

**TURNABOUT IS FAIR PLAY: WHY A  
RECIPROCITY REQUIREMENT SHOULD  
BE INCLUDED IN THE AMERICA LAW  
INSTITUTE'S PROPOSED FEDERAL  
STATUTE**

I. INTRODUCTION.....	200
II. HISTORICAL DEVELOPMENT OF FOREIGN JUDGMENT RECOGNITION AND ENFORCEMENT IN THE UNITED STATES .....	203
A. <i>Common Law Development</i> .....	203
1. <i>Hilton v. Guyot</i> .....	203
2. <i>Johnson v. Compagnie Generale Transatlantique</i> .....	206
3. <i>Erie R.R. Co. v. Tompkins</i> .....	207
B. <i>Reciprocity in State Law</i> .....	208
1. <i>The Uniform Foreign Money-Judgments Recognition Act</i> .....	208
2. <i>Restatement (Second) Conflict of Laws § 98</i> .....	210
3. <i>Restatement (Third) of The Foreign Relations Law of the United States §§ 481–482</i> .....	210
4. <i>Summary of Existing State Law</i> .....	211
C. <i>The International Landscape: A Need for and Lack of International Agreements on Recognition and Enforcement</i> .....	212
1. <i>United Kingdom-United States: Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters</i> .....	212
2. <i>The Hague Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters</i> .....	214

D.	<i>The ALI's International Jurisdiction and Judgments Project</i> .....	215
III.	THE RECIPROCITY DEBATE .....	221
A.	<i>Arguments Against Including the Reciprocity Requirement in the Draft Statute Rely Too Heavily on Domestic Precedent and Fail to Adequately Consider the Long-Term Effects of the Change</i> .....	222
1.	<i>The Lack of Precedent</i> .....	223
2.	<i>Legal and Fairness Principles</i> .....	225
3.	<i>Secondary Considerations</i> .....	229
B.	<i>Arguments in Favor of Reciprocity Support its Inclusion in the Draft Statute</i> .....	233
1.	<i>The United States Needs to Create Incentives for Foreign States to Enter Meaningful Negotiations for an International Judgments Recognition Treaty</i> .....	233
2.	<i>The Reciprocity Requirement Will Improve the Recognition of U.S. Judgments Abroad</i> .....	234
3.	<i>Turnabout is Fair Play</i> .....	237
IV.	CONCLUSION .....	237

## I. INTRODUCTION

One can hardly debate the fact that the United States is a vital player in a global economy that is becoming more global every day. In 2003, the value of worldwide exports was \$7.294 trillion and the value of worldwide imports was \$7.569 trillion.<sup>1</sup> This represents a 16 percent increase over 2002 for both imports and exports.<sup>2</sup> Likewise, in 2003, the United States ranked second among worldwide merchandise exporters with a total value of \$723.8 billion, representing 9.6 percent of the global

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1. World Trade Organization, *International Trade Statistics* 18 (2004), [http://www.wto.org/english/res\\_e/statis\\_e/its2004\\_e/its2004\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2004_e/its2004_e.pdf).

2. *Id.* at 18.

exports and a 4 percent increase over 2002 exports.<sup>3</sup> In addition, the United States ranked first in merchandise imports with over \$1.3 trillion in merchandise representing 16.8 percent of the global market and a 9 percent increase over 2002.<sup>4</sup> International trade is growing rapidly, and the United States is a major factor in this growth.

The astounding volume and growth of international trade has heightened the importance of uniform, efficient, and predictable recognition and enforcement of judgments rendered by sovereigns in this global economy.<sup>5</sup> The impact of judgment recognition and enforcement has been summarized as follows:

Traders seek the security provided by the enforcement of legal rights and the provision of an adequate remedy. Accordingly, without secure means by which that remedy may be given effect, exporters may undervalue the gains from trade. Consequently, they may fail to take advantage of trading opportunities that would otherwise be socially beneficial, taking into account both the gains for individual traders and the benefits that would flow to third parties. At the same time, the inability of importers to vindicate their legal rights through the effective enforcement of judgments would also distort incentives for trade, leading exporters not to appreciate fully the costs of their activities and encouraging them to exploit trading opportunities that would be better left unrealized.<sup>6</sup>

The purpose of this Comment is to examine the wisdom of imposing a requirement of reciprocity in the Proposed Foreign Judgments Recognition and Enforcement Act drafted by The American Law Institute's International Jurisdiction and Judgments Project. This issue is particularly relevant in light of the fact that both the American Law Institute (ALI) and The National Conference of Commissioners on Uniform State Laws (NCCUSL) are simultaneously working on foreign judgment

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3. *Id.* at 19.

4. *Id.*

5. See Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 BERKELEY J. INT'L L. 44, 46-47 (2001).

6. *Id.* at 44.

recognition projects, and they have taken conflicting positions on the issue of reciprocity.<sup>7</sup> While there are many other important considerations in the analysis of foreign judgment recognition, this Comment is confined to the issue of reciprocal recognition of foreign judgments.

To set the stage for this analysis, this Comment begins with a summary of the historical development of foreign judgment recognition and enforcement in the United States. Since the United States is currently not a party to any international convention governing the recognition of foreign judgments,<sup>8</sup> the Comment will first highlight select cases that have defined the common law landscape in the United States. Next, the current Uniform Foreign Money-Judgments Recognition Act, promulgated by the NCCUSL in 1962,<sup>9</sup> will be discussed in addition to Restatements related to the recognition and enforcement of foreign judgments. The Comment will proceed to briefly highlight the issues encountered during the Hague Convention and then will examine the factors leading to the ALI's proposed Foreign Judgments Recognition and Enforcement Act.

Part III of the Comment will provide a brief account of foreign judgment recognition and enforcement in select international jurisdictions. The intent of this brief review is to highlight the role reciprocity has played abroad in order to better understand how a reciprocity requirement in the United States would potentially affect the status quo.

Finally, the analytical focus of the Comment will be

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7. See AMERICAN LAW INSTITUTE (ALI), INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT § 7(Tentative Draft No. 2) (2004) [hereinafter ALI Draft Statute] (taking the position that reciprocity should be included in the Draft Statute). Memorandum from Kathleen Patchel to the Study Committee on Recognition of Foreign Judgments (June 25, 2003), [http://www.nccusl.org/nccusl/Scope&Program/Rpt\\_Foreign\\_Money\\_0603.pdf](http://www.nccusl.org/nccusl/Scope&Program/Rpt_Foreign_Money_0603.pdf) [hereinafter Patchel Memo] (taking the position that the NCCUSL should not include a requirement for reciprocity when updating the Uniform Foreign Money-Judgments Recognition Act).

8. Russell J. Weintraub, *How Substantial Is Our Need For a Judgments-Recognition Convention And What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 167-68 (1998).

9. Unif. Foreign Money-Judgments Recognition Act, 13 U.L.A. 39 (1962) [hereinafter Uniform Act].

dedicated to examining the arguments both for and against requiring reciprocal recognition of U.S. judgments as a prerequisite to U.S. courts recognizing foreign court judgments.

## II. HISTORICAL DEVELOPMENT OF FOREIGN JUDGMENT RECOGNITION AND ENFORCEMENT IN THE UNITED STATES

Article IV of the U.S. Constitution provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>10</sup> However, it is undisputed that the Constitution confers no such right to judgments rendered by foreign nations.<sup>11</sup> Therefore, the enforcement of foreign judgments in the United States has traditionally been governed by state common law and the Uniform Foreign Money-Judgments Recognition Act.<sup>12</sup>

### A. *Common Law Development*

While the intent of this Comment is not to provide an exhaustive review of the U.S. case law surrounding the issue of foreign judgment recognition and enforcement, it is important to recognize the cases that have shaped the current policy in this area in an effort to provide a fundamental backdrop for the reciprocity debate.

#### 1. *Hilton v. Guyot*

The 1895 Supreme Court decision of *Hilton v. Guyot*<sup>13</sup> is considered landmark in the area of foreign judgment recognition.<sup>14</sup> This case involved a suit brought by a French partnership against its U.S. trading partners operating in

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10. U.S. CONST. art. IV, § 1.

11. See *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912) (“No such right, privilege or immunity, however, is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations . . .”).

12. CHARLES S. BALDWIN, IV ET AL., *INTERNATIONAL CIVIL DISPUTE RESOLUTION: A PROBLEM-ORIENTED COURSEBOOK* 398 (2004).

13. 159 U.S. 113 (1895).

14. Weintraub, *supra* note 8, at 176.

France.<sup>15</sup> The case was tried in a French court and a final judgment was rendered, awarding a substantial sum to the French plaintiffs.<sup>16</sup> The case was appealed in French courts, but the U.S. defendants liquidated their assets in France prior to the judgment on appeal.<sup>17</sup> After working its way through the U.S. court system, the French plaintiff's action to have its French judgment recognized and enforced in the United States made it to the Supreme Court on a writ of error.<sup>18</sup>

Justice Gray's opinion based the recognition of foreign judgments on "the comity of nations."<sup>19</sup> He defined comity as:

[T]he recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>20</sup>

Justice Gray then proceeded to define comity's scope and composition, concluding:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried

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15. *Hilton*, 159 U.S. at 114.

