could pass a Chapter VII Resolution compelling all States Parties to suspend the operation of the Judgments Convention with respect to the target state while continuing to implement the Convention *inter se*.<sup>128</sup>

Furthermore, even if the Security Council perceived that the target state posed a threat to the peace, the Security Council might exclude civil judgments from sanction. The Security Council may not consider the mandatory nonrecognition of *private* law judgments as an appropriate sanction against the government of the target state because the brunt of the sanction would fall squarely on private individuals. In its advisory opinion on Namibia, the ICJ indicated that private individuals are to be shielded from Chapter VII countermeasures.<sup>129</sup> In 1966, the U.N. General Assembly determined that South Africa no longer had the right to

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123. *Id.* art. 41.

124. This is indicated by the self-judging language of Article 39 of the U.N. Charter. *Id.* art. 39; *see also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 120 (June 21) [hereinafter *Namibia Advisory Opinion*].

125. *Id.* (“The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter.”).

126. For example, Myres S. McDougal and W. Michael Reisman argue that a Chapter VII “threat to the peace” could include systemic suppression of human rights that occur within a state’s—for example, Rhodesia’s—own borders. Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT’L L. 1, 15, 18–19 (1968).

127. U.N. Charter arts. 41–42.

128. Nonetheless, there would be two challenges to securing a Chapter VII Resolution against the target state. First, a compromised judicial system is not necessarily enough to constitute a threat to the peace. The Security Council would likely require evidence of serious internal human rights violations, as in the case of Rhodesia. *See* McDougal & Reisman, *supra* note 126, at 2, 15, 18–19. Second, political dynamics within the Security Council can hinder consensus among member states. For example, in December 2019, the Security Council failed to adopt a resolution extending a prior authorization for the cross-border delivery of humanitarian aid to Syria. Competing proposals were tabled, and there was a clear division between European member states and the United States, on one side, and China and Russia, on the other side. *See* Press Release, Security Council, Security Council Rejects 2 Draft Resolutions Authorizing Cross-Border, Cross-Line Humanitarian Access in Syria, U.N. Press Release SC/14066 (Dec. 20, 2019).

129. *Namibia Advisory Opinion*, *supra* note 124, ¶ 125.

administer present day Namibia.<sup>130</sup> South Africa refused to withdraw.<sup>131</sup> In January 1970, the Security Council adopted Resolution 276 stipulating that the continued presence of South African authorities in Namibia was illegal and acts conducted by those authorities were “illegal and invalid.”<sup>132</sup> In June 1970, the Security Council asked the ICJ to advise it on the consequences for third-party states of the illegal occupation of Namibia by South Africa.<sup>133</sup> The Court studied the situation and allowed that private law relations with Namibia’s population would not necessarily fall under the proclaimed ban:

[W]hile official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.<sup>134</sup>

These examples are consonant with the deep policy of the Judgments Convention, which is to insulate private law relations that continue for the benefit of private parties from being sacrificed in circumstances in which the state itself is misbehaving.

A foreign civil judgment has both a public and private nature: “[I]t is public in so far as it is a pronouncement of a State institution and it is private in so far as it is a resolution of a dispute in which only the litigants are immediately involved.”<sup>135</sup> If the Security Council called on states to refuse recognition to the civil or commercial judgments of a target state or to derogate from obligations under the Judgments Convention, private litigants would suffer. Therefore, it is unlikely that a Chapter VII Resolution would call on states to do so, even assuming that the Herculean task of securing the agreement of all permanent members could be achieved. As such, a Chapter VII Resolution should not be anticipated as a means of suspending treaty relations under the Judgments Convention.

#### B. ARTICLE 62 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

If the target state undergoes a “fundamental change of circumstances,” the United States may be able to invoke Article 62 of the Vienna Convention on the Law of Treaties (the Vienna Convention) as a means of suspending treaty relations with the target state.<sup>136</sup> Article 62 provides:

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not

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130. G.A. Res. 2145 (XXI), at 2 (Oct. 27, 1966).

