

***Undue Due Process: Why the Application of  
Jurisdictional Due Process Requirements to the  
Recognition of Foreign-Country Judgments Is  
Inappropriate***

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**ABSTRACT**

When the recognition of foreign-country judgments is sought in the United States, it occurs that recognition is denied due to lack of jurisdiction. In the United States, jurisdiction of foreign courts is examined according to the same due process requirements of the U.S. Constitution that apply to direct jurisdiction and to the recognition of sister-state judgments. These criteria were developed in a national, federal, interstate context and are not appropriate for claims involving international elements, which necessarily follow jurisdictional concepts differently than the United States does.

American scholars consider this approach to be state-of-the-art, as it does not discriminate between local and international situations. However, the result is an undue overprotection of defendants to the detriment of plaintiffs abroad. This is not a political choice, but rather an unseen result of the internationalization of jurisdictional concepts that were developed inside the United States for domestic application. A new solution is called for and proposed in this paper: namely, a broader acceptance of the jurisdiction exercised by foreign courts. Otherwise, the application of the due process clause results in the exact opposite of what it stands for: an undue process.

**I**

**DIFFICULTIES WITH THE RECOGNITION OF FOREIGN-COUNTRY JUDGMENTS IN THE UNITED STATES**

In today’s globalized world, civil judgments frequently must be recognized and executed abroad. This is why the Hague Conference on Private International Law is currently trying to draft an

international convention that would facilitate the worldwide recognition and enforcement of civil judgments (“Judgments Project”).<sup>1</sup> The initiative goes back to a U.S. proposal presented in 1992,<sup>2</sup> and is still a work in progress.<sup>3</sup> Achieving agreement turns out to be a difficult task, as regimes of judgments recognition vary greatly and some countries are limited in making changes due to constitutional restrictions.<sup>4</sup>

Roughly summarized, three main recognition regimes exist worldwide, with approximately one third of the countries in each category.<sup>5</sup> In the first category are the countries that have a very strict

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<sup>1</sup> Hague Conference, The Judgments Project (2015), <https://www.hcch.net/en/projects/legislative-projects/judgments> (last visited Apr. 29, 2016).

<sup>2</sup> Letter from Edwin D. Williamson, Legal Advisor, United States Department of State, to Georges Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992), <http://www.state.gov/documents/organization/65973.pdf>; compare Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference*, 57 L. & CONTEMP. PROBS. 271 (1994) (for a discussion of the history of the early project).

<sup>3</sup> More limited recognition conventions have been concluded since (but not ratified by the United States), such as the Choice of Court Agreements Convention of 2005. However, the big goal of a general judgments recognition convention has not succeeded yet, and is still on the agenda of The Hague Conference.

<sup>4</sup> In Due Process Clause, U.S. CONST. amend. XIV, § 1. Cf. Eric Porterfield, *A Domestic Proposal to Revive the Hague Judgments Convention: How to Stop Worrying about Streams, Trickle, Asymmetry, and a Lack of Reciprocity*, 25 DUKE J. COMP. & INT’L L. 82 (2014) (“[T]he Hague Judgments Convention would likely conflict with the Constitution.”). The author even goes so far as to suggest that “the Hague Judgment Convention can be reworded to address the asymmetries of personal jurisdiction and judgment enforcement *without running afoul of the Constitution.*” *Id.* at 87 (emphasis added). This obviously is no solution, as every country would make similar requests; thus, the project is gravely weakened.

<sup>5</sup> The data for the comparative analysis is based on secondary sources, including the following summaries, studies and reports: an unpublished comparative study made by JONES DAY for The Hague Conference Permanent Bureau regarding JURISDICTIONAL GAPS AND THEIR EFFECT ON THE JUDGMENTS PROJECT (2015), quoted here with the kind permission of the authors; EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS, NATIONAL REPORTS ON RESIDUAL JURISDICTION, available for all EU countries at [http://ec.europa.eu/civiljustice/news/docs/study\\_resid\\_jurisd\\_germany\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_germany_en.pdf) (please replace ‘germany’ by any other EU-memberstate); another useful database is WIPO LEX of the WORLD INTELLECTUAL PROPERTY ORGANIZATION, i.e., a search facility for codes of civil procedure and information about recognition of foreign judgments available on <http://www.wipo.int/wipolex/en>; PATRICK DORIS, ENFORCEMENT OF FOREIGN JUDGMENTS 2015 (2015); see also Hague Conference, *supra* note 1.

recognition regime,<sup>6</sup> or recognize only judgments from countries with which they have a bilateral treaty.<sup>7</sup> The second category is composed of those countries that take a more liberal approach and favor recognition of foreign judgments, in the sense that they recognize even judgments from countries that exercised jurisdiction in a situation where their own courts would not have had jurisdiction.<sup>8</sup> The third group of countries follows the “mirror principle” (or symmetry<sup>9</sup>)—i.e., when determining whether a foreign judgment can be recognized or not, those courts examine if, in a similar situation, they would themselves have had jurisdiction to hear the case. In these countries, the jurisdictional power of the foreign court must be symmetrical to the one of the local court, with the effect that both jurisdictional powers are like mirrors. Or, in more technical terms: in order to determine the appropriateness of the jurisdictional power exercised by foreign courts (so-called “indirect jurisdiction”), the criteria that govern the jurisdictional competence of local courts for direct jurisdiction<sup>10</sup> are used (“mirrored”) in order to determine the appropriateness of the jurisdictional power exercised by foreign courts (indirect jurisdiction).<sup>11</sup>

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<sup>6</sup> In Australia for example, grounds of direct jurisdiction (determined by case law) are much broader than the accepted grounds of indirect jurisdiction (section 7(3) Australian Foreign Judgments Act 1991). Other examples: Nigeria, Norway, UAE, UK.

<sup>7</sup> Examples: Austria, China, Denmark.

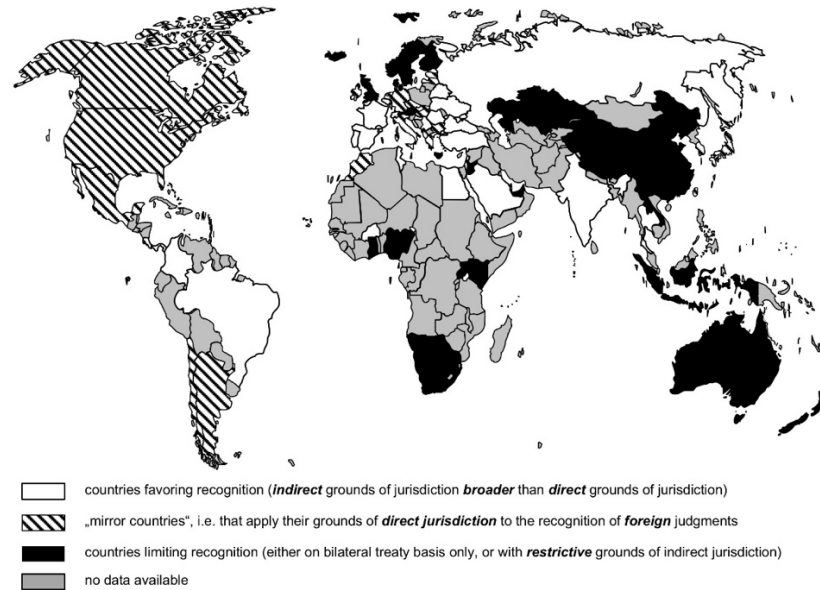
<sup>8</sup> For an example of *indirect* jurisdiction that is broader than *direct* jurisdiction, compare the Swiss BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [Federal Act on Private International Law] Dec. 18, 1987, SR 291 (Switz.): regarding direct jurisdiction, art. 59 gives jurisdiction to Swiss courts in divorce matters at the domicile of the defendant, under certain conditions at the domicile of the plaintiff, and in rare circumstances at the place of origin located in Switzerland. Art. 65 (regarding indirect jurisdiction) provides for the recognition of foreign-country judgments if they have been rendered in the state of domicile or habitual residence, or in the national state, of either spouse, or if they are recognized in one of these states. Other examples of states favoring recognition: Belgium, Brazil, Burkina Faso, Egypt, France, India, Russia, Saudi Arabia, Turkey.

<sup>9</sup> Ralf Michaels, *Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions*, DUKE L. SCH. LEGAL STUD. PAPER NO. 123, 30 (2006).

