Foreign Court Judgments and the United States Legal System

Edited by

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A foreign court renders a judgment, and one of the parties seeks to recognize or enforce the decision in the United States. Recognition involves giving res judicata effect to the foreign judgment or using it for collateral estoppel. Enforcement means providing a remedy, typically an award of damages, based on that judgment. In all these situations, the court that receives the foreign judgment must decide whether it qualifies for comity.

Ever since Hilton v. Guyott\(^1\) crystallized U.S. doctrine on the recognition and enforcement of foreign judgments, a receiving court has had to evaluate the quality of the rendering court’s judicial system. Hilton specified that, for a judgment to qualify, it had to come from “a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries.”\(^2\) The Uniform Foreign Money-Judgments Recognition Act, proposed by the National Conference of Commissioners on Uniform State Laws in 1962 and adopted in 33 States, bars recognition if “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”\(^3\) Good systems deserve comity, these sources tell us, and bad ones do not.

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\(^1\) John C. Jeffries, Jr., Distinguished Professor and David H. Ibbeken ’71 Research Professor, University of Virginia School of Law. I am grateful to participants in the Sokol Colloquium for their comments and criticisms. My interest in this topic arises out of my work as Co-Reporter of the American Law Institute’s Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction. The views contained herein, however, represent only my own thoughts and should not be imputed to the American Law Institute or my colleagues in the Restatement project.

\(^2\) Id. at 202. The Court went on to indicate that nonrecognition would result were there evidence to indicate “prejudice in the court, or in the system of laws under which it was sitting.” Id.

\(^3\) Uniform Foreign Money-Judgments Recognition Act § 4(a)(1) [hereinafter 1962 Uniform Act]. The 2005 update to this legislation, the Uniform Foreign-Country Money Judgments Recognition Act [hereinafter 2005 Uniform Act], which 19 states have adopted, contains
The proposition seems self-evident. Recognition of a foreign judgment is a significant act that alters legal rights and obligations. Enforcement can be even more meaningful, as it may entail the use of local assets to satisfy a foreign claim.\(^4\) Surely a receiving court has the obligation, as well as the right, to demand that the rendering court meet certain basic criteria that distinguish law-based adjudication from arbitrary fiat or discriminatory persecution.

On reflection, however, an inquiry into the qualities of a foreign judicial system presents two serious difficulties. First, courts are not especially well suited to inquire into the overall quality of a foreign system. Is it enough that the published standards to which the foreign system purports to hold itself satisfy the receiving court’s criteria? If the receiving court is to look past claims of propriety to examine actual practice, how should it go about assessing the operation of an entire system? Second is the negative pregnant problem. The test focuses on the nature of the system in question, not the particular proceedings that produced the judgment. A system might be sound but still suffer from deficiencies in particular instances. Should a receiving court recognize a judgment that results when a foreign court fails to meet its own standards for impartiality and fairness?

The problem is not hypothetical. In many countries around the world, there exist legal systems that on paper seem indistinguishable from those regularly regarded as acceptable, such as those of England and Wales or of today’s Germany, but in practice have much spottier records. It is not uncommon for courts in these problematic countries generally to do their jobs competently, but on occasion to surrender to the demands of powerful interveners. In the problematic countries, the existence of biddable judges and improper political pressure may be indisputable, but the prevalence of this practice might be unknown and, because concealed, unknowable. Without evidence about the frequency of partial or unfair proceedings and the factors that induce the judges to neglect their duty, one cannot determine whether the system as a whole is inadequate. Nor can one realistically invoke a zero-tolerance policy, refusing to extend comity to a system if there is any evidence at all of judicial corruption or improper political influence. Very few systems in the world could pass a zero-tolerance test, and those in the United States would not.