131. Namibia Advisory Opinion, *supra* note 124, ¶ 82.

132. S.C. Res. 276, ¶ 2 (Jan. 30, 1970).

133. *See* Namibia Advisory Opinion, *supra* note 124, ¶ 1.

134. *Id.* ¶ 125.

135. Ho, *supra* note 18, at 444.

136. Vienna Convention on the Law of Treaties art. 62, ¶¶ 1, 3, *supra* note 45.

foreseen by the parties, may not be invoked as a ground for terminating [or suspending] or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.<sup>137</sup>

The question remains whether a compromised judicial system qualifies as a “fundamental change of circumstances” and whether Article 62 permits the unilateral suspension of the Judgments Convention with regard to a *single party* of a multilateral treaty, as opposed to all parties.

To qualify as a fundamental change of circumstances under Article 62, (1) the original circumstances must have existed at the time the treaty was concluded; (2) the original circumstances must have “constituted an essential basis of the consent of the parties to be bound by the treaty”; (3) the change was not foreseen by the parties; (4) the change is fundamental to the consent of the parties; and (5) the change radically transforms “the extent of obligations still to be performed under the treaty.”<sup>138</sup>

Admittedly, there is nothing explicit in the Judgments Convention that speaks of overall judicial culture and systemic due process in a State Party as requirements for compliance with the provisions of the treaty. Every State Party makes that determination for itself when it joins the Judgments Convention and considers its opt-out options. However, it can be argued that a presumption exists in Article 7, paragraphs 1(b) and 1(c), the fraud and public policy exceptions to foreign judgment recognition.<sup>139</sup> Under the Judgments Convention, the fraud and public policy exceptions are the means of challenging the recognition of a judgment tainted by a denial of due process. The fraud and public policy exceptions are discretionary and generally must pertain to the *specific* judgment in question, so they assume that the overall judicial culture of the state issuing the judgment is sound and transparent. The burden of proof is on the defendant in exceptional, individual judgments to prove denial of due process. The opening phrase of the Preamble to the Judgments Convention also supports this presumption when it states that the parties are “[d]esiring to promote effective access to justice for all.”<sup>140</sup>

In short, the Judgments Convention provides that each State Party determine its degree of comfort with the overall judicial culture and systemic due process of each of the other States Parties when the party undertakes to comply with obligations under the treaty. Therefore, in the absence of any mechanism for dispute

137. *Id.* art. 62, ¶ 1.

138. Wolff Heintschel von Heinegg, *Treaties, Fundamental Change of Circumstances*, in 9 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1114, 1115 (Rüdiger Wolfrum ed., 2012) (emphasis removed) (breaking down Vienna Convention on the Law of Treaties Article 62 into sub-elements).

139. 2019 Hague Judgments Convention, art. 7, ¶ 1(b)–(c), *supra* note 1.

140. *Id.* pmb1.

settlement in the Judgments Convention, it must also remain to each party to determine for itself whether the overall judicial culture and systemic due process of another State Party has significantly changed so as to permit the party to avail itself of the option of Article 62 of the Vienna Convention.<sup>141</sup>

In the posited scenario, first, the target state would have had a fair and transparent judiciary at the time it became party to the Judgments Convention.<sup>142</sup> Second, reliance on the target state's functioning judiciary is what would have induced the United States to enter into treaty relations with the target state.<sup>143</sup> If the target state had a compromised judiciary at the time of accession, the United States would have exercised Article 29 to suspend treaty relations.<sup>144</sup> Third, under the posited scenario, the United States could not have foreseen the deterioration in the target state's judiciary.<sup>145</sup> Most likely, the authoritarian party or faction in the posited scenario would not yet have been in existence or would have been a political minority and socially marginalized. Fourth, the change is arguably "fundamental" because it profoundly impacts the quality of decisions rendered by the target state, which the United States will be obliged to enforce.<sup>146</sup> Fifth, in turn, this imposes a burden on U.S. courts, which will have difficulty refusing recognition to corrupted judgments and may be obliged to enforce a number of corrupted judgments against U.S. defendants.<sup>147</sup> As such, the United States could argue that the deterioration of the target state's judiciary constitutes a fundamental change of circumstances.