16. *Id.* at 114–15.

17. *Id.* at 116.

18. *Id.* at 114–23.

19. *Id.* at 163 ("The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'").

20. *Id.* at 163–64.

afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.<sup>21</sup>

While the French judgment appears to have met these criteria for granting comity, the judgment was not afforded conclusive effect for the independent ground of a “want for reciprocity”—French courts would not have recognized and enforced a U.S. judgment without a trial on the merits.<sup>22</sup> Furthermore, Justice Gray reviewed the current laws of numerous countries around the world and concluded reciprocity was a prerequisite to allowing conclusive effect of foreign judgments in the majority of foreign jurisdictions.<sup>23</sup> He was careful to note the holding was not based on a theory of retaliation, but on “the broad ground that international law is founded upon mutuality and reciprocity . . . .”<sup>24</sup>

*Hilton* was a 5–4 decision, and Justice Fuller authored a forceful dissent in which he argued the doctrine of *res judicata* should be applied to foreign judgments.<sup>25</sup> Since the court was competent; afforded equal treatment to all litigants (regardless of nationality); and appeared to have acted judicially, honestly and fairly, he argued the judgment should not be disturbed.<sup>26</sup> In addition, he noted that while several nations require reciprocity to enforce the judgments of other countries, countries governed by common law, such as England, simply require the court of judgment to have proper jurisdiction over the matter.<sup>27</sup>

Thus, in the seminal case regarding the recognition of foreign court judgments, the battle lines had already been drawn concerning the role reciprocity should play in the U.S. judicial system.

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21. *Id.* at 202–03.

22. *See id.* at 210.

23. *See id.* at 217–27.

24. *Id.* at 228.

25. *See id.* at 229–34.

26. *Id.* at 230–31.

27. *Id.* at 231–32.

## 2. *Johnson v. Compagnie Generale Transatlantique*

Thirty-one years after the landmark decision of *Hilton*, a case arose in which the Supreme Court's decision would be tested in the state of New York.<sup>28</sup> In *Johnson v. Compagnie Generale Transatlantique*, the New York Court of Appeals considered a controversy brought by a U.S. plaintiff against a French defendant.<sup>29</sup> The action arose over an alleged wrongful delivery of goods in which the U.S. plaintiff first sought relief in French courts; however, the French defendant won the French case in a final judgment on the merits.<sup>30</sup> The U.S. plaintiff subsequently turned to the U.S. courts in a separate action and the lower courts refused to give effect to the French judgment, relying on the holding of *Hilton*.<sup>31</sup> The New York Court of Appeals concluded it was not bound by the *Hilton* decision because "the question is one of private rather than public international law, of private right rather than public relations and our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights."<sup>32</sup>

While the court presumably could have distinguished *Hilton* as a case involving an international judgment against a U.S. defendant, Justice Pounds instead asserted the state's authority to decide cases of private international law. Furthermore, he expressly stated, "[c]omity is not a rule of law, but it is a rule of 'practice, convenience, and expediency. . . .' It, therefore, rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment."<sup>33</sup> Thus, in the first direct challenge to the reciprocity requirement established in *Hilton*, Justice Pounds effectively eliminated the requirement from consideration in New York courts.

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28. See *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926).

29. *Id.* at 122.

30. *Id.*

31. *Id.*

32. *Id.* at 123.

33. *Id.*

Ultimately, this position was adopted by a majority of the states.<sup>34</sup> While some scholars have cited *Johnston* in support of the majority view rejecting reciprocity,<sup>35</sup> an alternative reading of the case suggests the New York Court of Appeals may have had ulterior motives in its decision.<sup>36</sup> It is suggested that by offering a more favorable forum for recognition of foreign money judgments than the federal government, New York furthered its interest in inducing foreigners to invest capital within its borders, thus placing its interests ahead of the nation as a whole.<sup>37</sup> Regardless of New York's motivations, the U.S. Supreme Court solidified the states' authority just twelve years later in its historic decision in *Erie*.

### 3. *Erie R.R. Co. v. Tompkins*

As virtually every law student has learned in his first-year Civil Procedure class, *Erie* held that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.”<sup>38</sup> Furthermore, *Erie* noted “[t]here is no federal general common law[, and] Congress has no power to declare substantive rules of common law applicable in a [s]tate . . . .”<sup>39</sup> Therefore, *Erie* “invalidated *Hilton* by denying the application of federal common law for a federal court sitting in diversity.”<sup>40</sup> Following *Erie*, federal courts have thus applied the state law on the issue of reciprocity when considering the recognition and enforcement

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34. See J. Noelle Hicks, Comment, *Facilitating International Trade: The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 BROOK. J. INT'L L. 155, 162–63 (2002).

35. See Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 295 (2004) (criticizing a reciprocity requirement due in part to negative judicial responses to the doctrine in *Johnston*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and their progeny); see also Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 128 (1998) (stating the New York Court of Appeals was correct in rejecting reciprocity).

36. Perez, *supra* note 5, at 61.

37. *Id.*

38. *Erie*, 304 U.S. at 78.

39. *Id.*

40. Hicks, *supra* note 34, at 163.

of foreign judgments.<sup>41</sup> Thereafter, each state adopted its own standard for the recognition of foreign judgments, with the majority adopting the broader standard advocated in *Hilton*, but without the reciprocity requirement.<sup>42</sup>

*B. Reciprocity in State Law*

*1. The Uniform Foreign Money-Judgments Recognition Act*

In 1962, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Foreign Money-Judgments Recognition Act (Uniform Act).<sup>43</sup> At the time, there were many instances in which judgments rendered in the United States were refused recognition abroad because of the concern held by foreign courts that their judgments would not be recognized in an American jurisdiction.<sup>44</sup> The Uniform Act codified the common law applied in the majority of states with the goal of making domestic judgments more likely to be recognized abroad.<sup>45</sup>

The Uniform Act “applies to any foreign judgment that is final and conclusive and enforceable where rendered . . . [.]”<sup>46</sup> provided it grants or denies “recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.”<sup>47</sup> The Uniform Act further defines both mandatory and discretionary grounds for nonrecognition of foreign judgments in § 4; however, reciprocity is notably absent from this list.<sup>48</sup>

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41. ALI Draft Statute, *supra* note 7, § 7 Reporters’ Notes 2, at 89.

42. *See* Weintraub, *supra* note 8, at 177. This is problematic because it creates incentive to forum shop. If a party holds a judgment from a foreign court that he wishes to enforce in the United States, he has an incentive to research the laws of the individual states and select the forum that provides him the best opportunity for success in his enforcement action.

43. *See* Uniform Act, *supra* note 9, at 39.

44. *Id.* at 40.

45. *Id.*

46. *Id.* § 2.

47. *Id.* § 1.

48. *See id.* § 4. Mandatory grounds for nonrecognition include situations where 1) the judgment was rendered under a system that does not provide impartial tribunals; 2) the foreign court did not have personal jurisdiction over the defendant; or 3) the

Thirty-one states and provinces have adopted the Uniform Act with eleven enactments occurring since 1990 and five since 1996.<sup>49</sup> While most of the adopting states have enacted the Uniform Act as drafted, a notable minority of eight states have written in significant modifications concerning reciprocity.<sup>50</sup>

Six states provide a discretionary basis for nonrecognition on the grounds of lack of reciprocity.<sup>51</sup> Furthermore, two states (Massachusetts and Georgia) have made lack of reciprocity a mandatory ground for nonrecognition.<sup>52</sup> Unlike the before-mentioned states that have written in reciprocity as a ground for nonrecognition in § 4 of the Uniform Act, Colorado has taken a unique approach.<sup>53</sup> Colorado has defined “foreign state” in § 1 of the Uniform Act as one that has “entered into a reciprocal agreement with the United States recognizing any judgment of a court of record of the United States . . . .”<sup>54</sup> Since the United States has entered into no such agreements, it would appear that Colorado’s version could not be the basis for recognition of any foreign judgment; however, Colorado has effectively avoided this extreme result by nonetheless recognizing foreign judgments under the principles of comity.<sup>55</sup>

Therefore, if you include Colorado in the minority of states that have adopted lack of reciprocity as a valid basis for nonrecognition, then nine out of the thirty-one states (twenty-nine percent) that have enacted the Uniform Act have added this major revision.

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foreign court did not have subject matter jurisdiction. *Id.* Discretionary grounds for nonrecognition include situations where 1) the defendant did not receive proper notice of the proceedings; 2) the judgment was obtained by fraud; 3) the cause of action or claim for relief is repugnant to public policy; 4) the judgment conflicts with another final and conclusive judgment; 5) the judgment was contrary to an agreement between the parties; or 6) if jurisdiction was based only on personal service and the foreign court was a seriously inconvenient forum. *Id.*

49. Patchel Memo, *supra* note 7, at 3.

50. See ALI Draft Statute, *supra* note 7, § 7 Reporters’ Notes 3, at 90.

51. *Id.* (noting Florida, Idaho, Maine, North Carolina, Ohio and Texas have written in the grounds of lack of reciprocity).