\(^4\) Under the fundamental international legal principle of territorial sovereignty, assets located in one jurisdiction enjoy a de facto partitioning from legal claims arising in another. Enforcement of a foreign money judgment breaches this barrier. For a fuller discussion, see Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 Va. L. Rev. 17, 58–60 (2014).
One alternative might be to shift focus from an assessment of the system of foreign justice to the instance in question. Recognition and enforcement arise as an issue only if foreign litigation has produced a final and conclusive judgment. Rather than ask whether the litigation occurred in a fundamentally sound legal system, one instead might ask whether the proceedings that produced the judgment in question entailed impartial courts and fair procedures. The inquiry thus would be both retrospective and focused.

This solution, however, raises another problem. The thrust of U.S. doctrine regarding foreign judgments is to avoid relitigation. Allowing the person resisting recognition or enforcement to challenge particular aspects of the initial litigation pushes against that preference. The resisting party can put the entire prior proceeding under a microscope, potentially reopening every decision of the rendering court for review by the receiving court.

Courts in the United States have recognized these problems and for the most part have dealt with them pragmatically. On the one hand, the overwhelming majority of courts confronted with a challenge to the impartiality or fairness of a foreign tribunal have focused largely on the circumstances of the particular prior proceeding, rather than putting the entire judicial system of another country on trial. On the other hand, they have required clear evidence of impartiality or unfairedness, and have nearly always rejected arguments that foreign procedures that differed from U.S. norms were for that reason alone unfair.

This chapter is divided into four sections. First, I address the capacity issue, exploring the difficulty of a U.S. court launching an inquiry into the nature of a foreign judiciary in the context of an adversarial proceeding. Second, I address the under-inclusiveness issue, namely the possibility that courts in good systems do bad things. Third, I review how U.S. courts have handled challenges to the quality of foreign legal systems under the systemic standard. Even when doctrine and statutes have directed these courts to look only at the quality of the system, they have concentrated on how the court in the prior proceeding behaved. These receiving courts mostly have separated local conceptions of judicial propriety from the standards to which they hold foreign litigation. Finally, I draw on judicial practice in an analogous but distinct area, namely forum non conveniens dismissals, to illuminate what U.S. courts should focus on when they review a prior foreign court proceeding.

1 Judicial Capacity and the Systemic Test

At the time of Hilton v. Guyot, the difference between good and bad judicial systems seemed clear enough, at least to the Supreme Court. The distinction
between civilized and uncivilized nations did all of the work. Just a few years earlier the Court had justified the use of consular courts even with respect to grave crimes on the ground that informal justice dispensed by a U.S. diplomat was preferable to what one might expect from the courts of a savage nation. The lens of late-nineteenth-century imperialism provided the only criterion that the Court believed necessary for distinguishing legal systems: The courts of the Christian nations of Europe and the Americas, for the most part colonizers, were good, while those of the African and Asian colonies and of nominally independent states in those regions, all subject to European domination, were not.

But as decolonization took hold around the world, the distinction between civilized and uncivilized countries, and hence between good and bad judicial systems, seemed increasingly untenable. The courts needed another criterion to implement the distinction between impartial systems of justice and the other kind. For many years they struggled to find one.

Hypothetically, the United States might have divided the world in that part dominated by the Soviet Union or China, our ideological adversaries, and the remainder. The division could have rested on the conclusion that the judicial systems of Iron Curtain countries suffered from Party supervision and control and therefore did not provide disinterested justice. But, as far as I can tell, throughout the course of the Cold War no U.S. court definitively embraced the argument.

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5 The Court spoke of "the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries..." Ross v. McIntyre, 140 U.S. 453, 462 (1891). The distinction between civilized and uncivilized nations lived on well into the twentieth century. Article 38(1)(c) of the International Court of Justice, for example, authorizes that tribunal to apply "the general principles of law recognized by civilized nations." Statute of the International Court of Justice, Jun. 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993.

