AGAINST SYSTEMIC REVIEW OF FOREIGN JUDGMENTS

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When a court in the United States is asked to recognize and enforce a foreign judgment, should it focus only on the specific judgment at issue, or should it also consider, more generally, the quality of the foreign court system that produced the judgment? The 2005 Uniform Foreign-Country Money Judgments Recognition Act, adopted in twenty-nine states, provides that a court may not recognize a foreign-country judgment if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[1] Its predecessor, the 1962 Uniform Foreign Money-Judgments Recognition Act, still in force in nine states, contains a similar provision.[2]

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1. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(1) (NAT'L CONF. COMM'RS UNIF. STATE L. 2005) [hereinafter 2005 UNIFORM ACT] (adopted in Alabama, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, and Washington).

2. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1) (NAT'L CONF. COMM'RS UNIF. STATE L. 1962) [hereinafter 1962 UNIFORM ACT] (adopted in Alaska,

Yet very few decisions have denied recognition of foreign judgments based on systemic lack of due process.[3]

As a case study, this essay considers the recent decisions in *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.,* in which the New York Supreme Court refused to recognize a Chinese judgment based on systemic lack of due process, and New York's Appellate Division reversed that decision on appeal.[4] The case arose from an ordinary business dispute. Shanghai Yongrun had invested in Kashi Galaxy, and Kashi Galaxy agreed to repurchase the investment before an initial public offering.[5] When Kashi Galaxy breached the contract by failing to pay the full repurchase price, Shanghai Yongrun brought suit in Beijing, as provided by the parties' agreement.[6] After a trial, in which the defendants were represented by counsel, the Beijing court granted judgment for the plaintiff.[7] The decision was affirmed on appeal but could not be enforced because there were insufficient assets in China.[8]

Shanghai Yongrun then filed suit in New York state court seeking to enforce the Chinese judgment against the defendant's assets in the United States. The defendant did not point to any specific defect in the Chinese proceeding but instead argued that the judgment could not be recognized because China as a whole lacks impartial tribunals and procedures compatible with due process of law.[9] The New York Supreme Court agreed. The Court quoted passages from the State Department's Country Reports on Human Rights Practices for 2018 and 2019 noting "limitations on judicial independence" and "rampant" corruption in China.[10] The Court held that these reports "conclusively establish as a matter of law that the PRC [People's Republic of China] judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the

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Connecticut, Florida, Maryland, Massachusetts, Missouri, New Jersey, New York, Ohio, and Pennsylvania).

3. *See infra* notes 40-55 and accompanying text.

4. Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Cap. Co., No. 156328/2020, 2021 WL 1716424 (N.Y. Sup. Ct. Apr. 30, 2021), *rev'd sub nom.* Shanghai Yongrun Inv. Mgmt. Co. v. Maodong Xu, 203 A.D.3d 495 (N.Y. App. Div. 2022). The author wrote an amicus brief on behalf of fifteen professors of international litigation arguing for reversal. *See* Brief for Shanghai Yongrun Inv. Mgmt. Co. as Amici Curiae Supporting Plaintiff-Appellant, Shanghai Yongrun Inv. Mgmt. Co. v. Maodong Xu, 203 A.D.3d 495 (N.Y. App. Div. 2022) (Case No. 2021-01637) [hereinafter *Shanghai Yongrun* Amicus Brief].

5. *Shanghai Yongrun Inv. Mgmt. Co.*, 2021 WL 1716424, at *2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at *3.

