JUDGMENTS CONVENTIONS AND MINIMUM CONTACTS

*Patrick J. Borchers**

INTRODUCTION

The United States is a member of international organizations whose business it is to negotiate private law conventions. The most prominent of these is the Hague Conference on Private International Law, but there are others including the Organization of American States (OAS), Unidroit[1] and UNCITRAL.[2] In recent years these organizations have paid increasing attention to the related problems of international judgment recognition and jurisdiction in civil matters.

The reasons for the increasing attention are multiple. The success of the 1958 New York Convention on International Arbitration[3]—to which the United States has been a party since 1970—allows relatively easy recognition of arbitration awards in the more than 100 signatory nations.[4] The odd consequence is that while it is often difficult to obtain foreign recognition of an American judgment, it is often easy to obtain recognition of an American arbitration award. European success with the Brussels[5] and Lugano[6] Conventions has shown that judgments conventions can work re-

* Chair, Conflict of Laws Section, Association of American Law Schools, 1997-1998; Professor of Law and Associate Dean for Academic Affairs, Albany Law School of Union University.

1 Unidroit is an organization based in Italy and also known as the International Institute for the Unification of Private Law.

2 UNCITRAL is the abbreviation for United Nations Commission on International Trade Law.

3 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

4 *See* Patrick J. Borchers, Book Review, 90 AM. J. INT'L L. 547, 548 (1996).

5 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, *reprinted in* 8 I.L.M. 229 (1969), *as amended by* 1990 O.J. (C 189) 1, *reprinted as amended in* 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention].

6 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 (1989).

gionally, stirring optimism that a transregional convention might succeed.[7] Finally, and most importantly, the acceptance by the Hague Conference of the United States' proposal to negotiate a judgments convention has ensured that this task will be at the forefront of private law international efforts at least through the year 2001.[8]

All of this leads me to the topic of this year's meeting of the Section on Conflict of Laws of the Association of American Law Schools, which is: "Could a Treaty Trump Supreme Court Jurisdictional Doctrine?" The topic is intentionally stated in a provocative fashion to call attention to one of the significant difficulties facing the United States in attempting to enter into any international judgments convention. That significant difficulty is the messy state of American jurisdiction.

Successful judgments conventions adopt relatively clear jurisdictional rules. Article 5(3) of the Brussels Convention, for instance, provides for tort jurisdiction in "the place where the harmful event occurred."[9] The recently-concluded OAS convention on maintenance obligations[10] provides for jurisdiction in support matters in the support receiver's home state.[11]

Sensible though these jurisdictional rules might be, they are not entirely consistent with American jurisdictional doctrine. The Su-

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[7] *See, e.g.*, Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?*, 18 LOY. L.A. INT'L & COMP. L.J. 795, 798 (1996) (discussing efforts to include all Hague Conference members in an international judgments convention).

[8] *See* Hague Conference on Private International Law: Final Act of the Eighteenth Session with the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference, Oct. 19, 1996, 35 I.L.M. 1391, 1405 (1996) (indicating that "in the Agenda of the Nineteenth Session [in October 2000] the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters" will be included), *quoted in* Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 17, 18 (1998).

[9] Brussels Convention, *supra* note 5, at art. 5(3). *See generally* Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 143-46 (1992) (comparing tort jurisdiction in the United States to the approach taken by the Brussels and Lugano Conventions).

[10] *See* Inter-American Convention on Support Obligations, July 15, 1989, art. 8, 29 I.L.M. 73 (1990). *See generally* Carol S. Bruch, *The 1989 Inter-American Convention on Support Obligations*, 40 AM. J. COMP. L. 817 (1992) (comparing the Inter-American Convention with American practice and earlier international agreements).

[11] *See id.* For a discussion of the implications of Article 8, see Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 22 & n.160 (1993).

preme Court cases of *World-Wide Volkswagen Corp. v. Woodson*[12] and *Asahi Metal Industry Co. v. Superior Court*[13] forbid tort jurisdiction in the injury state—at least in some cases. *Kulko v. Superior Court*[14] forbids jurisdiction in the support receiver's home state—at least in some cases. As those cases are purported interpretations of the Due Process Clause of the Fourteenth Amendment, there is a significant question as to whether and to what extent United States entry into a judgments convention that articulates conflicting rules could alter those jurisdictional norms.