52. *Id.*

53. See Patchel Memo, *supra* note 7, at 37 n.186.

54. *Id.*

55. *Id.*

While the Uniform Act is a worthwhile effort and has indeed increased uniformity among the states,<sup>56</sup> these numbers alone illustrate the fact that the United States has not achieved a uniform approach to the recognition of foreign judgments. In fact, the co-Reporters on the ALI International Jurisdiction and Judgments Project have found “it is virtually impossible to explain to French or Dutch or Japanese lawyers that a judgment originating in their country may be enforceable in New York but not in New Jersey, in Oklahoma but not in Arkansas.”<sup>57</sup>

In addition to the uniformity efforts under the Uniform Act, the ALI has also drafted a number of Restatements courts may consider when making determinations regarding the recognition of foreign judgments.<sup>58</sup>

### 2. *Restatement (Second) Conflict of Laws § 98*

The Restatement (Second) Conflict of Laws, § 98 states that “a valid judgment rendered in a foreign nation after a fair trial in a contested proceeding [will] be recognized in the United States so far as the immediate parties and the underlying claim [are] concerned.”<sup>59</sup> This Restatement recognizes the current consensus that *Hilton* is not binding on state courts and chooses to follow the majority of states by not including reciprocity as a basis for recognition.<sup>60</sup>

### 3. *Restatement (Third) of The Foreign Relations Law of the United States §§ 481–482*

Again following the majority of states, the Restatement (Third) of the Foreign Relations Law of the United States has not included lack of reciprocity as a ground for nonrecognition.<sup>61</sup> The Restatement provides for mandatory nonrecognition of a

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56. See Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 636 (2000); See also Patchel Memo, *supra* note 7, at 4.

57. Silberman & Lowenfeld, *supra* note 56, at 636.

58. See Patchel Memo, *supra* note 7, at 3.

59. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 98 (1988).

60. See *id.* § 98 cmt. f.

61. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987) [hereinafter Restatement of Foreign Relations Law].

foreign court judgment if that judgment was rendered in a system without impartial tribunals or when the rendering court did not have personal jurisdiction over the defendant.<sup>62</sup> Additionally, courts have discretion in recognizing a foreign judgment if the foreign court (1) did not have jurisdiction over the subject matter, (2) the defendant did not receive proper notice, (3) the judgment was obtained by fraud, (4) the cause of action or the judgment itself is against U.S. public policy, (5) the judgment conflicts with another final judgment, or (6) the proceeding in the foreign court was contrary to an agreement between the parties.<sup>63</sup>

#### 4. *Summary of Existing State Law*

In sum, there currently is no real uniformity concerning the role of reciprocity in the recognition of foreign money judgments. The fact remains that twenty-nine percent of the states adopting the Uniform Act have written in a discretionary or mandatory reciprocity requirement.<sup>64</sup>

Furthermore, while both the Restatement (Second) Conflict of Laws and Restatement (Third) Foreign Relations Law of the United States indicate the majority of jurisdictions do not require reciprocity in the recognition of foreign money judgments, one should be mindful of the role Restatements play in our judicial system. Restatements, by definition, are intended to “restate the law, nothing more and nothing less.”<sup>65</sup> It is therefore not surprising that reciprocity is absent from these Restatements, as it is undisputed that a majority of states have adopted the Uniform Act without modification in this area.<sup>66</sup>

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62. *Id.* § 482(1)(a)–(b).

63. *Id.* § 482(2)(a)–(f).

64. See discussion *supra* subpart II.B.1

65. Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 866 (2001).

66. See Restatement of Foreign Relations Law, *supra* note 61, § 481, at Reporters Notes 1 (“[T]he great majority of courts in the United States have rejected the requirement of reciprocity, both in construing the Uniform Foreign Money Judgments Recognition Act, Introductory Note to this Chapter, and apart from the Act.”).

C. *The International Landscape: A Need for and Lack of International Agreements on Recognition and Enforcement*

Despite the considerable efforts to create a uniform judgment recognition standard in the United States, as well as the relative certainty of enforcement enjoyed by foreign country judgments in the United States, “enforcement of U.S. judgments abroad remains a problem.”<sup>67</sup> While the United States is not currently a party to any convention requiring the recognition of foreign judgments, there is general agreement that such a treaty would be beneficial, and the United States has participated in conventions focused on this objective.<sup>68</sup> Unfortunately, prior attempts at negotiating a judgment recognition treaty have either failed, or have stalled and are likely to collapse. This can be attributed to the belief that when compared to other nations, the United States is in the untenable position of having more to gain by entering into a judgments treaty.<sup>69</sup>

1. *United Kingdom-United States: Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters*

In its first convention on the subject,<sup>70</sup> the United States and the United Kingdom negotiated a judgments convention over a

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67. Patchel Memo, *supra* note 7, at 4. See also Brandon B. Danford, Comment, *The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?*, 23 REV. LITIG. 381, 382–83 (2004); Weintraub, *supra* note 8, at 170–71 (stating the conventional wisdom is that other countries do not accord reciprocal treatment to U.S. judgments while warning there is little empirical evidence to support this belief); Matthew H. Adler, *If We Build It, Will They Come?—The Need For a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL’Y INT’L BUS. 79, 94 (1994) (“U.S. courts are quite liberal in their approach to the recognition and enforcement of judgments rendered in foreign jurisdictions, whereas the reverse is not true.”).

68. See Weintraub, *supra* note 8, at 168–69.

69. See Danford, *supra* note 67, at 383. The United States has more to gain because many nations are already parties to judgment-enforcement treaties while the United States is not. *Id.* at 382–83. Since the United States presently affords liberal recognition of foreign judgments, these foreign nations have less to gain by entering into a formal treaty with the United States. See *id.*

70. Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Introductory Note, U.S.-U.K., Oct. 26, 1976, 16 I.L.M. 71.

number of years and in 1976 initialed a draft agreement.<sup>71</sup> The fact that the treaty was never ratified has disturbing implications for the United States' ability to successfully negotiate similar treaties in the future.<sup>72</sup> Even though the two countries share common languages, cultural ties, and a similar common law system, the treaty ultimately failed due to opposition expressed by the British insurance industry.<sup>73</sup>

First, British insurers feared that British courts would be compelled to recognize and enforce U.S. judgments based on jurisdiction as defined in the United States' expansive long-arm statutes.<sup>74</sup> In addition, they expressed a more significant concern related to the potential exposure they would face if forced to pay the shocking jury awards common in American products liability cases.<sup>75</sup> In response to these concerns, the Convention was revised to mitigate the perceived exposure of British insurance companies.<sup>76</sup> Nonetheless, the British pulled out of the project after several more years of unsuccessful negotiations.<sup>77</sup>

The failure of the U.K.–U.S. treaty was particularly disturbing because the inability to complete a bilateral treaty with a country sharing so many cultural and legal ties foreshadowed the challenges to be faced in negotiating a multilateral treaty with other countries.<sup>78</sup> In particular, this experience provided the United States with a glimpse of the concerns harbored by many Europeans: outrageous jury awards and expansive notions of jurisdiction.<sup>79</sup>

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71. See Weintraub, *supra* note 8, at 168–69.

72. See Adler, *supra* note 67, at 92–94.

73. See *id.* at 92–93.

74. *Id.* at 93.

75. *Id.*

76. See *id.*

77. See *id.*

78. *Id.* at 92–93.

79. See *id.* at 93.

2. *The Hague Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters*

Despite the challenges faced in the U.K. Convention, the continued disparate treatment of United States judgments in other countries led the United States Department of State to propose that the Hague Conference on Private International Law embark on the drafting of a recognition and enforcement convention in 1992.<sup>80</sup> The explicit objective was to address the problem encountered when seeking to enforce U.S. judgments in foreign jurisdictions.<sup>81</sup> “Over forty countries were involved in the negotiations, including, in addition to the United States, Canada, Australia, and Ireland, all [fifteen] Member States of the European Union, China, Japan, Israel, Egypt, Morocco and a number of Latin American and Eastern European countries.”<sup>82</sup>

The Hague Conference Special Commission began negotiations in 1996 and completed a Draft Preliminary Convention in 1999.<sup>83</sup> Over fifteen years have passed since the Preliminary Convention was drafted. Unfortunately, due to disagreements concerning the scope and terms of the Convention, negotiations are ongoing.<sup>84</sup>

While the United States “is very interested in establishing international rules for recognition and enforcement of foreign country judgments[,]” Europe does not share a similar need for the Convention.<sup>85</sup> First, for members of the European Union (EU) and the European Free Trade Association (EFTA), the exercise of judicial jurisdiction and judgment recognition and enforcement is currently regulated by the Brussels and Lugano Conventions.<sup>86</sup> Moreover, members of the EU and EFTA already

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80. See Miller, *supra* note 35, at 257.