<sup>10</sup> Indirect jurisdiction: whether a foreign court can be considered, from the point of view of the country where recognition is sought, to have had a legitimate interest in exercising jurisdiction. Examples of mirror states are Argentina, Canada, Estonia, Germany, Japan, Korea, Morocco, Taiwan, USA. The mirror principle is also known in international treaties such as the Hague Convention of 19 October 1996 on Parental Responsibility and Child Protection, <http://goo.gl/bhZeLX>.

<sup>11</sup> Direct jurisdiction: whether the own national courts are allowed to exercise jurisdiction in a situation involving international elements.

Illustration 1. Judgments Recognition Regimes Worldwide



The United States numbers among the “mirroring” countries.<sup>12</sup> In the United States, foreign-country judgments can only be recognized if the foreign court had jurisdiction to decide the case,<sup>13</sup> which is examined using the same standards that would apply to U.S. courts when they exercise their own direct jurisdiction.<sup>14</sup>

American authors usually present this regime as “liberal” and “fair.”<sup>15</sup> It’s “tit for tat,” or “do as you would be done by.” Identical criteria for the recognition of foreign and sister-state judgments eliminate discrimination and set equal standards for all judgments. No more (and no less) is required from foreign courts than from the

<sup>12</sup> Restatement (Third) of Foreign Relations Law § 482 cmt. (1987): “a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction” in light of United States rules governing jurisdiction to adjudicate.

<sup>13</sup> *Hilton v. Guyot*, 159 U.S. 113 (1895).

<sup>14</sup> *Cf. e.g., Mercandino v. Devoe & Reynolds, Inc.*, 436 A.2d 942, 943–44 (N.J. Super. Ct. App. Div. 1981).

<sup>15</sup> Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. OF PITT. L. REV. 491, 1 (2013); Porterfield, *supra* note 4, at 83 (“more than fair treatment of foreign money judgments in American courts”).

country's own local courts.<sup>16</sup> If a country exercises its own jurisdiction in a specific situation, then it should also be willing to recognize foreign judgments that are based on the same criteria.<sup>17</sup> And the mirror principle protects defendants against “undue” jurisdictional criteria, as judgments based on grounds of jurisdiction that are not accepted in the country of recognition simply are not recognized.<sup>18</sup>

Despite these obvious advantages, the discussions in the Hague Conference have revealed that countries that apply the mirror principle are not necessarily as liberal as they claim. Indeed, there are two distinct subcategories amongst the “mirroring countries,” according to whether they use a national or an international mirror standard.

In its international form, applied by nearly three quarters of all relevant countries, the mirror principle is used to mirror international<sup>19</sup> grounds of jurisdiction—i.e., specific sets of jurisdictional rules developed for international situations.<sup>20</sup> In contrast, a handful of countries, including the United States, go far beyond this ordinary mirror approach.<sup>21</sup> In the United States, the national/interstate rules of direct jurisdiction are mirrored and used as rules of international direct and indirect jurisdiction.<sup>22</sup> This uniform application of a single set of grounds of jurisdiction to both interstate and international situations makes the U.S. approach to judgments recognition one of the few outliers in international practice.

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<sup>16</sup> MARTIN FRICKE, DIE AUTONOME ANERKENNUNGSZUSTÄNDIGKEITSREGEL IM DEUTSCHEN RECHT DES 19. JAHRHUNDERTS 83 (1993).

<sup>17</sup> See MARTIN FRICKE, ANERKENNUNGSZUSTÄNDIGKEIT ZWISCHEN SPIEGELBILDGRUNDSATZ UND GENERALKLAUSEL 9 (Schriften zum deutschen und europäischen Zivil-, Handels- und Prozessrecht, Bd. 128, Gieseking 1990) (citing English cases stating that it seems “plain that our courts in this matter should recognize a jurisdiction which they themselves claim”).

<sup>18</sup> *Id.* at 87.

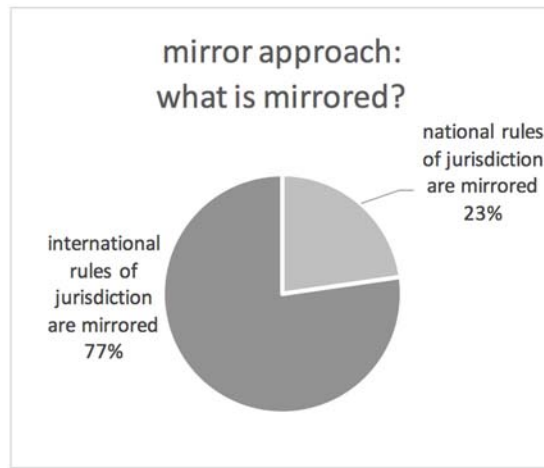
<sup>19</sup> In contrast to jurisdictional grounds used in an *interstate* or *federal context*.

<sup>20</sup> Such as Argentina, Israel, Italy, Japan.

<sup>21</sup> These countries are Canada, Mexico, Chile, Taiwan, and the United States. There does not seem to be a common denominator amongst these countries, as some federal states, such as Australia, apply other principles.

<sup>22</sup> Compare the following cases that use the criteria developed for direct jurisdiction in an interstate context (*Int'l Shoe Co. v. State of Washington et al.*, 326 U.S. 310 (1944)) in relationship with the recognition of foreign-country judgments. *Monks Own, Ltd. v. Monastery of Christ In Desert*, 168 P.3d 121, 123 (N.M. 2007); *Koster v. Automark Industries, Inc.*, 640 F.2d 77, 78 (7th Cir. 1981); *Mercandino v. Devoe & Raynolds, Inc.*, 436 A.2d 942, 943 (N.J. Super. Ct. App. Div. 1981).

Illustration 2. Judgments Recognition Regimes Worldwide: What is Mirrored?



This difference in the mirror approach is not only conceptual or theoretical; it has real implications. Indeed, all jurisdictional rules are developed in a certain context and for a certain purpose. In an international context, importance needs to be given to predictability and party autonomy, and with respect to recognition of foreign-country judgments, the focus of the rules lies on the acceptance of social facts created by foreign decisions, facts that should not be needlessly ignored or disputed.<sup>23</sup> In contrast, interstate or national rules of jurisdiction are concerned less with the interests of the parties than with the distribution of jurisdictional power amongst federal territorial entities and the proper administration of justice. Applying such national rules to international situations can create mismatches, as different interests are at stake. More than thirty years ago, Justice Brennan argued in *World-Wide Volkswagen*<sup>24</sup> with respect to the

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<sup>23</sup> For example, although a country may not want to grant access to its authorities regarding marriage on its territory, it should recognize foreign marriages, except where the public policy of the state addressed would be violated, as otherwise the legal status of the couple involved would change every time the couple crosses the boarder. Cf. e.g., Restatement (First) of Conflict of Laws § 121 (recognizing marriages validly celebrated everywhere).

<sup>24</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 308–11 (1980).

application of national U.S. concepts of direct jurisdiction to international situations:

[T]hat principle,<sup>[25]</sup> with its almost exclusive focus on the rights of the defendant, may be outdated . . . Given the tremendous mobility of goods and people . . . I do not think that the defendant should be in complete control of the geographical stretch of his amenability to suit. . . . People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States.<sup>26</sup>

This critique is all the more relevant with respect to foreign-country judgments, where the same national concepts of jurisdiction are applied, although the interests at stake are different. It's a miscarriage of justice that calls into question the "national" mirror principle as applied by the United States, and suggests that it should be restricted to grounds of jurisdiction that are appropriate in an international context.

The approach proposed in this paper invites the "national mirror states" involved in negotiating the Hague Judgments Project to reconsider their positions and to accept grounds of jurisdiction that are different from their national, domestic ones. The United States could and should break the "jurisdictional chains of due process" and adopt a new, international approach better suited for international situations. Not only would the Judgments Project benefit from this shift, but also areas such as the recognition of maintenance judgments,<sup>27</sup> where the problems related to the U.S. approach of indirect jurisdiction are especially acute.

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<sup>25</sup> Editorial comment: Justice Brennan refers to the jurisdictional principle of *Int'l Shoe Co. v. State of Washington et al.*, 326 U.S. 310 (minimum contacts test). This principle is applied in the United States also to the recognition of foreign-country judgments. *Cf. Mercandino v. Devoe & Reynolds, Inc.*, 436 A.2d 942, 943 (N.J. Super. Ct. App. Div. 1981) ("In determining whether the Italian court had jurisdiction we deem it appropriate to apply the minimum contacts test. . . . Although this test was developed to determine whether a judgment of a sister state is entitled to full faith and credit, it is equally applicable where a court of a foreign nation has exercised long-arm jurisdiction. See *Bank of Montreal v. Kough*, 612 F.2d 467, 470-471 (9 Cir. 1980)").