Of course, it is not inevitable that such a conflict will come to pass. To the extent that any convention would provide for narrower jurisdictional rules than the articulated constitutional boundaries, no difficulty exists as state and federal governments need not exercise all of the jurisdiction that the Constitution would allow.[15] Moreover, the United States might succeed—referring now to the Hague negotiations—in negotiating a convention that never purports to require an American court to exercise *in personam* jurisdiction beyond the boundaries of the Supreme Court's minimum contacts rubric.[16] This might be accomplished by leaving critical areas—for example, tort jurisdiction—in a "gray zone" in which the assumption of jurisdiction and recognition of any judgment would be left to the national laws of the signatory nations.[17]

While this solution could work in principle, it has—in my view—some significant practical difficulties. Leaving important subjects such as tort jurisdiction in an unregulated gray zone could deprive any convention of a good deal of its usefulness, and might make other nations—already wary of United States institutions such as

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[12] 444 U.S. 286 (1980).

[13] 480 U.S. 102 (1987).

[14] 436 U.S. 84 (1978).

[15] *See, e.g.*, N.Y. C.P.L.R. 302(a) (McKinney 1990) (exemplifying a long-arm statute providing for jurisdictional bases narrower than those permitted by the Due Process Clause); Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 209 N.E.2d 68, 80 (N.Y. 1965) (interpreting New York's long-arm statute in tort matters in a manner far less expansively than would be permitted by the Constitution).

[16] *See infra* Part II (discussing various Supreme Court cases addressing the exercise of long-arm jurisdiction).

[17] *See* Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, LAW & CONTEMP. PROBS., Summer 1994, at 271, 283-84 (discussing a proposal for a so-called "mixed" convention which would include mandatory jurisdictional bases—the "white" list—prohibited jurisdictional bases—the "black" list—and permitted jurisdictional bases—the "gray" list; bases on the gray list would be permissive in the sense that signatory nations would not be prohibited from employing them, but recognition of ensuing judgments would not be mandatory).

jury trials and punitive damages—reluctant to sign.[18] It may well be that United States insistence on negotiating around its domestic jurisdictional law makes it impossible to reach agreement. Moreover, even if a convention—whether negotiated under the auspices of the Hague Conference or another organization—apparently conforms to United States domestic jurisdictional law, the unstable state of domestic jurisdictional law makes it impossible to guarantee that a convention would *never* produce such a conflict.[19]

In addition to introducing the topic of our Section Meeting, my purpose in this Article is to argue that the United States could (and, if so required to obtain agreement, *should*) enter into judgments conventions with mandatory jurisdictional rules that are potentially broader than those apparently allowed for under current minimum contacts jurisprudence. In Part I, I explore the relationship of constitutional doctrine to foreign relations.[20] In Part II, I explore aspects of the Supreme Court's jurisdictional jurisprudence that make it amenable to redefinition in the context of an international judgments convention.[21]

I. FOREIGN AFFAIRS AND CONSTITUTIONAL LIMITATIONS

United States participation in an international judgments convention could cause a collision between two of the oddest constitutional doctrines. One is the Constitution's treatment of foreign affairs, the other is the notion that the Due Process Clause acts as a significant limitation on the jurisdictional reach of American courts.

Taking foreign affairs first, the Constitution clearly ascribes some significant foreign affairs powers to various branches of the federal government. For example, Article I gives Congress the power "[t]o regulate Commerce with foreign Nations,"[22] "[t]o establish an uni-

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[18] This is not to say that *nothing* should be left to the "gray zone." *See* Patrick J. Borchers, *A Few Little Issues for the Hague Judgments Negotiations*, 24 BROOK. J. INT'L L. 157, 164 (1998) (arguing that any successful Hague Convention is likely to include at least some "gray zone"). I am, however, skeptical that leaving a matter as significant as tort jurisdiction in the gray zone will result in a successful convention.

[19] *Compare* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) ("Due Process . . . act[s] as an instrument of interstate federalism" by limiting the jurisdiction of state courts.) *with* Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982) ("[The Due Process] Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.").

[20] *See infra* notes 22-81 and accompanying text.

[21] *See infra* notes 82-98 and accompanying text.