6 The closest instance I can find involved a Romanian judgment issued in 1983. The U.S. court referred to the nondemocratic nature of Romania at the time of the judgment as a reason why it could not decide, on a motion for summary judgment and in the absence of any evidence about the nature of Romanian courts submitted by the party seeking recognition, that the judgment might be eligible for recognition under the 1962 Uniform Act. Allstate Insurance Co. v. Administratia Asigurarilor de Stat, 962 F. Supp. 420, 426 (S.D.N.Y. 1997). For an instance of a U.S. court recognizing and enforcing a post-1989 Romanian judgment, see S.C. Chimexim S.A. v. Velco Enterprises Ltd., 36 F. Supp. 2d 206 (S.D.N.Y. 1999). See also Zalduno v. Zalduno, 45 Ill. App. 3d 849, 360 N.E.2d 386 (Ill. App. 1977) (recognizing 1970 Cuban divorce decree but denying enforcement of child support because of state policy of not enforcing any foreign child support order). In a dispute over trademark ownership, a U.S. court identified many reasons for disregarding an advisory opinion of the Supreme Court of East Germany in which the U.S. plaintiff had not participated, one of which was a finding
Without broad screens such as civilized-savage or Free World-Iron Curtain, a court has no easy-to-use tool to determine whether a foreign judicial system has a particular character or not. Systematic empirical research into foreign institutions is beyond the capacity of any judicial body. Reliance on scholarly work purporting to report on such research is not much better, because advocates for adversaries are not wholly trustworthy in their choice of studies and judges generally are not trained either to discover or to evaluate others' empirical research. Reliance on the reputation of researchers and journals may suffice in scholarly debate, but seems a weak reed on which to rest substantial judicial determinations. Finally, uncritical use of U.S. governmental statements, such as the human rights reports of the State Department that touch on judicial independence, invites serious mistakes. Foreign policy considerations, including pressure from U.S. constituencies that either support or despise particular foreign governments, make those reports both over- and under-inclusive.

The problem is not simply that courts may make mistakes that disserve the parties to cases. As others have noted, a U.S. court’s characterization of a foreign judicial system as inadequate can have collateral consequences. It may antagonize the government in question, complicating its relations with the United States in unforeseeable and potentially unfortunate ways. It could provoke retaliation, including a refusal of that jurisdiction’s courts to enforce U.S. judgments. None of these risks justifies a blanket refusal to assess the adequacy of a foreign judiciary, but they do reinforce the need for circumspection, care, and a deep awareness of a court’s limitations with respect to such an inquiry.

Several strategies suggest themselves as ways for a court to thread this needle. To avoid the risk of driving a wedge between judicial determinations and the conduct of foreign policy, courts might link the systemic inadequacy standard to objective criteria that dovetail with formal determinations of the political branches. For example, foreign asset control regulations, administered by the U.S. Treasury under specific legislative authority, could block the payment of any money collected to enforce a foreign judgment. Courts might develop

that “East German courts do not speak as an independent judiciary of the type found in the United States or even West Germany, but orient their judgment according to the wishes of the leaders of the socialist state…” Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 906 (S.D.N.Y. 1968) (citing law review article for support).


8 Countries currently under comprehensive Treasury asset-control regulation include Cuba, Iran, North Korea and Syria. See http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx (last viewed September 1, 2013).
a conclusive presumption that countries that have earned a place on the sanctions lists have inadequate legal systems, on the theory that effective courts would deter the kinds of actions that qualify a country for the list.\(^9\) Thus they could tie designation of a foreign judicial system as unworthy of comity to the U.S. political branches' identification of states as outcasts within the international community.

In addition, courts might also invoke a failed state standard. They could conclusively presume that during periods of civil unrest that thwart the functioning of regular courts, a local judicial system is systematically inadequate. Such an approach would focus on specific and easy-to-determine events during a limited time period. It would not look into hidden conduct, such as behind-the-scenes political interference, but rather at evident criteria such as the operation or not of regularly constituted tribunals at preannounced times with full access to witnesses and evidence.\(^10\) Moreover, a determination that a state, including its judicial system, had failed during a discrete period ought not to cause much offense to the regime that came to power subsequently.