10. *Id.* at *5.

requirements of due process of law in the United States."[11] Whether there were defects in the specific proceeding was irrelevant, the Court reasoned, because the systemic lack of due process ground "addresses the entire system, not just the underlying litigation."[12]

The Appellate Division reversed in a brief opinion.[13] "The allegations that [the] defendants had an opportunity to be heard, were represented by counsel, and had a right to appeal in the underlying proceeding in the People's Republic of China…," the Court held, "sufficiently pleaded that the basic requisites of due process were met."[14] The State Department's Country Reports, "which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters, do not utterly refute plaintiff's allegation that the civil law system governing this breach of contract business dispute was fair."[15]

By reversing the Supreme Court's decision on systemic lack of due process, the Appellate Division avoided serious negative consequences. If the Appellate Division had instead upheld the decision, no Chinese judgments would henceforth be entitled to recognition and enforcement in New York. The decision could have led to the same result in other states too, since the laws in the thirty-seven other states that have adopted either the 1962 or the 2005 Uniform Act contain the same grounds for non-recognition. The decision would also have effectively ended the recognition and enforcement of U.S. judgments in China. China recognizes U.S. judgments based on reciprocity,[16] which would be hard to maintain if U.S. courts condemned the Chinese legal system as incapable of producing judgments entitled to recognition. Finally, the decision would have opened the door to questioning judgments from other countries besides China. Recent State Department Country Reports express concerns for 141 other countries about judicial independence, corruption, or both. These are concerns similar to those that the New York Supreme Court relied on with respect to China.[17]

This essay argues against systemic review as a ground for denying recognition to foreign-country judgments. Part I discusses the origins of this

11. *Id.*

12. *Id.*

13. Shanghai Yongrun Inv. Mgmt. Co. v. Maodong Xu, 203 A.D.3d 495 (N.Y. App. Div. 2022).

14. *Id.* at 495.

15. *Id.* The court also held that the Country Reports did not constitute "documentary evidence" on which a motion to dismiss could be based under Rule 3211 of New York's Civil Practice Law and Rules. *Id.*

16. *See infra* notes 70-72 and accompanying text.

17. *See Shanghai Yongrun Inv. Mgmt. Co.*, 2021 WL 1716424 at *5.

ground and the rarity of U.S. decisions relying on it. Part II explains the implications of the *Shanghai Yongrun* case for the recognition of Chinese judgments in the United States and for U.S. judgments in China. Part III considers whether courts should rely on State Department Country Reports to decide if a country lacks impartial tribunals and procedures compatible with due process under the Uniform Acts. Part IV argues that case-specific grounds for non-recognition are sufficient to police foreign judgments, rendering the systemic ground unnecessary. Part V briefly concludes.

I. SYSTEMIC REVIEW IN U.S. LAW AND PRACTICE

The origins of systemic lack of due process as a ground for non-recognition lie in the U.S. Supreme Court's decision in *Hilton v. Guyot*.[18] *Hilton* established a presumption in favor of recognizing foreign judgments, but subject to a number of caveats:

> we are satisfied that where 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 afresh ….[19]

Some of the caveats developed into case-specific grounds for non-recognition, such as lack of personal jurisdiction, lack of subject matter jurisdiction, insufficient notice, and fraud.[20] *Hilton*'s reference to "a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries"[21] became the basis for the systemic lack of due process ground.

The Supreme Court decided *Hilton* under general common law.[22] However, in 1938, *Erie Railroad Co. v. Tompkins* abolished general common law,[23] and three years later, the Supreme Court held that federal

18. Hilton v. Guyot, 159 U.S. 113 (1895).

19. *Id.* at 202-03.

20. *See* 2005 UNIFORM ACT, *supra* note 1, §§ 4(b)(2)-(3), (c)(1)-(2) (listing these grounds); 1962 UNIFORM ACT, *supra* note 2, §§ 4(b)(2)-(3), (c)(1)-(2).

21. *Hilton*, 159 U.S. at 202.

22. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 reporters' note 1 (AM. L. INST. 2018).