[22] U.S. CONST. art. I, § 8, cl. 3.

form Rule of Naturalization,"[23] to "regulate the Value . . . of foreign Coin,"[24] "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,"[25] "[t]o raise and support Armies" and other branches of the military,[26] and "[t]o declare War."[27] Article II gives the President several important foreign affairs powers and duties, including making him the "Commander in Chief of the Army and Navy of the United States,"[28] giving him the power to "appoint [with Senate advice and consent] Ambassadors,"[29] and the power "to make Treaties, provided two thirds of the Senators present concur."[30] The Constitution also expressly excludes states from most of the major functions of foreign affairs, including the making of treaties, setting duties on imports and exports, and war activities.[31]

While these listed constitutional functions surely include many of the important elements of foreign affairs, they are far from exhaustive.[32] Moreover, their division between the legislative and executive branches is seemingly random.[33] Apparently because of this "spotty"[34] treatment, the Supreme Court eventually came around to the conclusion that the Constitution had *assumed* a pre-existing right of the federal government to conduct foreign affairs even beyond the scope of the powers expressly delegated to it.[35] As a result, both the President and the Congress—particularly the Senate

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[23] *Id.* § 8, cl. 4.

[24] *Id.* § 8, cl. 5.

[25] *Id.* § 8, cl. 10.

[26] *Id.* § 8, cl. 12.

[27] *Id.* § 8, cl. 11.

[28] U.S. CONST. art. II, § 2, cl. 1.

[29] *Id.* § 2, cl. 2.

[30] *Id.*

[31] *See* U.S. CONST. art. I, § 10; *see also* Zschernig v. Miller, 389 U.S. 429 (1968) (holding an Oregon statute regarding foreign inheritances unconstitutionally invaded the federal government's authority to conduct foreign affairs).

[32] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 14-16 (2d ed. 1996) (noting many questions about the conduct of foreign affairs that the Constitution does not answer).

[33] For instance, intuitively, one might expect the body that can declare war and raise and support armies (Congress) to be the same that ultimately commands the armed forces, but this latter power is given to the President. *See supra* text accompanying notes 26-28; *see also* HENKIN, *supra* note 32, at 15 n.** (noting the lack of explanation for the allocation of the different foreign affairs powers among the different branches of the federal government).

[34] HENKIN, *supra* note 32, at 16.

[35] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (declaring that in matters of foreign affairs, "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution"); *see also* HENKIN, *supra* note 32, at 16-18 (discussing the Court's reasoning in *Curtiss-Wright*).

as a result of its advice and consent role in treaties and appointments—have an unwritten "Foreign Affairs Power" of almost mystical quality that inevitably alters the constitutional calculus in international matters.[36]

The second constitutional oddity—the notion that the Due Process Clause limits the jurisdictional reach of courts—may reach back as far as the Supreme Court's 1877 decision in *Pennoyer v. Neff*.[37] The imposition of direct constitutional limits on *in personam* jurisdiction was not conclusively established, however, until 1915[38] and the question of how—if at all—strong jurisdictional restraints can be squared with the rest of constitutional law is a continuing subject of debate.[39] Several commentators have argued that the Supreme Court should abandon the notion that the Due Process Clause sets strong, territorially-based limits on jurisdiction.[40] It is not necessary, however, for present purposes to accept this more radical position. Rather, it is sufficient to note that all agree that constitutional limits on jurisdiction—especially in its current "minimum contacts"[41] incarnation—is an uncertain and malleable

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[36] *See, e.g.*, HENKIN, *supra* note 32, at 21 ("Whatever the theory, then, there is virtually nothing related to foreign affairs that is beyond the constitutional powers of the federal government."); Michelle D. Gouin, Note, United States v. Alvarez-Machain: *Waltzing with the Political Question Doctrine*, 26 CONN. L. REV. 759, 800 (1994) (arguing the Supreme Court was correct in holding the U.S. courts had jurisdiction over a Mexican citizen, subject to an extradition treaty, who instead was kidnapped by D.E.A. agents so that he could be prosecuted in the U.S.).

[37] 95 U.S. 714 (1877).

[38] *See* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 194-95 (1915) (holding due process does not permit jurisdiction over a corporation not transacting any business, nor having property or authorized agent in the forum state).

[39] *See generally* Jay Conison, *What Does Due Process Have To Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071 (1994) (examining the history and development of Due Process jurisdictional law and proposing a new "non-due process" approach for jurisdictional law).

[40] *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 100-05 (1990); Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1334-38 (1983); Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183, 2184 (1997) ("Supreme Court must with all deliberate speed disavow the doctrine that the Due Process Clause of the Fourteenth Amendment, or anything else in the United States Constitution, requires a territorial nexus between forum and defendant as a sine qua non for the exercise of in personam jurisdiction."); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 522-28 (1984); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 2), 14 CREIGHTON L. REV. 735, 846-52 (1981).