I suggest these approaches to make two general points. First, U.S. courts have only limited capacity to apply a systemic adequacy standard, but limited does not mean nonexistent. The development of objective tests tailored to the constraints of the litigation process and harmonized with concrete actions of the political branches is feasible, and such tests avoid the general shortcomings that courts face. Second, as will be seen below, actual judicial practice

\(^9\) Such a doctrine would not conflict with the U.S. practice of recognizing and enforcing arbitral awards in favor of countries subject to asset-control sanctions. \textit{E.g.,} Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366 (2009) (interpreting blocking regulations as not extending to an arbitral award). Recognition and enforcement of an international commercial arbitral award rests on an international treaty and federal legislation, unlike the recognition and enforcement of foreign court judgments. Both the treaty and the implementing legislation permit nonrecognition and a refusal to enforce based on deficiencies in the particular arbitral proceeding, but by their nature they do not address shortcoming of foreign judicial bodies.

\(^10\) \textit{E.g.,} Bridgeway v. Citibank, 201 F.3d 134 (2d Cir. 2000) (judgment originating in Liberian civil war). One might question that court's reliance on State Department reports as one basis of its determination about the collapse of Liberia's judicial system. As noted above, those reports arise out of a process that is driven more by policy than an objective search for truth through adversarial contest. In the \textit{Bridgeway} case, however, the court had plenty of other evidence, gathered by the parties rather than the government, on which it could and did rest its determination.
dovetails with this approach, suggesting that courts understand their limitations and seek to work within them.

2 Litigation-Specific Inadequacy

Neither the common law of comity nor the first Uniform Act addresses the possibility that the proceedings of the rendering court could be woefully inadequate even though the foreign system as a whole functioned properly. To be sure, *Hilton* and the 1962 Uniform Act permit nonrecognition where the foreign judgment rests on fraud.\(^{11}\) This rule might reach concealed interference in a proceeding, but it would not cover evident and open actions that indicate partiality or a failure of due process.

Should the law of judgment recognition guard against particular miscarriages of justice? On the one hand, a full review of the prior proceeding seems like relitigation, exactly the kind of wasteful duplication that current doctrine seeks to avoid. On the other hand, facilitating an injustice does not seem attractive either. The receiving court becomes complicit in a wrongful act perpetrated by the rendering court.

A rather discursive opinion by Judge Posner illustrates the difficulties of the systemic standard. The case involved one of the many efforts to enforce English judgments in favor of Lloyd's and against wealthy investors based on reinsurance contracts. The persons opposing recognition and enforcement sought to invoke the systemic-inadequacy standard. Posner first observed that attacking the English system of justice as uncivilized “borders on the risible” and, as to whether England has a civilized system of justice, “the question is not open to doubt.”\(^{12}\) He further argued that the 1962 Uniform Act did not permit a review of the proceedings leading to the particular judgment: The Act “does not support such a retail approach, which would moreover be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdiction…”\(^{13}\) To underscore the point, he emphasized that the systemic standard did not ask foreign states to “conform its procedural doctrines to the latest twist and turn of our courts regarding, for example, the circumstances under which due process requires an opportunity for a hearing in advance of the deprivation of a substantive right rather than afterwards.”\(^{14}\)


\(^{13}\) *Id.* at 477.

\(^{14}\) *Id.* at 476.
Rather, a court would ask only whether the foreign system complied with "the 'international concept of due process' to distinguish it from the complex concept that has emerged from American case law."\(^{15}\)

Having said all that, Posner proceeded to address and answer the question of whether the particular proceedings that produced the English judgment satisfied that standard of due process. He argued persuasively that they did.\(^{16}\) The English proceedings complied with the contract that Lloyd's customers had accepted, and there was nothing irregular about the contract itself.