*Rebus sic stantibus*,<sup>148</sup> the doctrine underlying Article 62, has been invoked in circumstances akin to the scenario considered here. The Netherlands invoked *rebus sic stantibus* in 1982 to suspend a development assistance agreement with Suriname when the government that the Netherlands had agreed to assist was overthrown in a coup d'état and the new regime committed a series of human rights violations.<sup>149</sup> In 1941, in quite a different context, President Franklin Roosevelt invoked the doctrine to suspend U.S. obligations under the 1930 International Load Line Convention during World War II.<sup>150</sup> Roosevelt's

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141. The HCCH might alternatively organize a working group of states to articulate standards or criteria for suspending operation of the Judgments Convention with regard to a compromised state.

142. Applying the requisite elements for the invocation of Article 62 of the Vienna Convention as set out by von Heinegg, *supra* note 138.

143. *See id.*

144. *See* 2019 Hague Judgments Convention art. 29, *supra* note 1.

145. *See* von Heinegg, *supra* note 138.

146. *See id.*

147. *See id.* and accompanying text.

148. *See Clausa Rebus Sic Stantibus*, BLACK'S LAW DICTIONARY (11th ed. 2019) (describing the doctrine as providing that a treaty is "binding only as long as the circumstances in existence when the treaty was signed remain substantially the same").

149. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 772 (2009); *see also* Malgosia Fitzmaurice, *Exceptional Circumstances and Treaty Commitments*, in THE OXFORD GUIDE TO TREATIES 595, 608–09 (Duncan B. Hollis ed., 2d ed. 2020).

150. Fitzmaurice, *supra* note 149, at 595, 609.

suspension of the Convention was widely criticized, though most states ultimately accepted the suspension.<sup>151</sup>

The ICJ has also had occasion to speak on Article 62 and has interpreted it narrowly.<sup>152</sup> Few parties have ever prevailed before the ICJ in an Article 62 defense.<sup>153</sup> In the *Fisheries Jurisdiction* cases, the ICJ rejected a *rebus sic stantibus* claim with respect to a 1961 agreement between the United Kingdom and Iceland concerning fishing rights, even though fishing techniques and the international law governing fisheries had changed in the intervening period.<sup>154</sup> The ICJ stipulated that the change must have rendered “the performance something essentially different from that originally undertaken.”<sup>155</sup> Similarly, in the *Gabčíkovo-Nagymaros* case, the ICJ determined that the collapse of the communist regimes in both Hungary and Czechoslovakia did not constitute a fundamental change of circumstances, even though the 1977 treaty between the parties was essentially intended as a vehicle for “socialist integration.”<sup>156</sup> The ICJ identified the 1977 treaty’s object and purpose as a joint investment program for energy production, flood control, and navigation on the Danube, which were sufficiently distinct from the change in the political and ideological structure of the states.<sup>157</sup>

Regardless of ICJ jurisprudence, the Judgments Convention does not have a dispute settlement mechanism, and the United States is not subject to the compulsory jurisdiction of the ICJ.<sup>158</sup> Other states may criticize the United States for invoking Article 62, but in practice, their objections would have few legal consequences for the United States, especially if the United States could provide evidence of the judicial deterioration of the target state.

151. *See id.*; *see also* STAFF OF S. COMM. ON FOREIGN RELATIONS, 95TH CONG., THE ROLE OF THE SENATE IN TREATY RATIFICATION 75 (Comm. Print 1977) (explaining that President Roosevelt concluded that it was “clear from its general nature that the [Load Line Convention] was a peacetime agreement”); *Roosevelt Ends Load Line Accord*, N.Y. TIMES, Aug. 10, 1941, at S8 (listing the contracting states that consented to the U.S. suspension).