[41] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

doctrine.[42] It is, moreover, a notion apparently unknown outside the United States, which one author—writing from a Western European perspective—described as "rather fantastic."[43]

Even giving each of these doctrines its full measure, there are good reasons to think that the constitutional limitations on jurisdiction will not present serious obstacles to an international judgments convention. In times past, it was seriously argued that treaties stood on equal footing to the Constitution.[44] It seems settled, however, that treaties are subject to constitutional limitations. Although dictum, the Supreme Court's discussion of a bird migration treaty in *Missouri v. Holland*[45] clearly implied that the treaty would be invalid if it encroached upon state authority or violated any affirmative constitutional command.[46]

While *Holland* did establish the principle that treaties which pass over constitutional lines cannot be enforced, it also reflected a perhaps-more-important principle of judicial deference to the political branches in foreign affairs matters. The bird migration treaty was, in fact, upheld in *Holland*, notwithstanding a plausible—particularly given the more constricted notion of federal power that predominated in 1920—argument that the treaty regulated in an area in which the states had traditionally asserted exclusive sovereignty.[47] Holmes's opinion for the Court gave little weight to formalistic notions of state sovereignty and instead leaned heavily upon "a national interest of very nearly the first magnitude" and insisted that the "[Federal] Government [need not] sit by while a food supply is cut off."[48]

To take a realist's perspective, the simple fact of the matter is that "[n]o provision in any treaty has been held unconstitutional by the Supreme Court and few have been seriously challenged there."[49]

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[42] *See, e.g.*, Hall's Specialties, Inc. v. Schupbach, 758 F.2d 214, 216 (7th Cir. 1985) (suggesting "the only honest answer" that lawyers can give with regard to many questions of personal jurisdiction is: "'Gee, I can't say for sure'").

[43] MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE 67 (1995).

[44] *See* HENKIN, *supra* note 32, at 185 (noting this view was held "even by eminent authority," undoubtedly finding its basis in the Supremacy Clause).

[45] 252 U.S. 416 (1920).

[46] *See id.* at 433 ("The treaty in question does not contravene any prohibitory words to be found in the Constitution.").

[47] Earlier efforts at federal legislation (without a treaty) were struck down as beyond the enumerated powers of Congress. *See id.* at 432 (citing United States v. Shauver, 214 F. 154 (E.D. Ark. 1914) and United States v. McCullagh, 221 F. 288 (D. Kan. 1915)).

[48] *Id.* at 435.

[49] HENKIN, *supra* note 32, at 185.

Even lower court authority invalidating treaty provisions is scarce and limited to the narrow circumstances of a particular application.[50] It is, of course, easy to concoct hypothetical treaties that clearly violate the Constitution. Presumably, United States participation in a treaty that allowed only one racial group to obtain visas would be swiftly struck down as violative of the equal protection component of the Fifth Amendment's Due Process Clause.[51] But, one hopes, no such monstrosity would ever be negotiated on behalf of the United States.

In a realistic, pragmatic light, it becomes necessary to evaluate whether the Supreme Court would treat a judgments convention as it would (presumably) treat the hypothetical treaty denying visas to one racial group. Would, for instance, the Supreme Court invalidate a provision—in the mode of the Brussels Convention Article 5(3)—placing tort jurisdiction in the injury state? Would the Supreme Court really invalidate a provision placing support jurisdiction in the support receiver's home state? Would a judgments convention adopting one or both of these benign jurisdictional bases—commonly employed throughout much of the rest of the world—really provoke the first case in which the Supreme Court declared a treaty provision unconstitutional? I think that the answer to all of these questions is in the negative; the Supreme Court would not strike down these jurisdictional bases as unconstitutional, and that to answer otherwise is to ignore the record of both the Court and the political branches of the federal government.

While the Supreme Court has never addressed the precise problem that would be posed by a private law judgments convention, it has considered international agreements that affect the forum choices of private parties. The case of relatively recent vintage closest to the issue is *Dames & Moore v. Regan*.[52] In *Dames & Moore* the Court addressed the implications of presidential executive orders and agreements settling the Iranian Hostage Crisis.[53] The agreement ultimately reached between the two governments "called for the establishment of an Iran-United States Claims Tri-

[50] *See id.* at 455, n.39 (citing Collello v. SEC, 908 F. Supp. 738 (C.D. Cal. 1995) and Burdell v. Canadian Pac. Airlines, Ltd., No. 66 L 10799 (Cir. Ct. Cook County, Ill. Nov. 7, 1968), *noted in* 63 AM. J. INT'L L. 339 (1969)).