Posner's opinion is quite odd and technically a bit daft, but its broader instincts seem sound. First, if the Uniform Law allows only an inquiry into the foreign system, as he so forcefully insists, why consider the arguments about the specific foreign proceedings? Second, where did he come up with this concept of international due process? International law knows no such thing: It imposes certain minimum standards on a state's interactions with foreign persons, but those standards are minimal as well as controversial.\(^{17}\)

To answer these questions in reverse order, Posner did not seem to mean that international law itself imposes any due process obligation, but rather that the concept of due process that courts may use in deciding whether to recognize

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15 Id. at 477. One might compare this decision to another odd Posner decision, this one involving an anti-suit injunction. Allendale Mutual Insurance Co. v. Bull Data Systems, Inc., 10 F.3d 425 (7th Cir. 1993). The dispute involved an insurance contract, which contained a choice-of-law clause that might have been interpreted as imposing a mandatory choice of a French forum for all disputes. The insurer sought a declaratory judgment in the United States, raising arson as a defense. The insured took part in the U.S. litigation but also initiated proceedings in France. When the insured sought to engage the French proceedings more actively, the insurer sought and obtained an antisuit injunction, which the Seventh Circuit affirmed. Posner talked about the insured's extensive participation in the U.S. proceeding, suggesting a waiver of whatever rights might have existed under the contract's dispute-resolution provisions. But he also rejected the French court because of its general characteristics, including its dependence on documentary testimony and its inability to consider an arson defense until criminal proceedings had concluded. Id. at 429–30. Failing to recognize that he was confronting conventional civil-law rules and procedures, Posner condemned the tribunal as systematically inadequate. The waiver argument would have justified the injunction, but the systemic-inadequacy portion of the opinion exposed Posner as willing to leap to dubious conclusions based on incomplete information.

16 Id. at 478–81.

17 For the United States, the question has arisen most recently as a matter of interpreting the treaty obligation to provide "fair and equitable treatment" to foreign investors. For discussion of the episode, see Charles H. Brower, II, Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article II05, 46 Va. J. Int'l L. 347 (2006).
a foreign judgment should be more abstract and general than that emanating
directly from the Fifth and Fourteenth Amendments of the U.S. Constitution,
as interpreted by the Supreme Court of the United States. He seems to harken
back to the pre-Warren Court concept of fundamental fairness, in contradistinc-
tion to things that “shock the conscience,” as opposed to the more specific and
elaborate rules adduced by the Court over the last fifty years.¹⁸ This is, of course,
an old debate within U.S. constitutional doctrine and has nothing to do directly
with international law.

Second, Posner may have turned to a review of the specific English proceed-
ings because he sensed the problem with a system-only approach. If the foreign
court really had done something outrageous, enforcing the resulting judgment
would have seemed deeply problematic. Posner did not want to open the door
to comprehensive relitigation of foreign proceedings, but neither was he com-
fortable with turning a blind eye to manifest, if discrete, injustice.

Not long after Posner wrote, law reformers began to address the issue directly.
In 2005 the National Commissioners on Uniform State Laws released an
updated version of the 1962 Uniform Foreign-Money Judgments Recognition
Act, a proposal prompted in large part by the American Law Institute’s pro-
posed statute for recognition and enforcement of foreign judgments.¹⁹ The
new uniform state law authorized courts to decline recognition of a foreign
judgment when the judgment occurred “in circumstances that raise substan-
tial doubt about the integrity of the rendering court” or the specific proceeding
leading to the judgment failed to meet “the requirements of due process of
law.”²⁰ The proposed federal statute contained similar language.²¹ As of this
writing, 19 states have adopted the 2005 Uniform Act, although Congress has
taken no action on the proposed federal legislation.²²

For an emerging plurality of states, then, the under-inclusiveness problem
has been solved, although, hypothetically, at the cost of greater impediments
to recognition and enforcement of foreign judgments. The legislation