152. Fitzmaurice, *supra* note 149, at 595, 604.

153. *Id.*

154. *Id.* at 605–06 (summarizing the finding in *Fisheries Jurisdiction* (U.K. v. Ice.), Judgment, 1973 I.C.J. 3 (Feb. 2)).

155. *Fisheries Jurisdiction*, 1973 I.C.J. 3, ¶ 43.

156. Fitzmaurice, *supra* note 149, at 595, 605–06 (summarizing the finding in *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. 7, ¶ 95 (Sept. 25)).

157. *See Gabčíkovo-Nagymaros Project*, 1997 I.C.J. 7, ¶ 15 (“The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding.”).

158. The United States withdrew its acceptance of the compulsory jurisdiction of the ICJ in 1985 after the ICJ determined that it had jurisdiction in *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1984 I.C.J. 395 (Nov. 26). *See Text of U.S. Statement on Withdrawal from Case Before the World Court*, N.Y. TIMES, Jan. 19, 1985, § 1, at 4. Furthermore, the target state would likely not succeed in bringing the United States before the ICJ using a secondary treaty, such as a treaty of amity or a friendship, commerce and navigation treaty. Although many such treaties include a provision whereby the parties consent to ICJ jurisdiction in the event of a dispute, these treaties do not contain provisions touching the enforcement of civil judgments. *See, e.g.*, Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899; Treaty of Friendship, Commerce and Navigation, U.S.-Isr., Aug. 23, 1951, 5 U.S.T. 550.

The question remains as to whether the United States could invoke Article 62 to suspend treaty relations with *a single* party as opposed to suspending relations with *all* contracting parties. It does not appear that a state has ever attempted to do so. At the same time, there is nothing in the Vienna Convention that prohibits suspension of a multilateral treaty toward another State Party to the multilateral treaty.

Some multilateral treaties by their very nature do not allow a State Party to suspend the treaty's application with regard to another State Party. Obligations created under the treaty are interdependent. The prime example of such a multilateral treaty is the U.N. Charter. The relationships generated by the U.N. Charter are deeply interconnected and one party cannot suspend application of the U.N. Charter toward another party.<sup>159</sup> However, a multilateral treaty may in effect be a network of essentially discrete, bilateral relationships.<sup>160</sup> This is the nature of the Judgments Convention, especially with its opt-out provision by which a State Party chooses the states with which it will maintain treaty obligations. It is essentially a series of bilateral relationships, committing a pair of parties to the reciprocal recognition and enforcement of foreign civil judgments. The suspension of a single bilateral relationship should not disrupt the functioning of treaty relations between other states. Hence, it can be argued that the United States would be able to invoke Article 62 of the Vienna Convention if and when confronted with a State Party whose overall judicial culture and systemic due process have significantly deteriorated from the time that it became party to the Judgments Convention.

### C. A RESERVATION TO THE JUDGMENTS CONVENTION

The United States might also consider making a reservation to the Judgments Convention, whereby it reserves for itself the right to suspend treaty obligations

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159. For example, in Chapter I of the U.N. Charter, the summary of the Charter's purposes and principles suggests the construction of a legal *community*. U.N. Charter art. 1, ¶¶ 3–4 (“The Purposes of the United Nations are . . . [t]o achieve international co-operation in solving international problems . . . and [t]o be a centre for harmonizing the actions of nations in the attainment of these common ends.”). Although there is some debate as to whether withdrawal from the Charter is permitted, scholars have not argued that the Charter can be suspended between two individual U.N. member states. See Dapo Akande, *Withdrawal from the United Nations: Would It Have Been Lawful for the Philippines?*, EJIL: TALK! (Sept. 19, 2016), <https://www.ejiltalk.org/can-the-philippines-withdraw-from-the-un> [<https://perma.cc/85GV-H7V8>] (discussing whether withdrawal from the United Nations was contemplated by the drafters).