81. See Patchel Memo, *supra* note 7, at 4.

82. *Id.* at 4 n.16 (citing Peter H. Pfund, *Intergovernmental Efforts to Prepare a Convention on Jurisdiction and the Enforcement of Judgments*, [http://www.ali-aba.org/ali/1999\\_pfund.htm](http://www.ali-aba.org/ali/1999_pfund.htm) (last visited Mar. 5, 2005)).

83. Miller, *supra* note 35, at 257.

84. *Id.*

85. See Patchel Memo, *supra* note 7, at 5.

86. Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 321

enjoyed liberal recognition and enforcement of their judgments in the United States without a requirement of reciprocity or treaty.<sup>87</sup> Therefore, it is believed that one reason these countries entered into negotiations with the United States was to establish limits on U.S. jurisdiction over foreign defendants in exchange for broader enforcement of U.S. judgments.<sup>88</sup>

After years of negotiations, parties to the Convention reached an impasse on the prohibited and permitted bases for jurisdiction and an informal working group was created to draft a text limited to certain issues.<sup>89</sup> In March 2003, this group proposed a draft on a limited topic and it appears negotiations may continue with this restricted scope.<sup>90</sup> While negotiations continued, the ALI initiated the International Jurisdiction and Judgments Project to draft a federal statute that would be used to implement the Hague Convention.<sup>91</sup>

#### *D. The ALI's International Jurisdiction and Judgments Project*

As negotiations at The Hague Convention stalled and it became apparent delegates were unlikely to reach agreement on a comprehensive Convention, the ALI decided to continue the Project with a new goal of producing a draft statute that would “make recognition and enforcement of foreign-country judgments uniform throughout the United States.”<sup>92</sup>

The purpose of the ALI Draft Statute is to propose legislation for Congress, because Project members believe federal legislation is required to achieve uniformity, and to implement various constructive draft proposals, including reciprocity.<sup>93</sup> A Tentative Draft was submitted at the ALI's 2003 Annual Meeting, but time constraints prevented portions from

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(2002) [hereinafter Silberman, Comparative Jurisdiction].

87. *Id.* at 321–22.

88. *Id.* at 322.

89. Patchel Memo, *supra* note 7, at 5.

90. *Id.*

91. See ALI Draft Statute, *supra* note 7, at xi.

92. *Id.* In addition, “[t]he Reporters built on the Uniform Foreign Money-Judgments Recognition Act promulgated in 1962 . . . but they included a number of related topics not addressed in the Uniform Act.” *Id.*

93. *Id.* at xi–xii.

being considered.<sup>94</sup> Subsequently, the complete draft was considered and substantial revisions are reflected in the 2004 version.<sup>95</sup>

While the ALI Draft Statute is comprehensive in its coverage of issues affecting the recognition and enforcement of foreign money judgments, this Comment is confined to the requirement of reciprocity found in Section 7: Reciprocal Recognition and Enforcement of Foreign Judgments. Section 7 provides that:

- (a) A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.
- (b) A judgment debtor or other person resisting recognition or enforcement of a foreign judgment in accordance with this section shall raise the defense of lack of reciprocity with specificity as an affirmative defense. Once the defense of lack of reciprocity is raised, [the judgment creditor or other person seeking to rely on the foreign judgment shall have the burden to show that the courts of the state of origin would grant recognition and enforcement to comparable judgments of courts in the United States.] [The party resisting recognition or enforcement shall have the burden to show that there is substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments of courts in the United States.] Such showing may be made through expert testimony, or by judicial notice if the law of the state of origin or decisions of its courts are clear.
- (c) In making the determination required under subsections (a) and (b), the court shall, as appropriate, inquire whether the courts of the state of origin deny enforcement to

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94. *Id.* at xii.

95. *Id.*

2006]

*TURNABOUT IS FAIR PLAY*

217

- (i) judgments against nationals of that state in favor of nationals of another state;
  - (ii) judgments originating in the courts of the United States or of a state of the United States;
  - (iii) judgments for compensatory damages rendered in actions for personal injury or death;
  - (iv) judgments for statutory claims;
  - (v) particular types of judgments rendered by courts in the United States similar to the foreign judgments for which recognition of enforcement is sought;
  - (vi) recognition practice of the state of origin with regard to judgments of other states.
- (d) Denial by courts of the state of origin of enforcement of judgments for punitive, exemplary, or multiple damages shall not be regarded as denial of reciprocal enforcement of judgments for the purposes of this section if the courts of the state of origin would enforce the compensatory portion of such judgments.
- (e) The Secretary of State is authorized to negotiate agreements with foreign states or groups of states setting forth reciprocal practices concerning recognition and enforcement of judgments rendered in the United States. The existence of such an agreement between a foreign state or group of states and the United States establishes that the requirement of reciprocity has been met as to judgments within the agreement. The fact that no such agreement between the state of origin and the United States is in effect, or that the agreement is not applicable with respect to the judgment for which recognition or enforcement is sought, does not of itself establish that the state fails to meet the reciprocity requirement of this section

- (f) A party seeking to raise a defense under this section may, in appropriate cases, be required to give security.<sup>96</sup>

Section 7(a) lays out the fundamental reciprocity requirement of the Draft Statue. There are two foundational elements of the provision worth highlighting. First, the drafters are explicit in the requirement that a foreign judgment “shall not be recognized or enforced” unless there is a finding that the courts of the foreign country would recognize a comparable judgment of courts in the United States.<sup>97</sup> As discussed *supra*, six states amended the Uniform Foreign-Money Judgment Recognition Act to include reciprocity as a discretionary ground for nonrecognition of a foreign judgment.<sup>98</sup> This Act rejects any discretion in this context in order to achieve uniformity throughout the country.<sup>99</sup> However, the Act recognizes the role of the judge and provides guidance in making the finding of lack of reciprocity in sections (b), (c), and (e).<sup>100</sup>

Section 7(b) provides that the party resisting recognition or enforcement “shall raise the defense of lack of reciprocity with specificity as an affirmative defense.”<sup>101</sup> Thus, the initial pleading burden is placed on the party resisting recognition or enforcement. Once raised, the Act provides two alternatives regarding which party should have the burden of establishing reciprocity or lack of reciprocity.<sup>102</sup> The first alternative places the burden on the judgment creditor or party seeking recognition, and thus departs from the Act’s general rule stated in § 5(c):<sup>103</sup> “The party resisting recognition or enforcement shall have the burden of proof with respect to the defenses set out in

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96. *Id.* § 7, at 81–83 (providing the model text for Section 7: Reciprocal Recognition and Enforcement of Foreign Judgments).

97. *Id.* § 7(a), at 81–82.

98. *See id.* § 7, Reporters’ Note 3, at 90 (noting Florida, Idaho, Maine, North Carolina, Ohio and Texas have written in the grounds of lack of reciprocity).

99. *Id.* § 7, Reporters’ Note 4, at 91.

100. *See id.*

101. *Id.* § 7(b), at 82.

102. *See id.*

103. *Id.* § 7 cmt. g, at 87.

subsections (a) and (b) . . .”<sup>104</sup> The second alternative follows the general rule of § 5(c), and further specifies that the party resisting recognition shall have the burden to show there is “substantial doubt” the foreign court would recognize comparable judgments of courts in the United States.<sup>105</sup> Regardless of which alternative is chosen for the final enactment, the objectives of this section are to “minimize the obstacles to rapid and efficient enforcement of foreign judgments,” and “to provide genuine incentives to states to assure reciprocal treatment to judgments rendered in the United States.”<sup>106</sup>

Section 7(c) provides the court with a framework for making the determinations set forth in §§ 7(a) and 7(b). When analyzing whether the courts of the state of origin would recognize similar judgments of U.S. courts, judges may look to “statutes, decrees of general applicability, or current decisions of courts of last resort, as well as by authoritative commentaries or treatises or expert testimony . . .”<sup>107</sup> While courts may look to decisions of lower courts as well, they should not be regarded as conclusive unless a consistent pattern emerges.<sup>108</sup> Additionally, if the court finds evidence that courts from the state of origin have recognized or enforced judgments of third states without an underlying treaty, this too may be considered as indicative that the reciprocal treatment of U.S. courts is to be expected.<sup>109</sup> Finally, if a foreign statute requires proof of reciprocity prior to recognition, the U.S. court may assume the existence of this Act satisfies such requirement and proceed accordingly.<sup>110</sup>

Section 7(d) is particularly important because it addresses a long-standing barrier to the recognition and enforcement of U.S. judgments. It provides that reciprocal enforcement by courts of the state of origin should be recognized under this Act as long as those courts would enforce the compensatory portion of U.S.

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104. *Id.* § 5(c), at 49.

105. *Id.* § 7(b), at 82.

106. *Id.* § 7 cmt. g, at 87.

107. *Id.* § 7 cmt. e, at 86.