¹⁹  2005 Uniform Act; American Law Institute, Recognition and Enforcement of
ALI Proposed Statute].
²⁰  2005 Uniform Act § 4(c)(7),(8).
²¹  ALI Proposed Statute § 5(a)(ii). The ALI project does not contain a reference to
satisfying due process of law.
²²  The Uniform Act does not apply to non-money judgments such as determinations of legal
status (e.g., ownership, heir, marriage and divorce) as well as declaratory judgments and
injunctive relief. In many instances, however, courts use the criteria codified in the Act to
guide their exercise of comity in recognizing non-money judgments.
largely rejects the first part of Posner's analysis (look only at systemic factors) and endorses the second part (determine if seriously partial or unfair factors impaired the proceedings that led to the judgment at issue). It leaves for judicial interpretation the specification of "due process of law." This invites, but does not resolve, Posner's speculation that the concept might apply differently to foreign judicial proceedings than it does to U.S. state action, administrative as well as judicial.

What remains to be determined, then, is how courts should apply a litigation-specific standard that demands impartiality and fairness from foreign courts, but leaves room for substantial variation in judicial practice. Here a review of what courts have done in other contexts when called upon to evaluate foreign legal systems can be helpful.

3 Courts and the Systemic Standard

As noted above, receiving courts, before adoption of the 2005 Uniform Act, had no mandate to assess the impartiality or fairness of the proceedings that produced the foreign judgment at issue. Yet they generally did so nonetheless, although without the discursive overlay that Posner supplied.

Consider one of the rare cases to flunk a foreign legal proceeding. The rendering court in question was part of post-Islamic-Revolution Iran's judicial system. Government-controlled banks sought to collect on notes signed by the former Shah's sister and obtained substantial default judgments in Iran. The banks then sought to enforce the judgment in the United States, where the defendant had fled. Rather than analyzing the general sway of the government in Iranian courts or the systemic deficiencies in Iranian legal proceedings, the Ninth Circuit focused on the particular challenges that the Shah's sister would face if she were to litigate in Iran. Rather than ruling that foreigners faced systemic unfairness in Iran, the court looked at the characteristics of the litigant in question.

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23 Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1411–13 (9th Cir. 1995).
24 The Osorio litigation also indicates the aversion of U.S. courts to judging foreign legal systems as a whole. The Nicaraguan judgment at issue in the case rested on a claim that U.S. multinational companies poisoned Nicaraguan agricultural workers and depended on special legislation adopted largely for that dispute. The district court ruled that the Nicaraguan court did not acquire jurisdiction over the U.S. defendants, that the Nicaraguan judicial system failed to meet standards of due process, and that the resulting judgment violated Florida's public policy. On appeal, the Eleventh Circuit affirmed, but
Other cases have taken the same approach when ordering enforcement of a foreign judgment. With regard to a Kuwaiti court, the U.S. court looked not at the general characteristics of Kuwait’s civil justice system, but rather at the particular treatment of the person opposing enforcement of the judgment. In ordering enforcement of a Russian child custody order, the U.S. court noted that the objecting husband had an opportunity to participate in the Russian proceedings but chose not to. In assessing a Romanian proceeding resulting in a damages award, the U.S. court looked at the actual proceeding, and not just the nature of Romania’s judiciary, as the basis for ordering enforcement of the award. Other examples abound. Indeed, my research has not uncovered a single case where a U.S. court has recognized or enforced a foreign judgment without assessing the quality of the particular proceeding that produced the judgment.

Equally noteworthy is how rarely a U.S. court will reject a foreign judgment because of deficiencies in the proceedings that produced it. Reported cases do not tell us about party decisions not to seek recognition or enforcement of a foreign judgment, or of settlements that devalued the foreign judgment because of a concern about nonrecognition. But the dearth of cases where a U.S. court has focused on deficiencies in a foreign legal system, rather than public policy objections, as a ground for withholding recognition is still impressive. One cannot argue from the existing data that this defense to recognition leads too easily to relitigation of foreign cases.