23. Erie R.R. Co. v. Tompkins 304 U.S. 64, 78 (1938).

courts sitting in diversity had to apply state choice-of-law rules.[24] Since then, it has been accepted that state law governs the recognition and enforcement of foreign judgments, including in cases involving federal courts sitting in diversity.[25]

In 1962, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a uniform act that states could adopt to govern the recognition and enforcement of foreign judgments.[26] The aim of this act was to facilitate the enforcement of U.S. judgments abroad by providing evidence of reciprocity to civil law countries that required reciprocity and were reluctant to accept anything short of a legislative enactment as sufficient proof.[27] The drafters attempted to codify existing law,[28] with the act's systemic lack of grounds in due process for non-recognition based directly on *Hilton*.[29] During the NCCUSL's discussion, various speakers mentioned China,[30] the Soviet Union,[31] and Cuba[32] as countries to which this ground for nonrecognition might apply. However, the reporters felt that "some general description" was better than listing specific countries because circumstances might change.[33]

In 2005, the NCCUSL adopted a revised version of the uniform act.[34] It left the systemic lack of due process ground unchanged[35] but added two new case-specific grounds: (1) that "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment";[36] and (2) that "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[37] The comments to the 2005

24. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

25. *See, e.g.*, DeJoria v. Maghreb Petroleum Exploration, S.A. 804 F.3d 373, 378 (5th Cir. 2015) ("Because federal jurisdiction in this case is based on diversity of citizenship, we apply Texas law regarding the recognition and enforcement of foreign judgments.").

26. *See* 1962 UNIFORM ACT, *supra* note 2.

27. *See* National Conference of Commissioners on Uniform State Laws, Proceedings in Committee of the Whole, Uniform Foreign Money Judgment Recognition Act 3-4 (1961) (remarks of Kurt Nadelmann).

28. *Id.* at 6-7 (remarks of Kurt Nadelmann).

29. *Id.* at 30 (remarks of Kurt Nadelmann) ("We used the language which is in Hilton [v]. Guyot ….").

30. *Id.* at 12 (remarks of Mr. Havighurst).

31. *Id.* (remarks of Willis Reese).

32. *Id.* at 31 (remarks of Kurt Nadelmann).

33. *Id.* at 12 (remarks of Willis Reese).

34. 2005 UNIFORM ACT, *supra* note 1, § 4(b)(1).

35. *Id.* § 4 cmt. 4 ("The mandatory grounds for nonrecognition stated in subsection (b) are identical to the mandatory grounds stated in Section 4 of the 1962 Act.").

36. *Id.* § 4(c)(7).

37. *Id.* § 4(c)(8).

Uniform Act contrast these case-specific grounds with systemic lack of due process, noting that the new grounds allow a court to deny recognition when bribery of the judge or political bias result in the denial of "fundamental fairness in the particular proceedings."[38]

Although systemic lack of due process has been a codified ground for nonrecognition of foreign judgments for more than fifty years,[39] only a handful of U.S. decisions besides *Shanghai Yongrun* have denied recognition to foreign judgments on that basis.[40] The leading case is *Bridgeway Corp. v. Citibank*,[41] in which the District Court for the Southern District of New York denied enforcement of a judgment that the Liberian Supreme Court issued during Liberia's civil war.[42] The Court found that "justices and judges served at the will of the leaders of the warring factions," that "the courts that did exist were barely functioning," and that "[t]he due process rights of litigants were often ignored, as corruption and incompetent handling of cases were prevalent."[43] More recently, in *Chevron Corp. v. Donziger*,[44] the Court refused to recognize an Ecuadoran judgment based on uncontested expert testimony that the Ecuadoran judiciary did not operate impartially.[45] Another case often counted in this category is *Bank Melli Iran v. Pahlavi*,[46] denying recognition of an Iranian judgment against the sister of the former Shah. Although the court in *Bank Melli Iran* did invoke systemic lack of due process as the ground for denying recognition,[47] it made a case-specific determination that the Shah's

38. *Id.* § 4 cmts. 11-12.

39. In 1963, Maryland became the first state to adopt the 1962 Uniform Act. By 1970, seven states had adopted the act, including California, Illinois, and New York. *Foreign-Country Money Judgements Recognition Act: Enactment History*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=ae280c30-094a-4d8f-b722-8dcd614a8f3e&tab=groupdetails#LegBillTrackingAnchor (last visited Oct. 28, 2022).