<sup>26</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 (Brennan, J., dissenting).

<sup>27</sup> According to the most recent working paper of the Judgments Project, maintenance judgments would not be covered by the Judgments Project, as they are already within the scope of application of the Child Maintenance Recovery Convention of 2007. However, this may still change, as some delegations propose to extend the Judgments Project also to maintenance claims. In any case, the underlying questions for both these instruments are the same: under which conditions should a foreign-country judgment be entitled to recognition abroad?



## II

### RELEVANCE OF THE PROBLEM AND ILLUSTRATIVE EXAMPLES

Recognition of foreign-country judgments is a real challenge in the United States, especially regarding maintenance judgments made in Europe, whose recognition is often denied for lack of jurisdiction.<sup>28</sup> This problem is not likely to change soon, despite the recent ratification (September 9, 2016) by the United States of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance,<sup>29</sup> as the United States made a reservation against the most important ground of jurisdiction in maintenance matters found in many international instruments and internal systems of maintenance recovery: the habitual residence of the maintenance creditor.<sup>30</sup>

Each year in the United States, about 150,000 child support orders concern situations with one parent living abroad.<sup>31</sup> Expressed in money terms, every year in the United States about \$300 million in maintenance claims are related to international situations.<sup>32</sup> Thus, recognition of foreign judgments is necessary to ensure that children's claims to maintenance are protected.

In order to illustrate the existing problems related to the recognition of foreign-country judgments in the United States, and to test various possible solutions, two fictitious cases based on situations involving the United States and Switzerland can serve as examples. Switzerland is a useful test case in relation to the United States, as it

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<sup>28</sup> Sandra John, *Überblick über Die Internationale Durchsetzung von Unterhaltsansprüchen Aus Dem Blickwinkel Der Zentralbehörde Für Internationale Alimentensachen Im Bundesamt Für Justiz*, 2015/03 FAMPRA.CH 536, 547–49 (2015) (regarding the recognition of Swiss judgments in maintenance matters in the United States).

<sup>29</sup> Letter from Vicki Turetsky, Comm. Off. of Child Support, to All State & Tribal Dir., Re: Ratification of the Hague Child Support Convention, <https://www.acf.hhs.gov/css/resource/us-ratification-of-hague-child-support-convention> (last visited Apr. 29, 2016).

<sup>30</sup> Reservation available under <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1016&disp=resdn> (last visited Apr. 29, 2016).

<sup>31</sup> Roughly 1% of the yearly total number of 15 million United States child support orders. See <https://www.acf.hhs.gov/css/resource/us-ratification-of-hague-child-support-convention> (last visited on Apr. 29, 2016).

<sup>32</sup> Timothy S. Grail, *Custodial Mothers and Fathers and Their Child Support: 2009*, U.S. CENSUS BUREAU, Dec. 2011, at 60, <http://www.census.gov/prod/2011pubs/p60-240.pdf> (explaining that 1% of the total sum of national child support due per year amounted to 35.1 billion dollars in 2009) (last visited Apr. 29, 2016).

is representative of many European countries<sup>33</sup> without being influenced by the internal laws of the European Union.

In the first example case, “Recognition in the U.S.,” a father is domiciled in the United States, while his child habitually resides in Switzerland, where she lives with her mother. All the parties are U.S. citizens. A Swiss court has issued a judgment condemning the father to pay \$1000 of child maintenance per month. The father, who never set foot in Switzerland, was duly served with all court documents, but he never participated in the proceedings or reacted to any court document he received. Now recognition of this judgment is sought in the United States at the father’s domicile.

Under the current legal situation, such a judgment would not be recognized in the United States, as the habitual residence of the creditor is not an accepted ground of jurisdiction.<sup>34</sup> This refusal of a foreign-country judgment is an unforeseen consequence of the national mirror principle, which extends domestic jurisdictional principles, despite their purely national context, to international situations. In a domestic situation, a child with a domicile in State A cannot introduce a maintenance claim in his home state against his father domiciled in State B, because the Revised Uniform Reciprocal Enforcement of Support Act of 1968 facilitates communication between courts throughout the United States and therefore renders jurisdiction at the domicile of the maintenance creditor unnecessary.<sup>35</sup>

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<sup>33</sup> Most countries in the European Union and the European Free Trade Association have a forum at the domicile of the maintenance creditor, which the United States does not recognize. See UNIF. INTERSTATE FAMILY SUPPORT ACT § 201 (UNIF. LAW COMM’N 2001). Therefore, the non-recognition of Swiss decisions can be used as a representative example for many European decisions, which face comparable difficulties when their recognition is sought in the United States. Although no official statistics are available regarding Switzerland, figures from surrounding countries such as Germany (where more than two thousand U.S.-German child support cases were pending in the year 2013; cf. Deutsches Institut für Jugendhilfe und Familienrecht (DIJuF) e.V. Forum für Fachfragen, *Geschäftsbericht für die Berichtsjahr 2012/2013*, DEUTSCHES INSTITUT FÜR JUGENDHILFE UND FAMILIENRECHT (2014), [https://www.dijuf.de/tl\\_files/downloads/2015/Geschaeftsbericht\\_2012-2013.pdf](https://www.dijuf.de/tl_files/downloads/2015/Geschaeftsbericht_2012-2013.pdf) (last visited Apr. 29, 2016) (suggesting that there is also a significant number of cases involving the United States and Switzerland). A conservative estimate would indicate at least one hundred pending cases every year.

<sup>34</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT, *supra* note 33. For judgments after January 1, 2017: US reservation against article 20 paragraph 1 letter c of the Hague Child Support and Maintenance Convention.

<sup>35</sup> *Kulko v. Superior Court of California In & For City and Cty. of San Francisco*, 436 U.S. 84, 86 (1978) (“California’s legitimate interest in ensuring the support of children residing in California without unduly disrupting the children’s lives is already being served by the State’s participation in the Uniform Reciprocal Enforcement of Support Act

Due to the mirror principle, jurisdiction at the domicile of the creditor is also excluded in international situations, although the procedural simplifications of the Act of 1968 only apply amongst sister-states.<sup>36</sup> This leaves maintenance creditors domiciled abroad without appropriate legal protection, as both recognition of foreign judgments and administrative court-cooperation between the United States and foreign courts are excluded. Such negative international consequences were never intended and do not reflect a political choice, but are rather the product of jurisdictional policies that focus on a federal context and that are inappropriate for international situations.<sup>37</sup> Even though the situation has slightly improved since January 2017, due to the entry into force in the United States of the Hague Child Support and Maintenance Convention which provides for administrative help for foreign creditors,<sup>38</sup> the main problem remains, as the United States made a reservation against the ground of jurisdiction of the domicile of the child.<sup>39</sup> Judgments rendered at the domicile of the child will not be recognized in the United States.

In the second example, “Recognition in Switzerland,” a father is domiciled in Switzerland, while his child has her habitual residence in the United States, where she lives with her mother. All the parties are U.S. citizens. Before the father moved to Switzerland, they were living in the United States, where conception took place.<sup>40</sup> This element is important, as it allows U.S. courts to exercise jurisdiction over defendants even if they reside abroad.<sup>41</sup> After the father’s

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of 1968, which permits a California resident claiming support from a nonresident to file a petition in California and have its merits adjudicated in the State of the alleged obligor’s residence, without either party’s having to leave his or her own State.”)

<sup>36</sup> See the scope of application of the Revised Uniform Reciprocal Enforcement of Support Act which facilitates *interstate* communication between United States authorities.

<sup>37</sup> Michaels, *supra* note 9, at 10 (explaining that grounds for indirect jurisdiction (recognition) should not be compared to direct national grounds of jurisdiction because there is no link between them).

<sup>38</sup> See art. 5 and 6 of the Hague Maintenance Convention of 2007, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131>.

<sup>39</sup> The Judgments Project: Special Comm. On the Judgments Project, <https://www.hcch.net/en/projects/legislative-projects/judgments> (last visited Apr. 29, 2016).

<sup>40</sup> This is an acceptable basis for jurisdiction in the United States. See, e.g., Phillips v. Fallen, 6 S.W.3d 862 (Miss. 1999) (finding jurisdiction over nonresidents if the defendant submitted to it by doing “the act of sexual intercourse within this state with respect to which a child may have been conceived”).