What this practice suggests is that, in spite of statutory strictures, courts have acted on an intuition about the proper balance between vigilance and comity that seems optimal. They have refused to become tribunals that weigh the quality of foreign judiciaries in the abstract. Before recognizing or enforcing a foreign judgment, however, they do examine its provenance and insist that the judgment in question not be poisoned by grave breaches of basic standards of justice. They manage to do this while maintaining, relative to the rest of the world, a rather generous and liberal approach to the results of foreign litigation.

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Also said that it would “not address the broader issue of whether Nicaragua as a whole ‘does not provide impartial tribunals’” and declined to adopt the district court’s holding on that point. Osorio v. Dow Chemical Co., 635 F.3d 1277, 1279 (11th Cir. 2011).

28 To my knowledge, the modern cases that this category comprises are Bridgeway v. Citibank, note 10 supra, and Bank Melli Iran v. Pahlavi, note 23 supra.
4 Judgment Recognition and *Forum Non Conveniens*

The two-pronged approach to judgment recognition that U.S. courts have followed—eschewing overall assessments of foreign legal systems but considering the specific facets of particular litigation—has a close parallel in the evolving practice of considering motions to dismiss U.S. lawsuits based on *forum non conveniens*. Both contexts invite a court to assess the degree of deference it should give to a foreign legal process, although they entail opposite sequences. In recognition, the foreign litigation comes first, and the U.S. court must respond to it. In *forum non conveniens*, the U.S. suit starts first, and the U.S. court must decide whether to suspend or shut down the litigation to give a foreign tribunal a chance to decide the case. Hypothetically, in both instances a U.S. court might devise a list of good and bad foreign courts and act based on which category applies to the foreign litigation in question. What courts actually do, however, is look at the foreign court's capacity to handle the case at hand.

As a matter of black-letter doctrine, a U.S. court will not invoke *forum non conveniens* unless the party seeking dismissal has proposed an adequate alternative forum. The Supreme Court has never focused, however, on what constitutes adequate.\(^{29}\) The lower courts have wrestled with the issue, especially when the alternative involves a foreign judiciary with a shaky reputation for integrity and fairness.

Plaintiffs opposing the motion have argued that evidence indicating weakness in the alternative judiciary suffices to render that forum inadequate. Practically without exception, the courts have rejected this claim.\(^{30}\) They look

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\(^{29}\) We know only that an alternative forum is not inadequate simply because its law is less favorable to the plaintiff than is that of the forum selected by the plaintiff. Piper Aircraft Co. v. Reyno. 454 U.S. 233, 263–65 (1981).

\(^{30}\) E.g., Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 390–92 (2d Cir. 2011) (requiring suit for enforcement of arbitral award against foreign governmental body to be brought in that country's courts because of local law issue about limits on payments toward award); Jiali Tang v. Synutra Intern., Inc., 656 F.3d 242, 250–51 (4th Cir. 2011) (discounting inadequacies of Chinese judiciary); MBI Group, Inc. v. Credit Foncier du Cameroun, 616 F.3d 568, 575 (D.C. Cir. 2010) (discounting inadequacies of Cameroon courts); Saqui v. Pride Cent. America, LLC, 595 F.3d 206, 212–13 (5th Cir. 2010) (discounting inadequacies of Mexican courts); Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund, 589 F.3d 417, 421–22 (7th Cir. 2009) (discounting inadequacies of Bulgarian courts); Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283. 1290–91 (11th Cir. 2009) (discounting inadequacies of Guatemalan courts); In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488,
instead for something specific in the foreign proceeding that would preclude the plaintiff from obtaining a fair hearing. Evidence that the foreign tribunal would erect a bar to plaintiff's claim that a U.S. court would not recognize, for example, justifies treating the alternative as inadequate.\textsuperscript{31} But impugning the integrity and capacity of foreign judges, by itself, does not work.