108. *Id.*

109. *Id.*

110. *Id.*

judgments.<sup>111</sup> Denial of enforcement of punitive, exemplary, or multiple damages shall not lead to the conclusion that reciprocity is denied.<sup>112</sup> “Refusal to enforce tort judgments rendered in the United States upon verdict of a jury would indicate a lack of reciprocity in the context of enforcing foreign tort judgments, but might not show lack of reciprocity with respect to other kinds of judgments.”<sup>113</sup> This subsection directly addresses the concerns about outrageous American jury awards raised by British insurance companies during negotiations of the Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters between the United States and Great Britain.<sup>114</sup>

Section 7(e) provides guidance concerning the role of the Secretary of State and agreements negotiated with foreign states. The Department of State is authorized to negotiate, publish, and keep current agreements that are in effect.<sup>115</sup> The Department of State should take into account past practices of the state of origin, as outlined in § 7(c) of the Act, when negotiating such agreements, and foreign state commitments to repeal or modify practices inconsistent with this Act may likewise be the basis for an agreement.<sup>116</sup> The role of the Department of State is expected to be limited to negotiating such agreements as it is not anticipated that the Department will be expected to “make representations in particular cases concerning the recognition or enforcement of foreign judgments . . . .”<sup>117</sup>

Furthermore, the drafters clarify that agreements with foreign states need not be formal treaties but could take the form of Memoranda of Understanding, bilateral declarations, or other similar agreements.<sup>118</sup> Moreover, should a formal convention such as the Hague Convention on Jurisdiction and

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111. *Id.* § 7(d), at 83.

112. *Id.*

113. *Id.* § 7 cmt. f, at 87.

114. *See* discussion *supra* subpart II.C.1.

115. ALI Draft Statute, *supra* note 7, § 7 cmt. d, at 85–86.

116. *Id.* § 7 cmt. D, at 86.

117. *Id.*

118. *Id.* § 7 cmt. c, at 85.

the Effects of Judgments in Civil and Commercial Matters be entered in to effect for the United States, it would supersede the agreements concluded pursuant to this section for parties to the Convention.<sup>119</sup> Again, this is consistent with the overall objective of providing “an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States.”<sup>120</sup>

Finally, § 7(f) provides that in certain cases, parties seeking to raise the affirmative defense of lack of reciprocity may be required to give security.<sup>121</sup> While the drafters do not specify their intent in including this subsection, it is relatively apparent their objective was to provide judgment creditors with some level of insurance that judgment debtors would not squander assets required to fulfill its obligations while the court makes its determination on the reciprocity requirement.

With the historical development of foreign judgment recognition and enforcement practice in the United States as a backdrop, this Comment will now turn to the reciprocity debate surrounding the ALI’s Draft Statute.

### III. THE RECIPROCITY DEBATE

As the foregoing has demonstrated, the United States has a long history of affording liberal treatment to foreign judgments. Soon after the Supreme Court established the reciprocity requirement in *Hilton*, the doctrine was limited by *Johnston*. *Erie* further limited the requirement’s reach by denying the application of federal common law in favor of state law for courts sitting in diversity. subpart II.B, *supra*, reviewed the various attempts to unify the judgment recognition laws that subsequently evolved under the state-controlled regime.

Unfortunately, the various attempts to achieve uniformity have resulted in a “crazy patchwork quilt of differing rules and requirements.”<sup>122</sup> Federalization of the U.S. judgments-enforcement regime would be a wise course of action. It would

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119. *Id.*

120. *Id.* § 7 cmt. b, at 85.

121. *Id.* § 7(f), at 83.

122. Danforth, *supra* note 67, at 426.

allow for standardization, providing the United States with a single bargaining platform that would prove useful should the United States enter into another judgments convention.<sup>123</sup> The purpose of this Part is to analyze whether reciprocity should be a part of this new national standard.<sup>124</sup>

A. *Arguments Against Including the Reciprocity Requirement in the Draft Statute Rely Too Heavily on Domestic Precedent and Fail to Adequately Consider the Long-Term Effects of the Change*

Scholars opposed to the inclusion of a reciprocity requirement raise three principle arguments in support of their position. First, they assert the long history of U.S. precedent favoring liberal recognition of foreign judgments, without the reciprocal recognition of U.S. judgments, should not be disturbed without evidence of disparate treatment of U.S. judgments abroad. Second, they argue substantive problems associated with the requirement run contrary to fundamental legal and fairness principles. Finally, there are concerns that secondary considerations such as *renvoi*,<sup>125</sup> excessive burdens on U.S. courts, and negative effects on international trade further support the exclusion of the reciprocity requirement. This Comment will demonstrate how each of these arguments is either fundamentally flawed or effectively addressed by the provisions of the Draft Statute.

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123. See *id.* For a more thorough review of this position see discussion *infra* subpart III.B.1.

124. Recognizing there are other proposals for addressing the foreign judgment recognition issues facing the United States, this Comment will focus solely on the enactment of a federal statute and whether or not a requirement for reciprocity should be included in the proposed statute. While other proposed solutions may be worthy of consideration, the scope of this Comment is not to analyze the relative merits of such proposals.

125. See BLACK'S LAW DICTIONARY 1300 (7th ed. 1999) (defining *renvoi* as "[t]he doctrine under which a court in resorting to foreign law adopts as well the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum.").

### 1. *The Lack of Precedent*

It is undisputed that the majority of U.S. jurisdictions currently do not impose a reciprocity requirement in their recognition and enforcement analysis.<sup>126</sup> In fact, as discussed *supra*, this recognition regime can be traced back to Justice Gray's opinion in the landmark *Hilton* case and its progeny.<sup>127</sup> The progression from *Hilton* to *Erie* and subsequent judgments "reflect an emphatic judicial rejection of reciprocity as a condition precedent to recognition."<sup>128</sup>

In addition, detractors rely on the fact that the Restatement (Third) of Foreign Relations Law and Restatement (Second) of Conflicts of Laws, both produced by the ALI, confirm the rejection of the requirement in the majority of U.S. jurisdictions.<sup>129</sup> Finally, those in favor of the status quo note reciprocity has been widely criticized by scholars because it "disregards both the merits of the claims and fairness to the parties."<sup>130</sup> Therefore, it is argued, the ALI should not disturb long standing precedent by including the requirement in the Draft Statute.<sup>131</sup>

The fatal flaw in this argument is that it simply assumes the current recognition scheme is effective and fails to consider the role of a reciprocity requirement in the United States' broader judgment recognition strategy. First, the existing approach to judgment recognition and enforcement is clearly in need of repair. Countless articles have criticized the fragmented,

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126. See Hicks, *supra* note 34, at 158–59 (discussing the fact that the United States is one of the most receptive nations with regard to the recognition and enforcement of foreign-country judgments); see also ALI Draft Statute, *supra* note 7, § 7 Reporters' Notes 3, at 90 (stating eight states have enacted a reciprocity requirement).

127. See discussion *supra* subpart II.A.1.

128. Miller, *supra* note 35, at 295.

129. *Id.* at 296; see also discussion *supra* subpart II.B.

130. Miller, *supra* note 35, at 295–96 (quoting Carol C. Honingberg, *The Uniform Foreign Money-Judgments Recognition Act: A Survey of the Case Law*, 14 VAND. J. TRANSNAT'L L. 171, 173 (1981) (internal quotations omitted); see also Lowenfeld, *supra* note 35, at 128 (claiming the Supreme Court in *Hilton* was wrong when it required reciprocity as a precondition to recognize a foreign judgment that was otherwise unassailable).

131. See Miller, *supra* note 35, at 294–97.

inconsistent recognition and enforcement practice in the United States and have advocated solutions including an amended Uniform Act,<sup>132</sup> a multinational judgment recognition treaty,<sup>133</sup> a World Trade Organization (WTO) agreement,<sup>134</sup> and a federal statute.<sup>135</sup> The driving force behind this movement to address the current U.S. regime is that despite the U.S. precedent of liberal recognition, U.S. judgments continue to face less than favorable recognition abroad.<sup>136</sup> In fact, a recent study by the Committee on Foreign and Comparative Law of the Association of the Bar of the City of New York shows that U.S. judgments are often not enforced abroad for a number of reasons including multiple and punitive damages, public policy areas, excessive jurisdiction (such as “doing business” jurisdiction), as well as certain types of activity-based jurisdiction.<sup>137</sup>

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132. See, e.g., Patchel Memo, *supra* note 7, at 36–39.

133. See, e.g., Weintraub, *supra* note 8, at 167; Danford, *supra* note 67, at 381; Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253 (1991); Adler, *supra* note 67.

134. See, e.g., Perez, *supra* note 5, at 44.

135. See, e.g., Hicks, *supra* note 34, at 155; Violeta I. Balan, Comment, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229 (2003); Brian Richard Paige, Comment, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 SEATTLE UNIV. L. R. 591 (2003); Susan L. Stevens, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115 (2002).