40. A recent empirical study of 587 U.S. state and federal decisions from 2000 to 2017 identified only six that denied recognition for systemic lack of due process. Samuel P. Baumgartner & Christopher A. Whytock, *Enforcement of Foreign Judgements, Systemic Calibration, and the Global Law Market*, 23 THEORETICAL INQUIRIES L. 119, 143 n.74 (2022). In my view, only two of these decisions should count—the *Bridgeway* and *Donziger* cases discussed below. Three of the decisions that Baumgartner and Whytock cite involve the *Osorio* case that was ultimately resolved on case-specific grounds. The other, *DeJoria*, was reversed on appeal. *See infra* notes 41-54 and accompanying text.

41. Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000).

42. *Id.* at 288.

43. *Id.* at 287.

44. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), *aff'd*, Chevron Corp. v. Donziger, 833 F.3d 74 833 F.3d 74 (2d Cir. 2016).

45. *Id.* at 609-14.

46. Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995).

47. *Id.* at 1410.

sister "could not get due process in Iran" because of political influence and hostility to the Shah's regime.[48] As Paul Stephan has noted, "[r]ather than ruling that foreigners faced systemic unfairness in Iran, the court looked at the characteristics of the litigation in question."[49]

In three other cases, the district courts denied recognition of a foreign judgment for systemic lack of due process, but the decisions were reversed on appeal. In *Osorio v. Dow Chemical Co.*,[50] the Eleventh Circuit affirmed the decision to deny recognition on case-specific grounds but specifically declined to adopt the district court's conclusion that Nicaragua does not provide impartial tribunals.[51] In *DeJoria v. Maghreb Petroleum Exploration, S.A.*,[52] the Fifth Circuit reversed the decision to deny recognition, concluding that the defendant had not met its "high burden" of showing "that the Moroccan judicial system lacks sufficient independence such that fair litigation in Morocco is impossible."[53] The Uniform Act, the Court observed, "does not require that the foreign judicial system be perfect."[54] Finally, as discussed above, in *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*, New York's Appellate Division reversed the New York Supreme Court's decision to deny recognition based on systemic lack of due process, holding that the plaintiff had "sufficiently pleaded that the basic requisites of due process were met." The Appellate Division also found that the State Department Country Reports on China, "which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters," did not rebut those allegations.[55]

There are several reasons that U.S. courts might be reluctant to decide that a foreign court system is incapable of producing enforceable judgments. First, as others have noted, courts seem institutionally ill-equipped to decide such questions. "Systematic empirical research into foreign institutions is beyond the capacity of any judicial body,"[56] and

48. *Id.* at 1411.

49. Paul B. Stephan, *Unjust Legal Systems and the Enforcement of Foreign Judgments*, in RECOGNITION AND ENFORCEMENT OF JUDICIAL JUDGMENTS 84, 93 (Paul B. Stephan ed., 2014).

50. Osorio v. Dow Chem. Co., 635 F.3d 1277 (11th Cir. 2011) (per curiam).

51. *Id.* at 1279.

52. Dejoria v. Maghreb Petroleum Expl., S.A., 804 F.3d 373 (5th Cir. 2015).

53. *Id.* at 382.

54. *Id.*

55. Shanghai Yongrun Inv. Mgmt. Co. v. Maodong Xu, 203 A.D.3d 495 (N.Y. App. Div. 2022).

56. Stephan, *supra* note 49, at 88; *see also* Baumgartner & Whytock, *supra* note 40, at 122 (noting that "courts are not necessarily institutionally well suited to draw conclusions about the systemic adequacy of other legal systems"); Thomas Kelly, Note, *An Unwise and Unmanageable Anachronism: Why the Time Has Come to Eliminate Systemic Inadequacy as a Basis for*