<sup>41</sup> Section 201 of the UNIFORM INTERSTATE FAMILY SUPPORT ACT provides for the recognition of judgments from a foreign judicial district where “the individual [defendant]

departure, a maintenance claim was introduced in the United States, and the U.S. court issued a judgment condemning the father to pay \$1000 of child maintenance per month. The father was duly served with all court documents, but he never participated in the proceedings. Recognition of this judgment is sought in Switzerland at the domicile of the father. According to Art. 84 of the Swiss Federal Act on Private International Law,<sup>42</sup> such a decision can be recognized in Switzerland: “Foreign decisions relating to the relationship between parents and child [including maintenance claims] shall be recognized in Switzerland if they were rendered in the state of the child’s habitual residence.” From a Swiss perspective, it does not matter which ground of jurisdiction was used by the foreign court, as long as the criterion “rendered in the state of the child’s habitual residence” is fulfilled.

In the two example cases, U.S. decisions would be recognized in Switzerland, but Swiss decisions would not be recognized in the United States. This result leaves creditors domiciled abroad without appropriate legal protection and unduly overprotects debtors in the United States, which was never intended as the historical analysis of the due process clause indicates.

### III

#### HISTORICAL OVERVIEW OF JUDGMENTS RECOGNITION IN THE UNITED STATES

##### *A. From Review on the Merits to Control of Indirect Jurisdiction*

Before the entry into force of the U.S. Constitution, the American colonies were foreign nations in relation to one another. They were free to exercise jurisdiction in cases with hardly any link to their territory.<sup>43</sup> In return, recognition of judgments from neighboring colonies depended on the goodwill of each colony.<sup>44</sup> The merits (facts) of these judgments from neighboring colonies were entirely re-

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engaged in sexual intercourse . . . and the child may have been conceived by that act of intercourse.”

<sup>42</sup> See BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG], *supra* note 8.

<sup>43</sup> Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 498 (2012), cites a case where “the mere attachment of a blanket, reputed to be [the defendant’s] property” was used in order to establish jurisdiction.

<sup>44</sup> *Hilton v. Guyot*, 159 U.S. 113, 181 (1895); Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 495 (2012).

examinable,<sup>45</sup> and the judgments were only considered an implied promise to pay money, or as prima facie evidence of a debt.<sup>46</sup> Non-local judgments had no more force than a contract.<sup>47</sup> If foreign decisions were recognized at all, they were viewed only as defenses. The courts' reluctance to enforce foreign decisions stemmed from a desire to prevent the enforcement of potentially unjust laws.<sup>48</sup>

As the non-recognition of judgments from neighboring colonies hampered economic activities, the decision was made, first in some colonies, and later throughout the country by means of the federal Constitution, to facilitate their recognition. Based on Article IV of the U.S. Constitution, which provides that “[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,”<sup>49</sup> some early federal judgments held that all sister-state judgments had to be recognized without control of jurisdiction.<sup>50</sup> This rule applied even to default judgments not relying upon an accepted ground of jurisdiction.<sup>51</sup>

A duty to recognize sister-state judgments without examining their basis for jurisdiction can have undesired effects, such as the recognition of abusive fora contradicting local exclusive jurisdiction in violation of the *forum rei sitae* principle<sup>52</sup> regarding immovable property. For this reason, from the beginning, state courts were reluctant to give unconditional recognition to sister-state judgments

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<sup>45</sup> *Hilton*, 159 U.S. at 181.

<sup>46</sup> Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1214 (2009).

<sup>47</sup> *Id.* at 1213.

<sup>48</sup> Arnaud Nuyts, *Due Process and Fair Trial: Jurisdiction in the United States and in Europe Compared*, 2 CILE STUDIES: PRIVATE LAW, PRIVATE INTERNATIONAL LAW, & JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP 27, 31–44 (2005).

<sup>49</sup> U.S. CONST. art. IV, § 1.

<sup>50</sup> *Mills v. Duryee*, 11 U.S. 481 (1813); *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 267–77 (1935) (“The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.”). *See also* *Williams v. State of N. Carolina*, 317 U.S. 287, 302 (1942); *World-Wide Volkswagen Corp.*, 444 U.S. at 292 (1980); *Rogers v. Coleman*, 3 Ky. (Hard.) 413, 428 (Ky. Ct. App. 1808).

<sup>51</sup> *Hampton v. McConnel*, 16 U.S. 234, 235 (1818).

<sup>52</sup> According to this principle, the court (latin: forum) where an object (latin: res, rei) is located (latin: sitae) should be the one to decide on this object, as it's the court with the closest link to the object, especially when immovable property is concerned.

and created some limits. They only recognized judgments “where both parties are within the jurisdiction of such courts at the time of commencing the suit, and are duly served with the process.”<sup>53</sup>

Following legal doctrine and the case law of state courts,<sup>54</sup> the Supreme Court recognized in 1850 in *D’Arcy* that “great embarrassment” would result if sister-state judgments had to be recognized without exceptions.<sup>55</sup> *D’Arcy* established that control of indirect jurisdiction would be performed by the court addressed, which would inquire whether the sister-state court that rendered the judgment had been entitled to do so: “[A] judgment entered without jurisdiction is not entitled to full faith and credit.”<sup>56</sup> The criteria for jurisdiction are set out in the due process clause,<sup>57</sup> which is interpreted

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<sup>53</sup> *Kibbe v. Kibbe*, 1 Kirby 119 (1787); *Rogers*, 3 Ky. (Hard.) at 413; see also James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 193 (2004). The legislative proceedings and comparisons with language used in evidentiary legislation demonstrate that in the 18th century, the term “full faith and credit” was not used in the context of recognition of judgments, but rather for the credibility attached to public documents, such as notary deeds, etc. This indicates that the full faith and credit clause was only intended to regulate evidence questions, not the recognition of judgments, allowing states to subject the recognition of sister-state judgments to some limitations. Cf. Sachs, *supra* note 46, at 1223–40; cf. also Weinstein, *supra*, at 178–81.

<sup>54</sup> JAMES KENT, COMMENTARIES ON AMERICAN LAW 261 (1840); see cases cited *supra* note 53.

<sup>55</sup> *D’Arcy v. Ketchum*, 52 U.S. 165, 175 (1850).

<sup>56</sup> *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank*, 98 A.3d 998, 1007 (D.C. 2014).

<sup>57</sup> U.S. CONST. amend. XIV, § 1. The constitutional rules on jurisdiction are specified by case law and the statutes of the states, which determine the recognition of judgments from sister-states and foreign countries. Some uniformity amongst the states has been achieved, as nearly two-thirds of them have enacted either the Uniform Foreign Money-Judgments Recognition Act of 1962 or the Uniform Foreign-Country Money Judgments Recognition Act of 2005. See FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT SUMMARY, UNIF. LAW COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited on Apr. 29, 2016). These statutes must comply with the constitutional due process requirement in *Smith v. DeWalt Products Corp.*, 743 F.2d 277, 278 (5th Cir. 1984). In the states that have not enacted specific statutes, recognition of judgments is based on case law, with similar criteria all throughout the country. Courts in these states generally adhere to the interpretation as provided in the Restatement (Third) of the Foreign Relations Law of the United States. Cf. Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 2015–37 U. OF PITTSBURGH LEGAL STUDS. RES. PAPER 21 (2015) (2015); Brand, *supra* note 15, at 494.

by the U.S. Supreme Court as requiring that the defendant had “certain minimum contacts” with the foreign forum.<sup>58</sup>

***B. Indirect Jurisdiction as an Alternative to a Review on the Merits***

The debate regarding indirect jurisdiction developed at the time when full faith and credit was introduced for sister-state judgments.<sup>59</sup> This indicates that control of indirect jurisdiction was conceived as an alternative to a review on the merits, which would also have provided protection against unacceptable results arising from the exercise of judicial power.<sup>60</sup>

The link between examination on the merits and indirect jurisdiction is supported by the fact that judgments from admiralty courts, i.e., courts that applied a universally homogenous law, were largely recognized without control on the merits or examination of indirect jurisdiction. “A foreign court . . . might apply an uncivilized and barbarous law. . . . Such reasoning explains why courts were more willing to . . . recognize the judgments of foreign admiralty courts, which all theoretically applied the same international law of admiralty.”<sup>61</sup> As the laws these courts applied were considered to be appropriate, there was no need to examine their judicial legitimacy. In areas where the substantive laws are harmonized, questions of jurisdiction become less important.<sup>62</sup>

Another fact supports the intrinsic link between indirect jurisdiction and control on the merits. Countries that reviewed foreign judgments on the merits were in general also less demanding with respect to the control of indirect jurisdiction. In Belgium, until

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<sup>58</sup> The criteria developed in *Int'l Shoe* are also used for indirect jurisdiction. Cf. e.g., *Hanson v. Denckla*, 357 U.S. 235, 250 (1958) (regarding indirect jurisdiction which nevertheless explicitly applies *Int'l Shoe*); cf. also cases cited *supra* note 22, 25.