[51] *Cf.* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding racial segregation in the District of Columbia's public schools violative of the equal protection component of the Fifth Amendment's Due Process Clause).

[52] 453 U.S. 654 (1981).

[53] *See id.* at 660.

bunal which would arbitrate [finally, and without any judicial review] any claims [by U.S. parties against the Iranian government or state-run enterprises] not settled within six months."[54] Various United States parties, some of which had claims that clearly could have been pursued successfully against Iranian enterprises under the "commercial activity" [55] provision in the Foreign Sovereign Immunities Act of 1976,[56] challenged the executive order and agreement on a variety of grounds.[57] One basis for the challenge was the alleged inconsistency between the establishment of the Claims Tribunal and the Foreign Sovereign Immunities Act's "grant[] [of] personal and subject-matter jurisdiction in the federal district courts over commercial suits brought by claimants."[58]

Although finding no express statutory authorization for the creation of the Claims Tribunal, the Court upheld the executive agreement and order.[59] The Court stressed its relatively narrow role in such matters.[60] Its opinion exuded deference to the Executive, and emphasized the need to avoid broad pronouncements in this area of the law.[61]

Of course, *Dames & Moore* is not a perfect fit with the issues likely to be presented by a judgments convention. While a judgments convention would cover private law matters, the *Dames & Moore* claims were all against the Iranian government or its enterprises, and presidential authority to settle such claims in times of national emergency is widely recognized.[62] But the usual explanations of executive authority do not completely resolve the case. In bygone days when sovereign immunity was complete, no private claimant could have possibly recovered against the Iranian government or its enterprises, so any executive action to settle such

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[54] *Id.* at 665.

[55] 28 U.S.C. § 1605(a)(2) (1994). *See, e.g.*, Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614-15 (1992) (resolving that the issuance of negotiable instruments pursuant to national debt restructuring qualifies as a commercial activity within the meaning of the Foreign Sovereign Immunities Act of 1976).

[56] 28 U.S.C. §§ 1602-1611.

[57] *See Dames & Moore*, 453 U.S. at 684.

[58] *Id.*

[59] *See id.* at 686 (noting the "history of acquiescence in executive claims settlement," which "may be treated as a gloss on 'Executive Power'").

[60] *See id.* at 660-61 (commenting that "the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases").

[61] *See id.* (indicating that the Court would "confine the opinion only to the very questions necessary to decision of the case").

[62] *See* HENKIN, *supra* note 32, at 220-22 (citing *Dames & Moore*, 453 U.S. at 654, and United States v. Belmont, 301 U.S. 324 (1937)).

claims would have exceeded the claimants' justified expectations. But with the advent of a narrower view of sovereign immunity, ultimately codified in the Foreign Sovereign Immunities Act, many private claimants had a perfectly justified expectation of recovering an enforceable judgment in a United States forum.[63]

Thus, in a quite retrospective manner, the executive agreement and implementing orders upset those reasonable expectations, and required the prosecution of the claims in a distant forum.[64] Let us contrast the claimants against the Iranian government with a hypothetically-aggrieved party under a judgments convention. Imagine, for instance, that the United States were to enter into a judgments convention including Mexico and providing for jurisdiction in support matters in the support receiver's home state.[65] Suppose further a couple living in Mexico were to separate with the father remaining in Mexico, the mother moving to California, and the children eventually joining her on facts similar to *Kulko v. Superior Court*.[66] It would seem perverse to tell the claimants against the Iranian government—relegated to an unknown forum by an Executive Agreement promulgated *after* the filing of their suits—that they had suffered no cognizable constitutional injury, while giving our hypothetical father a constitutional immunity from appearing in the California court.

Although, like *Dames & Moore*, not a perfect fit, the issues likely to be presented by a judgments convention also bear some kinship to those that have arisen regarding so-called "binational panels" re-

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[63] *See, e.g.*, Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 613-14 (1992) (discussing the "commercial activity" provision in the Foreign Sovereign Immunities Act which removes the shield of immunity when the foreign state is acting as a private participant (as opposed to a regulator) in the market).

[64] The Claims Tribunal was venued in the Netherlands, and doubts about such fundamental questions as its "nature," the law that it applied, and other matters persisted throughout its activities. *See generally* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990).