136. See Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 Hous. J. Int'l L. 327, 351 (2004) [hereinafter Silberman, *The Impact of Jurisdictional Rules*] (“Many countries are quite restrictive when it comes to enforcing judgments rendered by courts in the United States.”); Hicks, *supra* note 34, at 158 (stating that judgments flowing from the United States have no guarantee of enforcement abroad); Adler, *supra* note 67, at 94 (noting that while U.S. courts are liberal in their recognition and enforcement of foreign judgments, the reverse is not true); Weintraub, *supra* note 8, at 170–71 (explaining that while more data is needed, the prevailing view is that U.S. judgments do not receive comparable recognition and enforcement abroad); Brand, *supra* note 133, at 281–83 (explaining the problems faced by litigants who have received judgments in states without a recognition act as they try to obtain recognition and enforcement abroad).

137. Comm. On Foreign and Comparative Law Ass'n of the Bar of the City of New York, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 THE RECORD 378, 389–91 (2001) [hereinafter Bar of the City of New York Study]; see also Silberman, *The*

Given this disparate recognition of U.S. judgments abroad and the inconsistent patchwork of recognition practice in American jurisdictions, it is clearly time to make a change to enable judgments from the United States to enjoy equal treatment in the international community. When making this change, it makes no sense to embrace the nation's fractured precedent. Instead, as discussed *infra* in subpart III.B, the Draft Statute should include a requirement of reciprocal treatment of U.S. judgments as a condition precedent to the recognition of foreign state judgments.

## 2. *Legal and Fairness Principles*

A second argument in opposition to a reciprocity requirement is that fundamental legal and fairness principles dictate its exclusion. The legal principle relied upon is the doctrine of *res judicata*. *Res judicata* is based on two principle maxims: “[A]ll litigation must have an end, and ‘nobody should be allowed to vex his opponent twice.’”<sup>138</sup> The doctrine promotes certainty and avoids duplicative litigation.<sup>139</sup> Therefore, by including a reciprocity requirement, it is argued that the Draft Statute “thwarts the *res judicata* doctrine’s important goal of finality in litigation. . . .”<sup>140</sup>

While this argument is facially attractive, it overlooks the fact that *res judicata* is a domestic doctrine and should not be applied to international law:

Although there is a substantial overlap in the policies that should guide courts confronted with these problems, there are certain fundamental differences which require that recognition problems be analyzed separately. First, the effect of internationally foreign judgments differs from that of domestic judgments: the plaintiff seeking recognition of an internationally foreign judgment presumably has the option of suing on

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*Impact of Jurisdictional Rules*, *supra* note 136, at 351–52 (further explaining the results of the study).

138. Miller, *supra* note 35, at 298 (quoting Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44, 56 (1962)).

139. *Id.* (quoting Smit, *supra* note 138, at 58).

140. *Id.* at 298–99 (emphasis in original).

the underlying cause of action; the cause of action in domestic litigation merges with the judgment. Second, one of the purposes of *res judicata* is to maintain the integrity of the domestic judicial system. The case of recognition of internationally foreign judgments is quite different because it may be proper for different legal systems to come to different results on the same set of facts. Finally, there are basic differences in the surrounding circumstances. The economic and cultural relationships within a single jurisdiction tend to be closer, and as a result the practical arguments supporting conclusive effects for domestic judgments are stronger. At the same time, shared traditions and experience and the identity of procedures and standards help reduce doubt about the quality of justice represented by a judgment. For these reasons, treating recognition problems as an aspect of *res judicata* tends to lead to a confusion of concepts which should be kept separate.<sup>141</sup>

In addition, it is argued that fundamental principles of fairness dictate reciprocity should not be included in the ALI Draft Statute. First, a reciprocity requirement may force litigants to relitigate resolved claims and relieves the debtor of the consequences of choosing to do business in a foreign forum.<sup>142</sup> There is a concern, therefore, that such a policy would have a disproportionate and discriminatory impact on individuals and small businesses since these litigants are less likely to have the financial resources to utilize alternative means of dispute resolution such as international arbitration.<sup>143</sup> Finally, it is argued that it is unfair to punish private litigants for the political stance of the state rendering judgment.<sup>144</sup>

Again, these arguments fail to fully consider both sides of

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141. Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1605-06 (1968). Some proponents have argued that *res judicata* should be applied in the international setting. See generally GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 784 (3d ed., Kluwer Law Int'l 1996); Smit, *supra* note 138, at 56.

142. See Miller, *supra* note 35, at 299-300.

143. *Id.* at 300-01.

144. Danford, *supra* note 67, at 419.

the debate. One scholar has proposed a compelling argument explaining why principles of fairness actually support enacting a reciprocity requirement:

Could [a] judgment creditor expect to be treated more favorably abroad than a holder of a foreign judgment would be treated in the very court which rendered his judgment? Furthermore, is it really unfair for a domestic court to give less deference to a foreign creditor than to parties who are involved in lawsuits in the domestic jurisdiction and who want that jurisdiction to assure that the judgment which they finally receive will be enforced against the judgment debtor's assets in the domestic jurisdiction?<sup>145</sup>

In other words, why should foreign litigants enjoy widespread recognition and enforcement of their judgments in the United States when their jurisdiction would not recognize a similar judgment from a U.S. court? Is it really unfair to hold international litigants to the same standards they impose upon U.S. litigants?

Furthermore, the ALI's Draft Statute does not impose the stringent bright-line reciprocity rule required to reach these conclusions. The drafters' comments to § 7(c) of the Draft Statute explain "[e]vidence that the courts of the state of origin have, without benefit of a treaty, recognized or enforced judgments of third states may well be indicative that reciprocal treatment of judgments in the United States is to be expected."<sup>146</sup> Therefore, if the foreign state recognized third states' judgments, they will likely be afforded the same courtesy by U.S. courts.

Finally, the argument that individuals and small businesses will receive disparate treatment is without merit. Under the current system, there is no "automatic" recognition and enforcement of foreign judgments. The Uniform Act contains three mandatory grounds for nonrecognition including judgments rendered by impartial tribunals, tribunals lacking personal jurisdiction, and tribunals lacking subject matter

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145. *Id.* at 417 (quoting Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 221 (1994)).

146. ALI Draft Statute, *supra* note 7, § 7 cmt. e, at 86.

jurisdiction.<sup>147</sup> Additionally, the Uniform Act contains six discretionary grounds for nonrecognition including the notably vague ground that judgments may not be recognized if they are “repugnant to the public policy of this state . . . .”<sup>148</sup> In sum, a reciprocity requirement is fair because it puts U.S. judgments on equal footing with foreign judgments. Small businesses and individuals therefore are already faced with relitigation under the current system, and there is no reason to believe that the addition of a reciprocity requirement would add any material expense to obtaining recognition and enforcement of foreign judgments.

The next opposing argument in the category of legal and fairness principles is that the separation of powers doctrine has served to ensure the United States will speak with one voice by restricting certain political issues from judicial determination.<sup>149</sup> In other words, reciprocity is a subset of retorsion<sup>150</sup> and is therefore a diplomatic matter that should be left to governments and not courts to adopt.<sup>151</sup> Under this argument, the legislative branch should be responsible for such a global policy change because courts focus on single disputes and make decisions based on legal principles, thus risking international diplomacy.<sup>152</sup>

While this argument is compelling, it nonetheless fails for the simple reason that the ALI Draft Statute was created for the express purpose of submission to Congress for consideration and enactment.<sup>153</sup> By providing a Draft Statute for Congress to enact, the ALI’s approach supports the contention that it is desirable for the legislators and not the courts to adopt a principle of retorsion.<sup>154</sup>

Finally, some argue introducing reciprocity into the United

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147. Unif. Foreign Money-Judgments Act § 4(a), 13 U.L.A. 261 (1962).

148. *Id.* § 4(b).

149. Miller, *supra* note 35, at 303.

150. See BLACK’S LAW DICTIONARY 1318 (7th ed. 1999) (defining retorsion as “[a]n act of lawful retaliation in kind for another nation’s unfriendly or unfair act.”).

151. Miller, *supra* note 35, at 303–04.

152. See *id.*

153. ALI Draft Statute, *supra* note 7, Foreword at xi.

154. Weintraub, *supra* note 8, at 178.

States' recognition and enforcement practice "runs counter to global trends favoring expansion of individual rights and increased cooperation among nations."<sup>155</sup> In essence, this argument espouses the belief that reciprocity is a protectionist and isolationist doctrine that is contrary to international trends and should therefore be abandoned.<sup>156</sup>

The problem with this argument is that it fails to consider the fact that U.S. judgments are not receiving equal treatment abroad.<sup>157</sup> If other nations afforded U.S. judgments a comparable level of broad recognition, this argument would have more merit. However, as the survey conducted by the Bar of the City of New York illustrates, foreign courts deny recognition of U.S. judgments for a variety of reasons.<sup>158</sup> Moreover, since the United States is not a party to any international judgment recognition treaty,<sup>159</sup> individuals currently have no guarantee their rights will be protected when they attempt to take their judgments abroad.<sup>160</sup> In fact, the Department of State is very interested in negotiating a treaty to ensure the equal recognition of U.S. judgments,<sup>161</sup> and as this Comment will discuss in subpart III.B *infra*, a reciprocity requirement is one of the tools needed to provide foreign countries with adequate incentive to enter into meaningful negotiations.