"advocates for adversaries are not wholly trustworthy in their choice of studies."[57] Second, courts may recoil at the implications of such a decision. To deny recognition of a foreign judgment on this ground, a court must conclude not just that the judgment before the court is tainted but that all judgments from the foreign legal system are similarly tainted. And, as discussed below in Part II, condemning a foreign legal system as incapable of producing enforceable judgments may impact the enforceability of U.S. judgments in that legal system.[58] Third, courts have the alternative of denying recognition based on other, case-specific grounds. This is particularly true in the twenty-nine states that have adopted the 2005 Uniform Act with its new case-specific grounds relating to lack of integrity and due process in the particular proceeding.[59]

II. IMPLICATIONS FOR JUDGMENTS RECOGNITION IN THE UNITED STATES AND ABROAD

The decision that a foreign judgment is not entitled to recognition and enforcement on systemic grounds, because the foreign judicial system "does not provide impartial tribunals or procedures compatible with the requirements of due process of law,"[60] means that the U.S. court has concluded that the courts of the foreign country are incapable of ever producing a judgment that is entitled to recognition. As the New York Supreme Court put it in *Shanghai Yongrun*, "the fact that Defendants participated in the underlying litigation, were represented by an attorney, and appealed the trial court judgment … is of no consequence" because this ground for nonrecognition "addresses the entire system, not just the

Nonrecogntion of Foreign Judgment, 42 GEO. J. INT'L L. 555, 572 (2011) ("American courts are simply not equipped to jump the epistemological hurdles to determine whether a foreign judicial system judicial objectively provides impartial tribunals and procedures compatible with the requirements of due process of law.").

57. Stephan, *supra* note 49, at 88; *see also* Zachary D. Clopton, *Judging Foreign States*, 94 WASH. U. L. REV. 1, 40 (2016) (noting that "[p]rivate litigants likely have no special insight into the general features of foreign legal systems").

58. *See infra* Part II. Some authors have asserted that such determinations may cause difficulties in foreign relations that extend beyond the judgment context. *See* Kelly, *supra* note 56, at 557 (positing that such a determination might "create an international incident"); Stephan, *supra* note 49, at 88 (suggesting that such a determination "may antagonize the government in question, complicating its relations with the United States in unforeseeable and potentially unfortunate ways"). As Zachary Clopton has observed, however, such decisions "have not sparked international incident." Clopton, *supra* note 57, at 5.

59. *See infra* Part IV.

60. 2005 UNIFORM ACT, *supra* note 1, § 4(b)(1); 1962 UNIFORM ACT, *supra* note 2, § 4(a)(1).

underlying litigation."[61] This part considers the implications of such a decision for the recognition of foreign judgments in the United States and for the recognition of U.S. judgments abroad.

The effect of a decision finding a systemic lack of due process on other judgments from the same country depends on the rules of *stare decisis*.[62] The recognition of foreign judgments is governed by state law, and states are free to adopt their own rules of *stare decisis*.[63] In New York, one trial court's decision is not binding on other trial courts.[64] A decision by New York's Appellate Division, on the other hand, would be binding on all trial courts in New York.[65] Furthermore, a decision by the New York Court of Appeals would, of course, bind not just all state courts in New York but also federal courts sitting in diversity.[66] Within the federal system, a district court's determination of state law is not binding on other district courts, but a federal Court of Appeals' determination of state law is binding both on district courts in the circuit and on later panels within the same circuit.[67]

Obviously, the decision of a state or federal court with respect to New York law would not bind a state or federal court applying California law. On the other hand, the 2005 and 1962 Uniform Acts are *uniform* acts that are supposed to be interpreted consistently. Given that New York and California have both adopted the 2005 Uniform Act, it would be odd for Chinese judgments to be unenforceable in New York for systemic lack of

61. Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Cap. Co., No. 156328/2020, 2021 WL 1716424, at *5 (N.Y. Sup. Ct. Apr. 30, 2021)

62. One might argue that such decisions should have no precedential effect because a foreign legal system may have changed in the interim. In practice, however, judges tend to rely heavily on prior judicial decisions when the facts are difficult to ascertain, as they are for systemic questions. Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 965-67 (2017).