The preference of judges for the particular over the general becomes especially clear when one considers "rebound" cases in which a defendant obtains a forum non conveniens dismissal and then comes to regret the foreign alternative. To obtain dismissal, the defendant must argue for the integrity and competence of the foreign court. Once that court gets hold of the case, however, surprises may occur. The defendant then finds itself resisting recognition of the foreign judgment, while the plaintiff, formerly the enemy of the foreign forum, now defends its probity.\textsuperscript{32}

Some scholars have questioned the propriety of entertaining an attack on a foreign tribunal by a party that previously had defended its capabilities.\textsuperscript{33} Their argument betrays a deep confusion between the general and the specific as well as between ex ante and ex post. At the time a party pleads for sending a case to an alternative forum, no one can know with confidence what will happen in the new venue. The court deciding the motion can assess only the


\textsuperscript{32} The one full rebound case to confront U.S. court is the environmental tort suit brought by Nicaraguan workers. Note 24 supra. The Ecuadorian environmental tort suit brought against Texaco, to which Chevron succeeded in liability, involves similar issues, although the plaintiffs have not yet sort recognition or enforcement of their foreign judgment in the United States. See Chevron v. Camacho Naranjo, 667 F.3d 232 (2d Cir. 2012) (lower court lacked grounds to enjoin foreign enforcement of foreign judgment when plaintiffs had made no effort to seek relief in the United States).

\textsuperscript{33} E.g., Christopher A. Whytock & Cassandra Burke Robertson, Forum Non Conveniens and the Enforcement of Foreign Judgments, 111 COLUM. L. REV. 1444 (2011).
general aspects of the other forum, as well as the state of the law that it is likely to apply. Such an assessment necessarily is provisional and contingent. The caution that U.S. courts show in their refusal to condemn foreign legal systems seems an appropriate response to the limitations they face at this stage of the litigation.

When the foreign court has completed its part of the case, by contrast, more information has emerged. One no longer needs to speculate about its handling of the case, as we now know what happened. Parties of course will dispute the meaning of the historic record, but the inquiry has shifted from speculation about possibilities to interpretation of concrete events. A U.S. court will find the latter function familiar, just as it finds the former daunting.34

U.S. courts, accordingly, have had no problem repudiating a foreign judgment even though the party opposing the judgment previously had asserted the superiority of that tribunal. They appreciate the distinction between the general and prospective, on the one hand, and the specific and the retrospective, on the other. They use, in other words, the same tools that make comity work.

5 Conclusion

Reconciling a liberal approach to foreign judgment recognition with the risks of unfair foreign proceedings has engaged U.S. courts for over a century. For at least the last half-century, they have wrestled with this problem not by assessing and criticizing foreign legal systems as a whole, but rather by reviewing the adequacy of the proceedings that led to the rendering of a foreign judgment. This approach indicates something important about judicial capacity and the role of judges in managing international relations.

There is a tendency in contemporary academic work to depict encounters among judges from different legal systems as an opportunity for mentoring and diplomacy.35 This perspective assumes that the prestige of and deference owed to judges extends past the traditional role of dispute resolution to a broader articulation and shaping of a society’s values. The experience of filtering foreign judgments for recognition and enforcement suggests otherwise.

34 See In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 203–05 (2d Cir. 1987)  
(unupholding right of party seeking forum non conveniens dismissal to reserve right to oppose resulting judgment if foreign proceedings unfold unfairly).

35 For my criticism of this tendency, see Paul B. Stephan, note 4 supra.
U.S. judges do not engage their foreign counterparts at the level of systems, but rather in response to concrete events. Their engagement is thin rather than thick, limited to looking for egregious shortcomings. They try to figure out what happened, rather than imagining what should be.

Some might find this approach to judging mundane and uninteresting. For me, the working reality of the principle of comity reflects a practical modesty that I find admirable.