[65] *See supra* notes 10-11 and accompanying text (discussing the Inter-American Convention on Support Obligations, which provides for such jurisdiction).

[66] 436 U.S. 84 (1978). In *Kulko*, subsequent to the separation of the parents, both of the children lived with their father in New York while their mother had moved to California. *See id.* at 87. The parents agreed that the children would spend their vacation time with their mother in California. *See id.* Approximately one year later, one of the children, with the father's acquiescence, moved to California to live with her mother. *See id.* at 87-88. Approximately two years later, the other child informed his mother that he wished to live with her, and immediately thereafter, "[u]nbeknownst to" the father, the mother sent the son a plane ticket which he used to join his mother and sister in California. *See id.* at 88.

quired first by the Canada-United States Free Trade Agreement,[67] and more recently by the North American Free Trade Agreement[68] (NAFTA).[69] American antidumping and subsidy laws have been a bone of contention with, in particular, our North American neighbors, and during the course of the Free Trade negotiations, Canada sought substantive changes.[70] While these changes were not acceptable to the American negotiators, the parties reached a compromise solution: binational panels—drawn mostly from judges and retired judges of the affected countries—with the authority to engage in what amounts to judicial review of antidumping and countervailing duty determinations by executive branch agencies.[71] Review of binational panel decisions can be had only before an "extraordinary challenge committee," which too has a binational composition.[72]

The binational panels and the challenge committee are an uneasy fit with Article III of the Constitution, which vests "the judicial Power" of the United States only in the Supreme Court and in inferior federal tribunals, comprised only of duly appointed federal judges with life tenure and a guarantee against salary diminution.[73] The binational panels clearly do not qualify as Article III courts, yet they exercise judicial powers, including the construction and enforcement of federal laws. Perhaps the panels can be justified under the "balancing" approach to Article III currently favored by the Supreme Court, although even this is a stretch.[74]

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[67] Canada-United States: Free-Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988).

[68] North American Free Trade Agreement, Annex 1901.2, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (1993) [hereinafter NAFTA].

[69] *See* Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141, 145-46 (1994) (discussing negotiations between the U.S. and Canada and the binational panel system).

[70] *See id.* at 145 (reflecting the perception of Canadian officials that the "administering agencies [concerned with antidumping and subsidy laws] were influenced by domestic political considerations, with unfair results for Canadian firms").

[71] *See* NAFTA, *supra* note 68, at Annex 1901.2; *see also* Metropoulos, *supra* note 69, at 146 (describing the composition of the binational panels).

[72] *See* NAFTA, *supra* note 68, at art. 1904, Annex 1904.13.

[73] U.S. CONST. art. III.

[74] *See* CFTC v. Schor, 478 U.S. 833, 851 (1986). The factors to be considered are:

> the extent to which the 'essential attributes of judicial power' are reserved to Article III courts . . . the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. Use of the *Schor* test to validate the binational panels is a tenuous proposition because one factor that weighs heavily in the balance is the ultimate availability of judicial review by

Perhaps, then, as some argue, the binational panels are unconstitutional.[75] But it seems unlikely that this will be the ultimate result. Congress held extensive hearings on the constitutionality of the binational panels.[76] The majority of those testifying took the position that the panels were constitutionally permissible and Congress apparently concurred by passing the necessary implementing legislation;[77] surely this assessment is entitled to some judicial deference. There is more-than-respectable academic opinion in favor of their constitutionality, including that of the leading American commentator on the Constitution in foreign affairs.[78] Apparently the only judicial challenge to the panels was turned aside for lack of standing, a defect that may ultimately prove impossible to overcome.[79]

To be sure, the binational panels are an adventurous solution. Without them, however, there would not have been a NAFTA.[80] But the NAFTA negotiators—to their credit—did not suffer from constitutional claustrophobia. Recognizing that interpretation of the Constitution in matters foreign is not solely a judicial activity, and is not simply a matter of transplanting domestic concepts to foreign contexts, they crafted a new solution outside of any clearly-recognized framework.

It is, of course, not my contention that any provision in any treaty or convention will automatically withstand constitutional challenge.

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an Article III court. *See id.* at 851-52. While such review is usually available for executive branch agencies, *see* 5 U.S.C. § 702 (1994), it is not available for decisions of the binational panels, except that constitutional challenges to the panels may be heard in the United States Court of Appeals for the District of Columbia. *See* American Coalition for Competitive Trade v. Clinton, 128 F.3d 761, 765 (D.C. Cir. 1997) (citing 19 U.S.C. § 1516a(g)(4)(A) (1994)).