<sup>59</sup> *Hanley v. Donoghue*, 116 U.S. 1, 4 (1885) (“Judgments recovered in one state of the Union . . . [are not] re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.”).

<sup>60</sup> FRICKE, *supra* note 16, at 36–37 (The examination of foreign indirect jurisdiction is directly linked to the applicable law (and the examination of the merits of the case). Either the law applied on the merits is examined, or the jurisdiction of the foreign court is controlled in order to ensure that the law applied represents enough links with the case.).

<sup>61</sup> Sachs, *supra* note 46, at 1215.

<sup>62</sup> A.N. Makarov, *Internationales Privatrecht. Staatsangehörigkeitsrecht*, 10 JURISTENZEITUNG 22, 718–19 (1955); Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1047 (2005).

recently, foreign judgments were examinable on the substance, and in turn only exorbitant indirect grounds of jurisdiction were controlled.<sup>63</sup> Belgium has now changed its laws and no longer reviews foreign cases on the merits, but it now reviews the indirect jurisdiction of foreign courts in a stricter way.<sup>64</sup>

The link between review on the merits and indirect jurisdiction is an important finding in the present context. If the real question at stake with indirect jurisdiction is control on the merits in order to prevent giving effects to “uncivilized and barbarous” laws, then the application of the criteria developed for direct jurisdiction is not appropriate with respect to the recognition of foreign decisions.<sup>65</sup> On an international scale, the applicable laws can vary substantially. Which law applies in a proceeding is determined by the judgment state, and this determination is recognized or refused according to the grounds of indirect jurisdiction of the state where the judgment is enforced. Thus, grounds of jurisdiction have an indirect influence on substantive laws, as the latter are indirectly determined by the former. This militates against the uncontrolled extension of domestic jurisdictional principles to international situations. Yet, this is exactly what happened in the United States.

### *C. Extension of Due Process Requirements to Foreign-Country Judgments*

Recognition of judgments from foreign countries initially developed differently from sister-state judgments. At the time when the full faith and credit clause was introduced, “it was the intention of

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<sup>63</sup> See CODE JUDICIAIRE [C.JUD.] [Judicial Code] art. 570 (Belg.) of Oct. 10, 1967, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Oct. 31, 1967; see also P. Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Signed at Brussels, 27 September 1968)*, 4 OFFICIAL J. OF THE EUR. COMMUNITIES 59, Mar. 5, 1979 (regarding judgments recognition in Belgium in the 1970s. “Where there is no reciprocal convention, a court seised of an application for an order for enforcement has jurisdiction over a foreign judgment as to both form and substance, and can re-examine both the facts and the law. In other words, it has power to review the matter fully”).

<sup>64</sup> Cf. LOI PORTANT LE CODE DE DROIT INTERNATIONAL PRIVÉ [Belgium Code of private international law] of July 16, 2004, para. 25 in conjunction with paras. 39, 57, 72, 95, 115, and 121.

<sup>65</sup> Foreign-country judgments might have applied substantive laws largely different from local ones, and thus need a different control than sister-state judgments. Grounds of *direct* jurisdiction, which follow *procedural interests* such as the good and efficient administration of the justice system, are of no help when applied to *foreign* judgments, where the main interest is the *recognition of social facts* created abroad.



our own legislature, and also of the federal government, to place the judgments recovered in any of the courts of the United States on better ground than judgments rendered in any other state or country.”<sup>66</sup> The differences between foreign and sister-state judgments were two-fold: regarding the requirements, and regarding the effects of recognition.

Regarding the requirements of recognition of foreign-country judgments in the United States, the Supreme Court of Massachusetts stated in *Bissell* that, “[i]f the foreign court, which rendered the judgment, had jurisdiction of the *cause*. . .”<sup>67</sup> it can be recognized. Regarding sister-state judgments however: “A court of another state must have had jurisdiction of the *parties*, as well as of the *cause*, for its judgment to be entitled to the full faith and credit mentioned in the federal Constitution.”<sup>68</sup> Thus, it seems that foreign-country judgments were subject to a different, less strict jurisdictional test (jurisdiction of the cause) than sister-state judgments (jurisdiction of the cause and of the parties).

This less demanding scrutiny for foreign titles compared to sister-state judgments can be explained by the fact that initially, different effects were attached to their recognition. Only sister-state judgments were recognized without review on the merits (in exchange for the full review of indirect jurisdiction), whereas foreign judgments with their more limited review of indirect jurisdiction remained subject to an inquiry regarding the merits.<sup>69</sup>

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<sup>66</sup> *Hanley*, 116 U.S. at 4.

<sup>67</sup> *Bissell v. Briggs*, 9 Mass. 462, 464 (Mass. 1813) (emphasis added).

<sup>68</sup> *Id.* at 462 (emphasis added). In the nineteenth century, “jurisdiction of the cause” was to be understood as the subject-matter competence, given, e.g., if the cause exceeded certain sums or values of money, *Gordon v. Ogden*, 28 U.S. 33, 34 (1830), or in diversity cases for federal courts, *Clarke v. Mathewson*, 37 U.S. 164, 171 (1838), whereas “jurisdiction of the parties” referred to jurisdiction over the person of the defendant; see TIMOTHY BROWN, COMMENTARIES ON THE JURISDICTION OF COURTS (1891).

<sup>69</sup> *Bissell*, 9 Mass. at 462 (“If such judgment be produced to obtain execution of it here, and the court rendering it had jurisdiction of the cause, yet it is still open to an inquiry into its merits.”). The situation may be compared to eighteenth- and nineteenth-century Germany, where indirect jurisdiction of foreign decisions was not seen as a requirement for recognition, but rather as a condition of validity of the original judgment, and thus, examined according to the standards of the court of *origin*. If the court lacked jurisdiction according to its own criteria, the judgments was considered to be void. Only exorbitant jurisdiction was examined according to the standards of the court addressed. Cf. Dieter Martiny, *Anerkennung Ausländischer Entscheidungen Nach Autonomem Recht*, 1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS ¶ 602 (1984).

Since then, the situation has changed a lot regarding the recognition of foreign judgments. Today, “[t]he foreign judgment is enforceable in the same manner as the judgment of a sister[-]state, which is entitled to full faith and credit.”<sup>70</sup> “[T]he merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.”<sup>71</sup> In compensation for these more favorable procedure and effects, judgments from foreign countries are nowadays also subject to the same criteria as sister-state judgments regarding indirect jurisdiction.<sup>72</sup> Indirect jurisdiction is considered to be in compliance with due process when there is a “relationship among the defendant, the forum, and the litigation,”<sup>73</sup> which means that the U.S. criteria for indirect jurisdiction are identical to those used for the exercise of direct jurisdiction by U.S. courts.<sup>74</sup> Thus, today, all jurisdictional questions receive the same inquiry in the United States: “whether it be Wisconsin or the Netherlands, the standard of minimum contacts is the same.”<sup>75</sup>

#### IV INAPPROPRIATENESS OF U.S. DUE PROCESS REQUIREMENTS IN THE CONTEXT OF THE RECOGNITION OF FOREIGN-COUNTRY JUDGMENTS

The application of a single set of criteria to the questions of direct and indirect jurisdiction regarding both sister-state and foreign-country judgments is inappropriate for: (A) procedural reasons, (B) because of the federal origin of the direct grounds of jurisdiction mirrored for the use in international situations, and (C) due to the

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<sup>70</sup> § 3 UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, § 7 UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT.

<sup>71</sup> *Hilton*, 159 U.S. at 203.

<sup>72</sup> Compare the following cases regarding national and international indirect jurisdiction that refer to the same standards developed in *Int'l Shoe: Mercandino, Inc.*, 436 A.2d at 943; *Koster*, 640 F.2d at 78; *World-Wide Volkswagen Corp.*, 444 U.S. at 291; *Monks Own, Ltd.*, 168 P.3d at 127; *Frank E. Basil, Inc. v. Guardino*, 424 A.2d 70, 74 (D.C. 1980).