### 3. *Secondary Considerations*

The first secondary consideration to adopting a reciprocity requirement is that it can lead to an analytical circle known as the "problem of renvoi."<sup>162</sup> This issue arises primarily when the granting jurisdiction's law provides a "mirror-image procedural rule referring back to the law of the forum jurisdiction . . ."<sup>163</sup> Essentially, the argument is that when both jurisdictions point

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155. Miller, *supra* note 35, at 305.

156. *See id.* at 305–08.

157. *See* discussion *supra* subpart III.A.1.

158. *See* Bar of the City of New York Study, *supra* note 137, at 389–91.

159. Silberman, *The Impact of Jurisdictional Rules*, *supra* note 136, at 329.

160. Hicks, *supra* note 34, at 158.

161. Silberman, *Comparative Jurisdiction*], *supra* note 86, at 321.

162. Brand, *supra* note 133, at 283.

163. *Id.*

to the other jurisdiction's law for reciprocal recognition, there is no way to escape the analytical circle.

While the problem of *renvoi* is a valid concern, this analytical circle can be addressed by placing the burden on the judgment debtor to establish that the foreign state would not recognize a comparable U.S. judgment.<sup>164</sup> In fact, as discussed *supra*, the Draft Statute contains this provision as one of the alternatives in § 7(b), effectively addressing this concern.

Another secondary argument against a reciprocity requirement is that it places unnecessary burdens on the U.S. courts. It is argued that “[t]he collection of data and evaluation of judicial motives required by the Act’s current reciprocity provision will either cripple U.S. courts, or encourage them to engage in inequitable evidentiary short cuts.”<sup>165</sup> Additionally, it could lead to a “battle of the experts” and result in prolonged trials and increased administrative costs.<sup>166</sup>

This argument is flawed for a number of reasons. First, there is no valid reason to believe U.S. courts could not manage the “burdens” imposed by the Draft Statute. Courts have already demonstrated they are more than capable of managing much more complex and demanding issues. For example, consider the burdens imposed on courts when the Supreme Court made its landmark decision in *Daubert*.<sup>167</sup> This decision required courts to consider a myriad of technical and scientific factors in order to determine whether an expert’s opinion was reliable as opposed to merely “generally acceptable” as defined in *Frye*.<sup>168</sup> Courts have not been “crippled” by the burden *Daubert* imposed, and while I have been unable to locate a study indicating the exact number of foreign-money judgment recognition and enforcement cases heard annually in the United States, I am confident that the number pales in comparison to cases requiring the admission of expert testimony. Moreover, the

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164. Weintraub, *supra* note 8, at 178 (advocating that any reciprocity provision should take the form of the Texas provision placing the burden on the judgment debtor in order to prevent problem of *renvoi*).

165. Miller, *supra* note 35, at 304.

166. *Id.* at 315.

167. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

168. See *id.*; See also *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

ALI Draft Statute clearly places the burden of collecting data and presenting arguments for or against recognition on the parties to the suit and not on the court.<sup>169</sup>

Another way to analyze the issue of burdens placed on courts is to consider the impact the current system has on foreign courts. When a party attempts to enforce a U.S. judgment in a jurisdiction requiring reciprocity, the foreign court has to look to the applicable U.S. law to determine if a U.S. court would have enforced a similar judgment from the foreign court.<sup>170</sup> This requires the foreign court to work through the confusion and complexity created by *Erie*, inherent complexities of our federal system, as well as the patchwork of state laws resulting from the inconsistent adoption of the Uniform Act.<sup>171</sup> Adoption of the uniform approach proposed in the Draft Statute would greatly reduce the burdens placed on foreign courts and therefore eliminate at least one barrier to increased recognition of U.S. judgments.

The final secondary consideration is that a reciprocity requirement would have a negative impact on international trade by decreasing “the predictability and speed of business transactions . . . .”<sup>172</sup> This argument emphasizes that reciprocity requirements are “inconsistent with a summary procedure” because raising the affirmative defense will likely result in a battle of the experts.<sup>173</sup> Additionally, it is argued it would be nearly impossible for parties to determine whether a foreign judgment would be recognized given “the number of U.S. state and federal courts charged with making such determinations . . . .”<sup>174</sup>

If this assertion were true, then logically one would expect to find that international trade has been negatively impacted in Florida, Idaho, Maine, North Carolina, Ohio, Texas, Massachusetts, and Georgia since each of these states has

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169. ALI Draft Statute, *supra* note 7, § 7(b), at 82.

170. Brand, *supra* note 133, at 281–82.

171. *See id.*

172. Miller, *supra* note 35, at 313.

173. *Id.* (citing Andreas F. Lowenfeld, Remarks, *Proceedings of the 77th Annual Meeting of The American Law Institute*, 77 A.L.I. PROC. 204, 217 (2000)).

174. *Id.*

included reciprocity as a ground for nonrecognition when adopting the Uniform Act.<sup>175</sup> A thorough review of relevant literature has uncovered no empirical evidence suggesting trade has indeed been negatively impacted in these states. In fact, a preliminary search of international trade statistics for Texas and Florida has demonstrated quite the opposite is true.<sup>176</sup>

Regarding the concern that it will be nearly impossible for parties to determine whether a foreign judgment would be recognized, it is unclear how a reciprocity requirement would necessitate this conclusion. As discussed *supra*, the current environment is certainly more onerous than a uniform federal statute with a reciprocity requirement.<sup>177</sup> In addition, were Congress to enact the Draft Statute, then parties faced with

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175. ALI Draft Statute, *supra* note 7, § 7 Reporters' Notes 3, at 90.

176. For Texas, statistical evidence shows that international trade is growing rapidly:

Texas exports for 2004 year to date (the third quarter, through October 2004) total more than \$97 billion, which is \$15 billion over last year's third quarter results. Texas exports during 2003 totaled more than \$98.8 billion, an increase of 3.6[%] from 2002. Total exports for the United States increased slightly by 4.4[%]. For the second year in a row, Texas is ranked as the number one state by export revenues. Recent Texas exports information indicate a slight increase in exports in the 2003 first quarter followed by a decline, reflecting the continued weak world economy. The state's top value-added Texas exports are Computer and Electronic Products, Chemicals, Industrial Machinery (not electrical), and Transportation Equipment.

Business and Industry Data Center, *Overview of the Texas Economy*, <http://www.bidc.state.tx.us/overview/2-2te.htm#InternationalTrade> (last visited Sept. 1, 2005). Likewise, Florida has not suffered a negative trade impact from its adoption of a reciprocity requirement:

Florida's total international merchandise trade volume was equivalent to about 16% of the Gross State Product in 1999. If Florida were a country, its exports would place it among the top 35 exporters worldwide. At \$30 billion in 2000, Florida exports exceeded those of South Africa, the Czech Republic, Hungary, Turkey and Argentina, to name a few. In terms of total dollar value of state-origin exports, Florida ranked seventh among U.S. states in 2001, for the fifth consecutive year.

Florida Chamber of Commerce, *Importance of International Trade to Florida's Economy*, [http://www.flchamber.com/flchcw/hw.dll?page&file=intrade\\_index](http://www.flchamber.com/flchcw/hw.dll?page&file=intrade_index) (last visited Sept. 1, 2005).

177. The current environment is mired by the confusion and complexity created by *Erie*, inherent complexities of our federal system, and the patchwork of state laws under the Uniform Act.

recognition and enforcement questions would enjoy the benefit of reciprocity determinations made in courts across the United States, thus greatly reducing the uncertainty in the system.

*B. Arguments in Favor of Reciprocity Support its Inclusion in the Draft Statute*

Unlike the numerous arguments in derogation of a reciprocity requirement, the arguments in support of its inclusion in the ALI Draft Statute are concise and practical, and will ultimately result in greater uniformity and increased recognition of U.S. judgments throughout the international community.

1. *The United States Needs to Create Incentives for Foreign States to Enter Meaningful Negotiations for an International Judgments Recognition Treaty*

Numerous scholars have recognized the fact that the current practice of liberal enforcement of foreign judgments has resulted in an environment in which other nations have little incentive to enter into a judgment recognition and enforcement treaty with the United States.<sup>178</sup> This argument is inherently logical. Consider the following example: “If country A’s courts cooperate and country B’s courts do not, A will be worse off than if A had not cooperated. Indeed, if A’s courts cooperate in the absence of a treaty for reciprocal enforcement, they may, ironically, undercut efforts by the political branches to negotiate such a treaty.”<sup>179</sup> This is so because while the United States’ interest in treaty negotiations is to increase the recognition of U.S. judgments abroad, countries whose judgments already enjoy broad recognition in the United States are focused more on “establishing a narrower scope of jurisdictional authority over

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178. See Danford, *supra* note 67, at 417; Hicks, *supra* note 34, at 176; Silberman & Lowenfeld, *supra* note 56, at 638–39; Adler, *supra* note 67, at 109; *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT’L L. 387, 420 (Sean D. Murphy ed., 2001); Weintraub, *supra* note 8, at 220 (noting that the EU in particular has little incentive to increase recognition of U.S. judgments due to its participation in the Brussels Convention).