[75] *See* Metropoulos, *supra* note 69, at 160-68 (applying the *Schor* test and concluding that the Supreme Court should invalidate binational panels).

[76] *See, e.g.*, 139 CONG. REC. H9875-01 (daily ed. Nov. 17, 1993); 134 CONG. REC. H6611-02 (daily ed. Aug. 9, 1988).

[77] *See* NAFTA Implementation Act, Pub. L. No. 103-182, §§ 401-408, 411, 107 Stat. 2057, 2129 (codified as amended at 19 U.S.C. §§ 3431-3438, 1516a (1994)).

[78] *See* HENKIN, *supra* note 32, at 271-72 ("It is difficult to accept that United States participation in contemporary forms of multinational cooperation should depend on 'technicalities' about 'delegation', 'judicial power', and 'case or controversy', and on forms and devices to satisfy them.").

[79] *See American Coalition for Competitive Trade*, 128 F.3d at 764-65 (holding plaintiffs failed to allege a concrete, particularized injury caused by the challenged conduct, and likely to be redressed by a favorable decision); *see also* Timothy Burn, *Judges Dismiss Challenge to NAFTA*, WASH. TIMES, Nov. 15, 1997, at C1 (noting the standing obstacle will be difficult to overcome because businesses are reluctant to challenge NAFTA provisions for fear of losing international business).

[80] *See* Metropoulos, *supra* note 69, at 146 (reporting that binational panels were described by American negotiators as the "linchpin" of the Agreement).

But it gives far too little weight to the special nature of foreign affairs to assume that some modest adjustments to our jurisdictional regime will provoke the Supreme Court's ire, and cause it—for the first time in history—to strike down a treaty provision as unconstitutional. It is simplistic to assume that the Supreme Court, or any other court, would engage in a rote transplantation of domestic concepts to an international judgments convention. Far more realistic is Professor Henkin's assessment that "even lesser concerns of Foreign relations . . . weigh importantly in the balance" when adjudicating any claim of unconstitutionality of a treaty provision.[81] Ultimately, therefore, I believe that—within the context of any judgments convention that would actually be ratified—even mandatory jurisdictional rules beyond the boundaries of the minimum contacts test will survive constitutional scrutiny.

II. INTERNATIONAL CONSIDERATIONS IN MINIMUM CONTACTS

As I argued in the previous section, international concerns will act as a "thumb" on the balance to validate almost any conceivable provision in a judgments convention. Several features of the minimum contacts test itself support that assertion, and my purpose in this section is to briefly sketch them.

The Supreme Court has addressed *in personam* jurisdiction over international defendants twice in recent years. In *Helicopteros Nacionales de Colombia v. Hall*,[82] the Court held that even substantial forum-state purchases by a Colombian company—in that case, $4 million in helicopter parts—were not enough to justify general jurisdiction over the defendant.[83] In *Asahi Metal Industry Co. v. Superior Court*,[84] the Court held that the forum-state resale of a Japanese company's allegedly defective tire valve could not justify jurisdiction over the company in an indemnity action brought by a Taiwanese company.[85] In concluding that exercising jurisdiction over the Japanese company would be unreasonable, the Court reasoned that "[t]he unique burdens placed upon one who must defend

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[81] HENKIN, *supra* note 32, at 280.

[82] 466 U.S. 408 (1984).

[83] *See id.* at 417 (holding "purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction").

[84] 480 U.S. 102 (1987).

[85] *See id.* at 114-15 (reasoning that because the plaintiff was not a California resident and the dispute concerned indemnification, "California's legitimate interests in the dispute [were] considerably diminished").

oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[86]

To be sure, both *Helicopteros* and *Asahi* are awkward decisions that reach results of debatable wisdom. But they do show that the Court has an instinctive sense that foreign cases are special. Assume, hypothetically, the United States and Japan were both parties to a judgments convention that allowed for jurisdiction over parties such as the *Asahi* defendant. The Court's concern about the "unique burdens" on the Japanese company—perhaps defensible without a convention—should vanish. If, under our hypothetical convention, the Japanese and American governments are both willing to agree that jurisdictional assertions of this kind are reasonable, it is hard to imagine the Court not deferring to this assessment. Surely the Court would not assume that it is in a better position than the Japanese government to assess the burdens of long-arm jurisdiction on Japanese companies.