<sup>73</sup> *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

<sup>74</sup> *Mercandino*, 436 A.2d at 942.

<sup>75</sup> *Koster*, 640 F.2d at 79; *Mercandino*, 436 A.2d at 943–44 (“Although this [minimum contacts] test was developed to determine whether a judgment of a sister state is entitled to full faith and credit, it is equally applicable where a court of a foreign nation has exercised long-arm jurisdiction. . . . In either instance, the minimum contacts standard provides assurance that the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’ *International Shoe Co. v. Washington*.”); see also *Bank of Montreal*, 612 F.2d at 470.

vagueness of the main criterion used for direct jurisdiction in the United States. A particularly telling example of the inappropriateness of applying federal grounds of jurisdiction to international situations is tag jurisdiction.

#### *A. Procedural Differences Between U.S. and International Situations*

The United States has a plaintiff-friendly procedural system. Contingency fees lower the cost-entry barriers for plaintiffs, pre-trial discovery proceedings with horrendous costs force defendants to settle and therefore advantage plaintiffs, jury trials tend to award high punitive damages to plaintiffs, and there is no risk of having to pay defendant's attorney fees, as these costs are not considered to be damages.<sup>76</sup> In this plaintiff-friendly setup, the defendant needs some protection, in that he is only subject to jurisdiction if he himself established minimum contacts with the court. This explains why following *International Shoe*, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."<sup>77</sup>

Most European rules of jurisdiction, in contrast, do not require in addition to the traditional requirement of contact between the court and the case a protective link between the court and the defendant, because their setup is not as plaintiff-friendly as in the United States. In many European countries, for example, securities must be paid by the plaintiff for the probable party costs of the defendant, which protects the defendant against abusive or frivolous proceedings.<sup>78</sup> Furthermore, many European countries don't have pre-trial discovery proceedings.<sup>79</sup> These differences protect the defendant, as the plaintiff has to gather some evidence before he can initiate a lawsuit; and punitive damages and contingency fees are prohibited, in order to

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<sup>76</sup> Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 37 (1996); cf. Michaels, *supra* note 9, at 1054–55.

<sup>77</sup> *Shaffer*, 433 U.S. at 204.

<sup>78</sup> See, e.g., art. 98 of the Swiss Zivilprozessordnung [ZPO] [Civil Procedure Code] Dec. 19, 2008, SR 272 (Switz.): "The court may demand that the plaintiff make an advance payment up to the amount of the expected court costs."

<sup>79</sup> See, e.g., title 10 of the Swiss Civil Procedure Code, *supra* note 78.

prevent speculative judicial proceedings.<sup>80</sup> Because of the defendant-friendly procedural set-up characteristic of many European legal regimes, there is no need for a special constitutional due process requirement that would protect the defendant against undue lawsuits.

In the aforementioned example, “Recognition in U.S. Case,” during the proceedings in Switzerland the defendant would have the right to be heard; he could request that the plaintiff provide security for the defendant’s attorney fees; he could ask for free legal aid (e.g., representation by a Swiss attorney) if he does not have sufficient financial resources,<sup>81</sup> and secure the assistance of an English interpreter.<sup>82</sup> He could be exempted from being present in court due to the long distance, and all court documents would be transmitted to him according to internationally accepted standards.<sup>83</sup> The plaintiff would have to advance the costs for obtaining the evidence that she requires (e.g., a DNA test in order to prove paternity), and if the plaintiff loses she has to pay all the costs, including the defendant’s expenses and the costs of translation/interpretation.<sup>84</sup> In addition, Swiss courts would apply a law according to conflict-of-laws principles that are internationally recognized as being fair.<sup>85</sup>

Despite all these defendant-friendly rules, which favor the U.S. defendant, the Swiss judgment would not be recognized in the United States because it would be considered to violate the due process rights of the defendant due to the missing link between the court and the defendant. Under these circumstances, the due process requirement becomes a purely formalistic criterion, deprived of any substantive meaning.

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<sup>80</sup> Schlosser, *supra* note 76.

<sup>81</sup> *See, e.g.*, art. 117 of the Swiss Civil Procedure Code, *supra* note 80: “A person is entitled to legal aid if: (a) he or she does not have sufficient financial resources; and (b) his or her case does not seem devoid of any chances of success.”

<sup>82</sup> *See* art. 95 of the Swiss Civil Procedure Code, *supra* note 78: translation costs are not party costs, but court costs, which have to be borne by the unsuccessful party.

<sup>83</sup> Hague Service Convention, to which both the United States and Switzerland are parties.

<sup>84</sup> Swiss Civil Procedure Code, *supra* note 78, Art. 53: The parties have the right to be heard; art. 99: Security for party costs; Art. 102 Advance for taking of evidence; Art. 106 General principles of allocation, Art. 117: Entitlement to legal aid.

<sup>85</sup> Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, ratified by Switzerland.

### **B. Federal Context**

The principles developed under the due process and full faith and credit clauses protect a broad variety of interests,<sup>86</sup> such as “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.”<sup>87</sup> These American grounds focus on the relationship between the court and the defendant,<sup>88</sup> without considering the situation of the plaintiff, who may be protected in his rights if he lives in the United States,<sup>89</sup> but not if he lives abroad. They are unilateral, as they are based on territorial interests of the United States, which do not take into account foreign interests.<sup>90</sup> And they focus, at least implicitly, on the delimitation of powers in a federal system.

These federal reasons behind the American principles of direct jurisdiction are of course irrelevant when the question of the recognition of a foreign-country judgment is at stake. The reason that many countries have different sets of jurisdictional grounds for local and for international situations, as well as for direct and for indirect jurisdiction, is precisely because these situations are different.<sup>91</sup> For

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<sup>86</sup> Michaels, *supra* note 9, at 1030; Andrew L. Strauss, *Where America Ends and the International Order Begins*, 61 ALB. L. REV. 1237 (1997).

<sup>87</sup> *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 113 (1987); *see also World-Wide Volkswagen Corp.*, 444 U.S. at 292 (1980).

<sup>88</sup> Michaels, *supra* note 9, at 1030. In many other countries, such as in the European Union, jurisdiction is on the contrary more focused on the parties—an approach that can be described as horizontal where jurisdictional grounds determine, e.g., where the plaintiff can sue the defendant. Regulation 1215/2012 (Brussels-Ibis-Regulation), 2012 O.J. (L 351/1) (EU). This may be due to the fact that continental European law, with its principle of actor sequitur forum rei, is traditionally more focused on the protection of the defendant and must therefore provide for some reliefs for the benefit of the plaintiff. In the traditional European approach, consideration is also given to the protection of weak parties, who might benefit from a jurisdictional ground based on social considerations.

<sup>89</sup> *See* Michaels, *supra* note 9, at 1030.

<sup>90</sup> Michaels, *supra* note 9, at 1031.

<sup>91</sup> For an example of a foreign law which provides for special grounds of indirect jurisdiction particularly for international situations, compare Swiss Federal Act on Private International Law (*supra* note 8), Dec. 18, 1987, SR 291, art. 149 (Switz.): (1) Foreign decisions relating to a right pertaining to the law of obligations shall be recognized in Switzerland: (a) if they were rendered in the state of the defendant’s domicile; or (b) if they were rendered in the state of the defendant’s habitual residence, insofar as the rights relate to an activity carried out in such state. (2) They shall also be recognized: (a) if the decision pertains to a contractual obligation, was rendered in the State of performance of

instance, the Brussels I Regulation<sup>92</sup> regarding the recognition of judgments in the European Union has not been mirrored and extended to third states (extra-EU cases) in part because to do so would be to apply inappropriate criteria to the recognition of third-country judgments.<sup>93</sup>

In the United States, by contrast, because of the mirror principle, the very same jurisdictional concepts that are used in the federal context are also applied to situations involving foreign countries,<sup>94</sup> despite their inappropriateness. This is contrary to the original intent and purpose behind those rules.<sup>95</sup> The American system excludes, for example, a forum for child maintenance at the domicile of the child,<sup>96</sup> making the plaintiff the procedural victim of due process. Likewise, no forum for product liability exists under American law in the place where an accident took place and where the victim lived,<sup>97</sup> thus depriving the latter from legal protection if the defendant did not somehow avail himself of the benefits of the forum and could therefore be submitted to U.S. jurisdiction on that basis of purposeful availment.<sup>98</sup>

Such an extension of the American constitutional rules regarding jurisdiction from the domestic to international situations was never intended.<sup>99</sup> Until the beginning of the twentieth century (more specifically until *International Shoe*), it was established that the constitutional prescriptions regarding jurisdiction did not apply to

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the characteristic obligation and the defendant was not domiciled in Switzerland; [(b)–(f) omitted].