160. See, e.g., Convention on Special Missions, *adopted* Dec. 8, 1969, 1400 U.N.T.S. 231; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Although these treaties attempt to create uniform treatment with regard to the diplomatic relationships among the States Parties, they are bilateral in nature and states may—by agreement—modify the treaties as between themselves without endangering the rights and obligations of any other State Party. Joost Pauwelyn distinguishes between bilateral and collective treaty relationships that exist under the Marrakesh Agreement Establishing the World Trade Organization and the different legal consequences that entail if a contracting state breaches an obligation under a bilateral as opposed to a collective treaty relationship. See generally Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT'L L. 907 (2003).

with a state that no longer meets a minimum standard of judicial integrity. Under Article 19 of the Vienna Convention, a state may formulate a reservation when joining a treaty so long as there is no express prohibition in the treaty and the reservation is compatible “with the object and purpose of the treaty.”<sup>161</sup> As regards the first exception, the Judgments Convention has no such prohibition on reservations, and indeed, an HCCH working group paper indicates that reservations to the Judgments Convention are permitted.<sup>162</sup>

Furthermore, a reservation can be crafted so as to comply with the object and purpose of the Judgments Convention. The object and purpose are set out in the treaty’s Preamble:

[T]o promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation, . . . [to] enhance[] through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments, . . . [and to] provide[] greater predictability and certainty in relation to the global circulation of foreign judgments . . . .<sup>163</sup>

A carefully drafted reservation that emphasizes the need for the overall stability and integrity of a party’s judicial culture is not inconsistent with the object and purpose of the Judgments Convention as reflected in the Preamble and Article 7, paragraph 1(c).<sup>164</sup> The reservation might be cast as follows: “The United States reserves the right to suspend the operation of the Convention with respect to a party if the United States determines that party’s rule of law and judicial independence have fallen below the international minimum standard.”<sup>165</sup>

The operation of the reservation in a particular instance would commence with a finding by the Executive Branch that the rule of law and judicial independence of the target state has fallen below the minimum standard, followed by notification to the depositary of the suspension.<sup>166</sup> With that, the Judgments Convention would cease to operate with respect to the target state and individual judgment

161. Vienna Convention on the Law of Treaties art. 19, ¶ (c), *supra* note 45.

162. CHAIR OF THE INFORMAL WORKING GRP. ON GEN. & FINAL CLAUSES, *supra* note 41, ¶ 420.

163. 2019 Hague Judgments Convention pmb., *supra* note 1.

164. *See id.* As addressed *supra* Section I.A, Article 7, paragraph 1(c) of the Judgments Convention permits nonrecognition if “recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State.” *Id.* art. 7, ¶ 1(c).

165. The language of this reservation loosely mirrors the language used by the United States in its reservation to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. *See* 1 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 346 (1949), [https://www.loc.gov/tr/frd/Military\\_Law/pdf/Dipl-Conf-1949-Final\\_Vol-1.pdf](https://www.loc.gov/tr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-1.pdf) [<https://perma.cc/6WVF-24F8>].

166. The proposed procedure for the notification of suspension of the Judgments Convention is in accordance with the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties arts. 65, 67, *supra* note 45.

creditors seeking to enforce a foreign judgment from the target state's courts could not rely on the Judgments Convention's fast track.<sup>167</sup> The target state's judgments would be reviewed and enforced in accordance with the preexisting U.S. law on foreign judgments recognition.<sup>168</sup>

The advantage of a reservation for the United States is threefold. First, the language of the reservation would be expressly self-judging.<sup>169</sup> In other words, the United States would reserve the right to judge *for itself* when a co-contracting party's judiciary fell below an international minimum standard. Second, the reservation by its own terms is consistent with the objects and purposes of the Judgments Convention, as explained above. This consistency would render it more difficult for other contracting parties to challenge the United States if it chose to invoke the reservation to suspend treaty relations with another party. Third, the reservation may ease the Judgments Convention's passage through the U.S. Senate. If the Judgments Convention is to be adopted as an Article II treaty in the United States, the President will require "the Advice and Consent of the Senate" to ratify it.<sup>170</sup> A reservation would make the Judgments Convention far less confining because the United States could lawfully extricate itself from treaty relations with a particular State Party without recourse to another body or instrument in international law.