Moreover, the Court has expressed a willingness to defer to political judgments about the reasonableness of jurisdiction. In *McGee v. International Life Insurance Co.*,[87] the Court justified the assertion of jurisdiction over an out-of-state company on the basis of the sale of a single insurance policy, in part because of the existence of a particularized forum-state jurisdictional statute so providing.[88] In *Shaffer v. Heitner*,[89] the Court concluded that it could not justify an assertion of jurisdiction over out-of-state corporate fiduciaries without a forum-state "statute more clearly designed to protect [the forum state's] interest" in asserting jurisdiction.[90] In *Kulko v. Superior Court*, the Court refused to allow for jurisdiction over an out-of-state father in a child support matter in part because of an alternative statutory procedure under the Uniform Reciprocal Enforcement of Support Act.[91]

Of course, a treaty—requiring the assent of the Executive and two thirds of the Senate[92]—is a different sort of expression of political will than a statute. But it is an expression of political interest

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[86] *Id.* at 114.
[87] 355 U.S. 220 (1957).
[88] *See id.* at 221.
[89] 433 U.S. 186 (1977).
[90] *Id.* at 215.
[91] *See* Kulko v. Superior Court, 436 U.S. 84, 99-100 (1978).
[92] *See* U.S. CONST. art. II, § 2, cl. 2.

commonly placed on the same plane as a statute,[93] and—in all likelihood—any ratified treaty would be implemented by federal legislation.[94] In short, the Court has expressed its willingness to accord the political branches, even those of the States, some deference in matters of jurisdiction. If a judgments convention actually emerges from the negotiation process, commands Executive assent, is ratified by two thirds of the Senate, and—presumably—is implemented by federal legislation that passes both Houses of Congress, it is hard to imagine the Court not giving considerable weight to the judgment of its coordinate branches.

Finally, as a federal act, a judgments convention and any implementing legislation would be measured by the Fifth Amendment's Due Process Clause, not by the Fourteenth Amendment, which is applicable to the states.[95] Much has been written on whether the standards under the Fifth and Fourteenth Amendments differ.[96] The Supreme Court has refused to address the question,[97] but there is considerable lower court authority for applying a more relaxed test under the Fifth Amendment.[98] If the Supreme Court, in considering a judgments convention, needs a way to distinguish its earlier authorities, the door is open to applying a different standard under the Fifth Amendment.

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[93] *See* HENKIN, *supra* note 32, at 211 ("At the end of the twentieth century . . . the equality of treaties and statutes in domestic U.S. law appear[s] to be firmly established.").

[94] *See, e.g., id.* at 198-206 (noting that while treaties are typically self-executing, when domestic legislation or an appropriation of funds is necessary, Congress has "responded to a sense of duty to carry out what the treaty-makers promised").

[95] *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 313 (1945) (articulating the Fourteenth Amendment standard).

[96] *See, e.g.*, Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 4 (1984) (noting that the Supreme Court has never defined the due process limits of the Fifth Amendment, and arguing, in the context of nationwide service of process statutes, that like the Due Process Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment should require courts to consider the unfairness of requiring a party to defend in a distant forum); Irene Deaville Sann, *Personal Jurisdiction in Federal Question Suits: Toward a Unified and Rational Theory for Personal Jurisdiction over Non-Domiciliary and Alien Defendants*, 16 PAC. L.J. 1, 130 (1984) (discussing lower courts' holdings that nationwide service of process "gave a federal court personal jurisdiction that was consistent with constitutional mandates without any separate test of amenability by minimum contacts or another standard").

[97] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987).

[98] *See, e.g.*, Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 946-48 (11th Cir. 1997) (holding Fifth Amendment due process standards require only minimum contacts with the United States as a whole and that the chosen forum not be unreasonably inconvenient).

CONCLUSION

Perhaps the day will never come when a constitutional challenge to a judgments convention is mounted. Political considerations, either on the U.S. or the foreign side, may well prevent a successful conclusion to any judgments negotiations. But it is not an inevitability. The United States may find, as it did in the NAFTA negotiations, that it must craft some solutions that do not fit within clearly established constitutional categories if agreement is to be reached.[99] If this is what it takes to reach agreement, I hope that the U.S. negotiators will seize the chance, because there is every reason for optimism that the judicial branch will ultimately respect their judgment.

[99] *See supra* notes 67-79 and accompanying text.