<sup>92</sup> Regulation (EC) No 44/2001, 2001 O.J. (L 12/1), now replaced by Regulation (EU) No 1215/2012 (Brussels-Ibis-Regulation), 2012 O.J. (L 351/1).

<sup>93</sup> European Parliament, *Possibility and Terms for Applying Brussels I Regulation (recast) to Extra-EU Disputes*, Study PE 493.024 (2014) 40, [www.europarl.europa.eu/studies](http://www.europarl.europa.eu/studies) (direct link: <http://goo.gl/HGknzZ>) (last visited Apr. 29, 2016):

In summary, we do not see valid and convincing reasons to override the existing separate private international law treatment of intra-EU cases and that of extra-EU cases. There are, in our opinion, important reasons—a different constellation of interests and differing considerations as to access to justice—to maintain the distinction.

<sup>94</sup> Mercandino, 436 A.2d 942: the U.S. criteria for indirect jurisdiction are identical to those used for the exercise of direct jurisdiction by U.S. courts.

<sup>95</sup> Michaels, *supra* note 9, at 1035–36.

<sup>96</sup> *Kulko*, 436 U.S. at 84.

<sup>97</sup> *Asahi*, 480 U.S. at 102.

<sup>98</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011); *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

<sup>99</sup> Strauss, *supra* note 86, at 1250–51.

international cases and were limited to the territorial boundaries of the state.<sup>100</sup> Insisting on identical criteria for direct and indirect grounds of jurisdiction, while accepting differences in the applicable substantive laws if the choice-of-law rules designate foreign statutes, does not seem coherent. The interests of the parties are more affected by differences in substantive laws (for instance, whether and how much maintenance one has to pay), rather than by procedural or jurisdictional questions (such as, in which country the maintenance claim of the child is decided). Putting this dichotomy in the style of a well-known quotation: for an accused, it is more important to know whether he will be hanged, rather than where his sentence is delivered.<sup>101</sup> Continuing with this metaphor, the current U.S. approach accepts differences in substantive laws (i.e., the hanging), as long as the hanging was decided where the defendant “engaged in sexual intercourse”<sup>102</sup> (i.e., control of jurisdiction)—a disturbing idea of due process.

### *C. Practical Problems: Vagueness and Unpredictability of the Minimum Contacts Test*

The application of the same jurisdictional criteria to both direct/interstate and indirect/international jurisdictional questions is problematic because of the vagueness of the *International Shoe* criterion: “certain minimum contacts.”<sup>103</sup> This criterion, which requires certain minimum contacts among court, case, and defendant, in order for a court to be allowed to exercise jurisdiction,<sup>104</sup> does not prevent overlapping jurisdictions, as minimum contacts could exist with different states at the same time.

Such a vague delimitation of jurisdiction is acceptable amongst federal states, where the identification of a precise court becomes less important because of the full faith and credit status of the courts

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<sup>100</sup> See, e.g., *Picquet v. Swan*, 19 F.Cas 609, 611 (C.C.D. Mass. 1828) (“Even the court of king’s bench in England, though a court of general jurisdiction, never imagined, that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit.”); Strauss, *supra* note 86, at 1250–53.

<sup>101</sup> Example given by Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978).

<sup>102</sup> See *supra* note 88 and accompanying text.

<sup>103</sup> *Int’l Shoe Co.*, 326 U.S. at 316.

<sup>104</sup> *Shaffer*, 433 U.S. at 186.

involved. Regardless of where in the federal republic the judgment will have been rendered, it will be recognized everywhere, as long as some minimal contacts existed. In addition, amongst sister-states, mutual trust exists: all sister-state courts are considered to meet the basic criteria of procedural fairness, as they are all bound by the U.S. Constitution. Therefore, jurisdictional grounds developed in a federal context can focus on enabling access to court by using broad and imprecise criteria such as “minimum contacts.” Indeed, within the United States, it is less important where exactly the court is located, as the due process guaranties under the Constitution will ensure a fair trial.

In contrast, in an international context an imprecise delimitation of jurisdictional power is inadequate, as the question becomes one of localization and legal certainty.<sup>105</sup> The *International Shoe* test, while appropriate in a federal context, does not provide for this much-needed legal certainty in international situations, and therefore seems inappropriate for use in an international context.

#### ***D. Example: Inappropriateness of Tag-Jurisdiction in International Situations***

One ground of jurisdiction particularly inappropriate in an international context, due to its profound link to federalism, is jurisdiction based on the exercise of sovereign power. Whereas this power was ensured by physical arrest in ancient times,<sup>106</sup> it now suffices to serve process on the defendant (tag-jurisdiction).<sup>107</sup> In the United States, service of process has become necessary<sup>108</sup> and sufficient<sup>109</sup> for a court to establish jurisdiction, a principle that is also applied regarding the recognition of foreign judgments.<sup>110</sup>

In a federal context amongst states that have mutual trust in the legitimacy of each other’s actions, jurisdiction defined by the exercise

<sup>105</sup> Strauss, *supra* note 86, at 1257.

<sup>106</sup> Michaels, *supra* note 9, at 1028; JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 450 (1834).

<sup>107</sup> McDonald v. Mabee, 243 U.S. 90, 91 (1917); Michaels, *supra* note 9, at 1028; Weinstein, *supra* note 53, at 204.

<sup>108</sup> Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

<sup>109</sup> Burnham v. Superior Court of California, Cty. of Marin, 495 U.S. 604, 610–16 (1990).

<sup>110</sup> According to article 5 of the UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, a foreign judgment may not be refused recognition for lack of personal jurisdiction if “the defendant was served with process personally in the foreign country.”



of physical power can be mutually recognized. Simple rules such as tag-jurisdiction help to “bind these mutually jealous states into a nation.”<sup>111</sup> The mutual acceptance of jurisdiction based on the exercise of sovereignty gives states real power inside their borders and a corresponding incentive to respect the identical prerogatives of their sister-states.

On an international level however, jurisdiction based on the mere exercise of power is less appropriate. There is no mutual trust among foreign countries, and therefore states have to protect the legitimate interests of their citizens against the abusive use of jurisdiction by foreign states. One’s short and temporary presence in a jurisdiction should not give a court competence without any further contacts to the place, as this hampers foreseeability, legal certainty, and hinders international affairs. But according to the Uniform Interstate Family Support Act, American courts can base jurisdiction merely on service of process. According to Section 201, “in a proceeding to establish, or enforce, or modify a support order . . . , a tribunal of this State may exercise personal jurisdiction over a nonresident individual . . . if: (1) the individual is personally served with [citation, summons, notice] within this State.”

## V

### SUGGESTIONS FOR A NEW SCHEME OF JUDGMENTS RECOGNITION

#### *A. Developing an International Notion of Jurisdictional Due Process*

Due process in the United States has two aspects. It ensures *procedural* fairness in trial (independence and impartiality of judges, right to be heard before a court, etc.), and guarantees *jurisdictional* appropriateness of the court (a court has jurisdiction if the defendant is physically present, or if he purposefully availed<sup>112</sup> himself of the protections of the forum).

Some U.S. decisions have already recognized the necessity of adapting the procedural aspects of due process to international contexts, instead of applying them directly. As an example, a foreign judgment rendered by a judge without a jury-trial does not

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<sup>111</sup> James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 3 (1992).

<sup>112</sup> *Hanson*, 357 U.S. at 235.

automatically offend the American notion of due process, even if a jury would have been necessary had the trial taken place in the United States. The decisive criterion in these cases of “international due process”<sup>113</sup> is the fundamental fairness of the foreign procedure, which can be guaranteed even without a jury trial.