Furthermore, there is little incentive for other contracting states to object to such a reservation by the United States. There is nothing in the reservation that would single out another state for censure.<sup>171</sup> The reservation serves as a contingency only if some unforeseen events compromise the judicial integrity of a contracting party. All contracting states with treaty relations with the United States would be confident in the robustness of their judicial systems at the time of the reservation. Indeed, it is possible that other states may follow suit and adopt similar reservations when joining the Judgments Convention.

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167. As the Introduction discusses, the "fast track" refers to the near automatic enforcement of foreign judgments issued by other contracting states barring the narrow grounds for nonrecognition permitted under the Judgments Convention. See *supra* Introduction; see also 2019 Hague Judgments Convention art. 7, *supra* note 1 (detailing the grounds for a state's refusal of recognition and enforcement).

168. See *supra* Section I.B for a discussion of the 1962 and 2005 Recognition Acts and Sections 483 and 484 of the Restatement (Fourth) of Foreign Relations Law.

169. In international investment law, for example, there has been a proliferation of essential security exceptions using expressly self-judging language in recent international investment agreements. See, e.g., OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY 21 (art. 18) (Apr. 20, 2012), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [<https://perma.cc/B8U8-CYF8>]. A self-judging clause is comparatively more difficult for an opposing party or adjudicatory body to contest. For a discussion of self-judging clauses in international investment agreements, see Stephan Schill & Robyn Briese, "If the State Considers": *Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. UNITED NATIONS L. 61, 93, 96–97 (2009) (addressing the potential for abuse of self-judging clauses).

170. U.S. CONST. art. II, § 2, cl. 2.

171. Although there is little incentive for other contracting states to object to a U.S. reservation, there may be some push back if the reservation is perceived as yet more evidence of "American exceptionalism."

## CONCLUSION

As an actor committed to a rules-based global order, the United States has an interest in promoting and adhering to multilateral treaties, such as the Judgments Convention. Indeed, U.S. litigants have more to gain from the Judgments Convention's protections than do litigants of almost any other state.<sup>172</sup> However, the presumption underlying the Judgments Convention—that courts, worldwide, are irreversibly improving in equity and transparency—may not always hold true. If the judicial system of a State Party were to deteriorate, the Judgments Convention would not permit other States Parties to suspend the operation of the treaty with regard to the compromised state. The courts of the United States would find themselves obliged to recognize corrupted judgments, subject only to the narrow grounds for nonrecognition provided in the Judgments Convention.<sup>173</sup> Prudence dictates that before adhering to the Judgments Convention, the United States explore fail-safes under international law should the judicial integrity of a co-contracting state fall below a minimum standard.

This Note concludes that a reservation to the Judgments Convention is the surest recourse. Although a U.S. reservation might elicit some pushback from some States Parties, it is likely to be accepted by the majority of co-contracting states because it is entirely consonant with the Judgments Convention's objects and purposes. From a domestic perspective, a reservation may also bolster the Judgments Convention's prospects for advice and consent by the Senate.

During an earlier stage of the Judgments Project, H. L. Ho reflected on the competing objectives of foreign judgments recognition: “[t]he considerations of, on the one hand, the justice of the case and, on the other, the higher policies of international political and commercial relations, compete against each other and what we have is a compromise.”<sup>174</sup> A U.S. ratification of the Hague Judgments Convention—with a reservation—may be that compromise.

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172. See generally Coco, *supra* note 18 (analyzing the advantages that the Judgments Convention holds for U.S. litigants).

173. See 2019 Hague Judgments Convention art. 7, *supra* note 1; *supra* Section I.A.

174. Ho, *supra* note 18, at 444.