179. William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161, 219 (2002).

their domiciliaries.”<sup>180</sup> The United States is clearly at a fundamental bargaining disadvantage. The addition of the reciprocity requirement will help level the playing field and allow the Department of State to better represent U.S. interests in future negotiations. In fact, this is the stated purpose for including reciprocity in the Draft Statute.<sup>181</sup>

Some feel that while the inclusion of a reciprocity requirement would provide incentives for treaty negotiations, the international community may perceive the addition as a “negotiating club,” thus limiting its impact.<sup>182</sup> While this could be true, the United States has an inherent right to protect its interests and, given the failure of the U.K.-U.S. Convention and the lack of progress at The Hague Convention, at least one scholar concedes “it may be the only way to equalize incentives found in a judgments convention.”<sup>183</sup>

## 2. *The Reciprocity Requirement Will Improve the Recognition of U.S. Judgments Abroad*

Many scholars have used game theory<sup>184</sup> as a paradigm for analyzing strategic decision making, including the study of the relative advantages and disadvantages of instituting a reciprocity requirement for the recognition of foreign judgments.<sup>185</sup> Game theory examines the strategic behavior that occurs when “individual decision-making turns on what an individual expects that some other individual will choose to

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180. Silberman & Lowenfeld, *supra* note 56, at 639.

181. ALI Draft Statue, *supra* note 7, § 7 Reporters' Note 1 at 88.

182. See Weintraub, *supra* note 8, at 178; Miller, *supra* note 35, at 291.

183. Adler, *supra* note 67, at 109–10.

184. For a more exhaustive review of game theory and its application to legal issues see Douglas G. Baird et al., *GAME THEORY AND THE LAW* (1994) and Robert Axelrod, *THE EVOLUTION OF COOPERATION* (1984). It is not within the scope of this Comment to analyze the intricacies of game theory. My intention is merely to apply this theory to better understand the strategic implications of instituting the reciprocity requirement.

185. See, e.g., Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELBOURNE U.L.R. 416 (1999); Perez, *supra* note 5; Susan L. Stevens, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115 (2002).

do.”<sup>186</sup> It examines the pay-off each player will receive given the various strategic options available and enables solution concepts to be applied to determine what strategy combination the players will adopt.<sup>187</sup>

Applying game theory to the reciprocity debate, the classic “prisoners’ dilemma”<sup>188</sup> has been used to illustrate the decisions countries face when considering whether to recognize and enforce a foreign judgment.<sup>189</sup> While the dominant strategy in the prisoners’ dilemma is noncooperation, scholars believe that by playing multiple iterations of the game for an indefinite future the strategic dynamics change, such that the dominant strategy is for the parties to cooperate.<sup>190</sup>

This is significant when the analogy of the prisoners’ dilemma is applied to the question of whether or not to require reciprocity. The original reciprocity requirement stated in *Hilton, supra* subpart II.A.1, appears reasonably calculated to lead to this level of strategic cooperation.<sup>191</sup> “In other words, the U.S. courts would offer to reward cooperation and punish noncooperation by the courts of other states.”<sup>192</sup> Additionally, by demonstrating a willingness to cooperate by relaxing the reciprocity requirement under certain circumstances,<sup>193</sup> U.S. courts would have signaled a willingness to cooperate.<sup>194</sup>

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186. Whincop, *supra* note 185, at 418.

187. *Id.*

188. The prisoners’ dilemma hypothetical is the classic situation where two criminals are caught and faced with the decision of whether they should cooperate with authorities. Perez, *supra* note 5, at 59. If they both cooperate, then they both avoid extended sentences. *Id.* If only one cooperates, then the noncooperating prisoner suffers the “sucker’s payoff” of an extended sentence, while the cooperating prisoner suffers a shorter sentence. *Id.* Therefore, the safest strategy is for both to cooperate and avoid the sucker’s payoff because neither can be guaranteed of the other’s cooperation. *Id.*

189. See Perez, *supra* note 5, at 59; Stevens, *supra* note 185, at 135–55; Whincop, *supra* note 185, at 418–22.

190. Whincop, *supra* note 185, at 419 (explaining that by playing multiple iterations of the game “cooperation behavior is encouraged by a player’s capacity to punish his or her counterpart at time 1 (by acting uncooperatively) for the latter’s defection at time 0.”).

191. See Perez, *supra* note 5, at 60.

192. *Id.*

193. See discussion of *Johnston supra* subpart II.A.2

194. See Perez, *supra* note 5, at 60.

This strategy could have led to widespread recognition of U.S. judgments abroad.<sup>195</sup> Unfortunately, the holding in *Erie* and the resulting evolution of state law gradually dispensed with the reciprocity requirement.<sup>196</sup> The widespread recognition of foreign judgments in the United States without the threat of nonrecognition undermined the effectiveness of this strategy in securing the recognition and enforcement of U.S. judgments abroad.<sup>197</sup>

Interestingly, one scholar conducted a detailed analysis of game theory solutions applied to the reciprocity requirements included in a prior version of the ALI Draft Statute.<sup>198</sup> In this prior draft, the ALI had two alternative approaches to reciprocity.<sup>199</sup> The reciprocity requirement in Version A was the same as the reciprocity requirement embodied in § 7(a) of the current draft.<sup>200</sup> The reciprocity requirement in Version B required the Secretary of State to maintain and publish a list of foreign countries that accord recognition to U.S. judgments as well as those that do not.<sup>201</sup>

After an exhaustive application of game theoretic strategies to each Version,<sup>202</sup> it is apparent that the inclusion of a reciprocity requirement “would enable the [United States] to confer the largest possible benefit on its citizens.”<sup>203</sup> Moreover, when choosing between Version A and B, it was determined that Version A should be adopted because it provided the United States with more flexibility in accommodating the preferences of multiple countries and therefore should lead to the recognition of a larger number of U.S. judgments.<sup>204</sup>

While it has been argued game theorists concede that

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195. *Id.*

196. *See id.* at 60–61; *see also* discussion *supra* subpart II.B.

197. *Id.* at 61.

198. *See* Stevens, *supra* note 185.

199. *Id.* at 130–31.

200. *See id.* at 131. When the text of the Version A in this prior draft is compared to the current ALI Draft Statute § 7(a), the statutory language is virtually unchanged.

201. *Id.*

202. *Id.* at 135–54.

203. *Id.* at 154.

204. *Id.* at 155.

“reciprocity is not always capable of generating a global optimum’ and reciprocity constraints fail to generate efficient levels of cooperation in heterogeneous groups . . . [.]”<sup>205</sup> the depth of analysis in the foregoing studies provide ample evidence that including a reciprocity requirement in the ALI Draft Statute could indeed lead to broader recognition of U.S. judgments abroad.

### 3. *Turnabout is Fair Play*

Last, but not least, the ALI Draft Statute should include the reciprocity requirement because fundamental fairness dictates that U.S. courts should hold international litigants to the same standards their countries impose upon U.S. litigants. As discussed *supra* in subpart III.A.2, the ALI Draft Statute, as written, provides flexibility in recognizing foreign judgments when evidence exists that the foreign court would recognize a similar U.S. judgment. Moreover, concerns about adverse effects on individuals and small businesses are unlikely to materialize.

Protecting U.S. interests and U.S. litigants is neither childish nor reactionary. Fairness dictates that the legislature should enact laws that level the playing field. Simply put, turnabout is fair play.

## IV. CONCLUSION

The ALI has taken a major step forward by incorporating a reciprocity requirement into the ALI Draft Statute. The current patchwork of state laws has resulted in forum shopping and confusion. The United States’ liberal recognition strategy has proven ineffective when one considers the disparate treatment U.S. judgments receive abroad. It is time for the United States to demand judicial respect.

The ALI Draft Statute, if enacted into law, would hold international litigants to the same standards imposed upon U.S. litigants. Foreign countries would finally have an incentive to enter into meaningful treaty negotiations with the United

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205. Miller, *supra* note 35, at 309 (citing Francesco Parisi & Vincy Fon, *Reciprocity-Induced Cooperation* 29, 32 (George Mason U., Law and Economics Working Paper Series No. 02-13, 29. 2003)).

States, and the Secretary of State would be better able to adequately represent U.S. interests. Most importantly, the inclusion of the reciprocity requirement is likely to lead to broader recognition of U.S. judgments abroad, saving U.S. judgment holders the added time and expense of relitigating their claims in a foreign court.

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\*J.D., University of Houston Law Center, expected 2006; B.B.A., Honors Business and Finance, University of Texas, 1993; B.A., Honors Spanish Literature, University of Texas, 1993. I would like to thank my best friend and wife, Deborah Ballard, for supporting me during my Quixotic journey to law school after ten years in the business world. I never could have pursued a legal career without her love and support. This Comment received the James Baker Hughes Prize.