A similar approach should be taken regarding the jurisdictional implications of due process when the recognition of foreign-country judgments is at stake. Instead of requiring an additional link to the defendant, the due process criteria should be adapted to international situations and limited to the control of the legitimacy of the foreign court in exercising its jurisdictional power, based on a sufficient link between court and case. “[T]he State in which the injury occurred would seem most suitable for litigation of a products liability tort claim.”<sup>114</sup> The protection of the defendant’s legitimate interests in the foreign procedure can be ensured by a procedural, rather than a jurisdictional control, in which it would be up to the defendant to demonstrate that he did not benefit from a fair trial abroad, just as the current U.S. laws already require him to establish a prima facie case if he invoked a public policy violation regarding substantive laws.<sup>115</sup>

### ***B. Focusing on the Contacts of the Case Instead of the Defendant***

Countries such as France<sup>116</sup> and Canada<sup>117</sup> have a judgments recognition requirement similar to the U.S. standard of “minimum contacts,” but instead of asking for a “relationship among the defendant, the forum, and the litigation,”<sup>118</sup> it is enough in Canada to

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<sup>113</sup> *Society of Lloyd’s v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Osorio v. Dole Food Co.*, 665 F.Supp.2d 1307 (S.D. Fla. 2009); *The Society of Lloyds v. Webb*, 156 F.Supp.2d 632 (N.D. Tex. 2001). This notion is not international by its *source*, but by its *orientation*, the same way as each country has its own set of “international” grounds of jurisdiction, i.e., rules that determine when a national court is entitled to decide a case containing international elements.

<sup>114</sup> *J. McIntyre Machinery, Ltd.*, 564 U.S. at 899 (Ginsburg, J., dissenting). Although this quote refers to direct jurisdiction in an international context, it also applies to indirect jurisdiction with respect to the recognition of foreign-country judgments; compare footnote 25 and the reference to *Mercandino*, where the standards of *Int’l Shoe* are applied to a recognition case.

<sup>115</sup> Steven Winterbauer, *Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim*, 13 BERKELEY J. EMP. & LAB. L. 386, 392 (1992).

<sup>116</sup> *Simitch*, Cour de cassation [Cass.] [supreme court for judicial matters], *Chambre civile 1*, 83-11.241, Bull. I N. 55 [1985] (Fr.).

<sup>117</sup> *Morguard Investments Ltd v. De Savoye* (1990), 3 S.C.R. 1077 (Ca.); *Beals v. Saldanha* (2003), 3 S.C.R. 416 (Ca.).

<sup>118</sup> *Shaffer*, 433 U.S. at 204.

show “a real and substantial connection between the State of origin and the facts on which the proceeding was based.”<sup>119</sup> This flexible approach without focus on the defendant could also be used in the United States for the recognition of foreign-country judgments.

Applied to the aforementioned “Recognition in the U.S.” case, it is undeniable that there is a strong link between the case and the courts of Switzerland, as it is there that the child, who is more vulnerable than the adult maintenance debtor, lives and where her monetary needs can best be evaluated. The court has a legitimate interest in exercising jurisdiction, which therefore should be recognized in the United States. This interest can differ from the local American conception, but this difference should not prevent recognition, just as differences in the substantive laws of the state of origin and the state addressed are no impediment to recognition. Recognition should only be refused if the defendant can demonstrate that he did not benefit from a fair process abroad, not by simply indicating that the foreign grounds of jurisdiction differed from those known in the United States.

### *C. Defining Specific Grounds of Jurisdiction for International Situations*

Instead of a flexible notion of international due process on a case-by-case basis, jurisdictional criteria could also be defined in a general manner for each type of judgment. Regarding maintenance, recognition could for example be accepted if “the creditor was habitually resident in the State of origin at the time proceedings were instituted,”<sup>120</sup> which would allow recognition of the Swiss judgment

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<sup>119</sup> ART. 8 CANADIAN UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT (2003); *cf.* ENFORCEMENT OF FOREIGN JUDGMENTS IN 29 JURISDICTIONS WORLDWIDE 31 (Mark Moedritzer & Kay Whittaker eds., 2014) (“A court in Canada would consider whether the court of the country where the judgment was issued had personal jurisdiction over the defendant. However, there is no necessary requirement to show that the foreign court . . . had personal jurisdiction over the defendant. A Canadian court asked to recognise and enforce a foreign judgment would apply the factors relevant to whether there was shown to be a real and substantial connection between the cause of action and the country in which the foreign judgment was issued.”).

One explanation for this difference compared to the United States may be a less plaintiff-favoring approach of Canadian law, rendering the protective link between court and case unnecessary.

<sup>120</sup> Such a ground of jurisdiction is mentioned in art. 20 of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of

in the “Recognition in the U.S.” case. Regarding tort claims, a judgment could e.g. be recognized if “the judgment ruled on an obligation arising from death, physical injury, . . . and the act or omission directly causing such harm occurred in the State of the court of origin of the judgment.”<sup>121</sup> This would improve legal certainty and therefore reduce litigation costs.

Another interesting approach for judgments recognition would be a general acceptance of foreign decisions unless the defendant establishes a (negative) ground of non-recognition, such as “jurisdiction based on the nationality of the plaintiff.”<sup>122</sup> Such a list would contain all abusive grounds of jurisdiction, that is, those that have no characteristic link between court and case.<sup>123</sup> The “Recognition in the U.S.” case would again pass this test and could be recognized, because jurisdiction based on the habitual residence of the child is not abusive. It is based on a real and substantial connection, the habitual residence of the child being the place where she goes to school, where her needs can best be established, etc.

The negative-list approach is compelling by virtue of its simplicity and open approach (all non-listed jurisdictions would be acceptable). On the other hand, a positive-list of specifically accepted grounds of jurisdiction may better ensure the protection of local defendants, as the grounds of jurisdiction used by foreign courts are unforeseeable. It could be risky to open the door of judgments recognition too widely. It is therefore assumed that a positive list has some advantages compared to a negative one. In contrast to a case-by-case approach, these solutions would be much more predictable and foster legal certainty.

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Family Maintenance, signed (but not ratified) by the U.S. Art. 20 allows the contracting states to make a reservation in respect of this ground of jurisdiction.

<sup>121</sup> Example taken from the currently ongoing work at the Hague Conference in the Judgments project, *cf.* Hague Conference, *supra* note 1.

<sup>122</sup> Compare the 2005 proposal of the American Law Institute regarding a Foreign Judgments Recognition and Enforcement Act. For more information, see *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, AM. LAW INST., <https://www.ali.org/publications/show/recognition-and-enforcement-foreign-judgments-analysis-and-proposed-federal-statute/> (last visited Apr. 29, 2016).

<sup>123</sup> Such as “umbrella jurisdiction,” based on the mere presence of assets, exemplified by a forgotten umbrella, unrelated to the case, in the jurisdiction of the court.

***D. Replacing Procedural Due Process by Indirect Jurisdiction***

A major problem with the American system of judgments recognition lies with the expression of “due process.” As the question of jurisdictional grounds is currently considered in the U.S. legal system as part of the due process principle, criticizing jurisdictional grounds may be seen as denying due process to defendants, which incurs immediate and harsh backlash. This makes it difficult to question the appropriateness of the current U.S. system.

Of course, the defendant should enjoy a fair trial in international cases. The main point of this paper is that the defendant should not be protected by jurisdictional grounds that are irrelevant to international situations. It therefore seems important to change the use of due process when talking about jurisdictional requirements, and instead use the internationally accepted expression “indirect jurisdiction.” This would separate the jurisdictional aspect of due process (question of the jurisdictional power of foreign courts) from its normative, procedural ones (questions of fair trial, judicial independence, etc.). Due process can (and should) of course remain relevant with respect to procedural fairness such as impartial judges and the right to be heard, but not with respect to indirect jurisdiction.

**CONCLUSION**

The mirror principle is a theoretically convincing approach to indirect jurisdiction. Yet, as the foregoing analysis has shown, its practical application can give rise to problems. The best solution is to question and refrain from applying the mirror principle in all the cases where the mirrored grounds are not appropriate for being mirrored due to the national and federal context of their development.

The selective non-application of the mirror principle would create a gap that must be closed. The most promising solution would be the development of an international notion of jurisdictional due process, uncoupled from the requirements of *International Shoe*, as the protective link between court and defendant is not systemically required outside of the United States, where the procedural laws often privilege the defendant. This would allow the recognition of foreign judgments (even if based on jurisdictional grounds unknown by local standards) as long as there was a sufficient link between the case and the court. An example would be jurisdiction at the domicile of a maintenance creditor.

In common law countries such as the United States, where the development of law is among the duties of the courts, the development of an international notion of due process could be possible without having to amend the Constitution. It would be a small step for a judge, but one giant leap for (foreign) judgments.