63. *See* Zachary B. Pohlman, Note, *Stare Decisis and The Supreme Court(s): What States Can Learn from Gamble*, 95 NOTRE DAME L. REV. 1731, 1747-52 (2020) (discussing *stare decisis* in state courts).

64. Just a few months before *Shanghai Yongrun*, another New York Supreme Court judge held "that the Chinese legal system comports with the due process requirements and the public policy of New York." Huizhi Liu v. Guoqing Guan, Index No. 713741/2019 (N.Y. Sup. Ct., Jan. 7, 2020). The judge in *Shanghai Yongrun* concluded that he was not bound by that decision. *Shanghai Yongrun*, 2021 WL 1716424, at *5.

65. *See* Mountain View Coach Lines, Inc. v. Storms, 476 N.Y.S.2d 918, 919-20 (N.Y. App. Div. 1984) ("The Appellate Division is a single statewide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule." (citations omitted)).

66. Under the *Erie* doctrine, intermediate state court decisions are persuasive authority but do not bind federal courts tasked with applying state law. *See* 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4507 (3d. ed. 2021) (discussing the determination of state law under the *Erie* doctrine).

67. Anderson Living Tr. v. Energen Resources Corp., 886 F.3d 826, 834 (10th Cir. 2018).

due process, and, at the same time, be enforceable in California.[68] As noted above, thirty-eight states have adopted one of the two Uniform Acts containing systemic lack of due process as a ground for nonrecognition. This means that the refusal to recognize a foreign judgment on this ground has the potential to render judgments from that country unenforceable throughout much of the United States.

The refusal to recognize a foreign judgment for systemic lack of due process also has implications for the recognition and enforcement of U.S. judgments abroad. A number of other countries require reciprocity as a condition for enforcing foreign judgments.[69] Among these countries is China, which recognizes foreign judgments only if provided by treaty or based on the principle of reciprocity.[70] In 2022, China's Supreme People's Court adopted a new policy of *de jure* reciprocity under which reciprocity exists if a Chinese judgment would be recognizable under the foreign country's laws even if that country has not previously recognized a Chinese judgment.[71] This new policy of *de jure* reciprocity replaces the old policy of

68. In the course of recognizing Chinese judgments, several federal district courts in California and Illinois have either rejected a challenge on systemic due process grounds or noted that such a challenge had not been made. *See* Yancheng Shanda Yuanfeng Equity Inv. P'ship v. Wan, 20-CV-2198, 2022 WL 411860, at *9 (C.D. Ill. Jan. 10, 2022) (rejecting challenge for systemic lack of due process grounds); Qinrong Qiu v. Hongying Zhang, No. CV 17-05446-JFW, 2017 WL 10574227, at *3 (C.D. Cal. Oct. 27, 2017) (concluding that "the Chinese court was an impartial tribunal"); Glob. Material Techs., Inc. v. Dazheng Metal Fibre Co., No. 12 CV 1851, 2015 WL 1977527, at *7 (N.D. Ill. May 1, 2015) ("GMT does not allege that the Chinese judicial system as a whole is biased and incompatible with principles of basic fairness."); Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, at *6 (C.D. Cal. July 22, 2009) ("RHC has not presented any evidence, nor does it contend, that the PRC court system is one which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.").

69. *See* STANDING INTERNATIONAL FORUM OF COMMERCIAL COURTS, MULTILATERAL MEMORANDUM ON ENFORCEMENT OF COMMERCIAL JUDGMENTS FOR MONEY (2d ed. 2020) (finding reciprocity requirements in Abu Dhabi, Cayman Islands, China, Gambia, Germany, Japan, Kazakhstan, Malaysia, Sierra Leone, South Korea, and Uganda among thirty-three countries surveyed).

70. Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, last amended Dec. 24, 2021, effective Jan. 1, 2022), art. 289, 2022(1) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 96 (China).

71. Quanguo Fayuan Shewai Shangshi Haishi Shenpan Gongzuozuotanhui Huiyi Jiyao (全国法院涉外商事海事审判工作座谈会会议纪要) [Minutes of the National Court's Symposium on Foreign-Related Commercial and Maritime Trials] art. 44 (Sup. People's Ct. Jan. 24, 2022) http://cicc.court.gov.cn/html/1/218/62/409/2172.html. Although the Minutes are not legally binding, they will guide Chinese judges in future cases involving the recognition and enforcement of foreign judgments. *See* Meng Yu & Guodong Duo, *China's 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments*, CONFLICT OF LAWS.NET (July 1, 2022), https://conflictoflaws.net/2022/chinas-2022-landmark-judicial-policy-clears-final-hurdle-for-enforcement-of-foreign-judgments/.

de facto reciprocity, which required that the foreign country had in fact previously recognized Chinese judgments.[72] Because Chinese courts have previously held that the United States satisfied the requirement of *de facto* reciprocity based in its prior recognition of Chinese judgments,[73] there seems little doubt that U.S. judgments will satisfy the more relaxed *de jure* standard.

But denying recognition of Chinese judgments based on systemic lack of due process would change that.[74] Maintaining judgment reciprocity with China does not require U.S. courts to recognize every Chinese judgment. U.S. courts have denied recognition on case-specific grounds when the Chinese court lacked personal jurisdiction over the defendant[75] or the Chinese judgment conflicted with another final judgment.[76] Denying recognition on the ground that China lacks impartial tribunals or procedures compatible with due process is fundamentally different from using case-specific grounds, however, because it indicates that Chinese judgments will never be recognizable or enforceable.

Whether a New York decision denying recognition of Chinese judgments for systemic lack of due process would have destroyed reciprocity with respect to the entire United States or only with respect to New York is an important question. Technically, each state constitutes its own jurisdiction for purposes of judgment recognition, and (as noted above) courts in California are not bound to follow those in New York. But in applying the old policy of *de facto* reciprocity, China did not distinguish among different states or between federal and state courts.[77] China's approach makes sense because of the substantial uniformity within the United States of state law on foreign judgments. Treating the United States as a single jurisdiction, however, also means that a decision in one state

72. William S. Dodge & Wenliang Zhang, *Reciprocity in China-U.S. Judgments Recognition*, 53 VAND. J. TRANSNAT'L L. 1541, 1551-52 (2020) (discussing policy of *de* facto reciprocity).

73. *See, e.g.*, Liu v. Tao (Wuhan Interm. People's Ct. June 30, 2017) (citing Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798- FMC-SSx, 2009 WL 2190187 (C.D. Cal. July 22, 2009)), *translated in appendix to* Ronald A. Brand, *Recognition of Foreign Judgments in China: The* Liu *Case and the "Belt and Road" Initiative*, 37 J.L. & COM. 29 (2018).

74. Even proponents of review for systemic lack of due process admit that "there are possible reciprocal effects; Chinese courts will arguably be less likely to enforce U.S. judgments." Donald C. Clarke, *Judging China: The Chinese Legal System in U.S. Courts*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4150893 (manuscript at 93).

75. *See* Folex Golf Indus., Inc. v. Ota Precision Indus. Co., 603 F. App'x 576, 577 (9th Cir. 2015).

76. *See* UM Corp. v. Tsuburaya Prod. Co., No. 2:15-cv-03764-AB (AJWx), 2016 WL 10644497, at *8 (C.D. Cal. Sept. 22, 2016).

77. *See* Dodge & Zhang, *supra* note 72, at 1576-78.

denying recognition for systemic lack of due process has the potential to destroy reciprocity with respect to the entire United States.

III. THE ROLE OF STATE DEPARTMENT COUNTRY REPORTS

Every year, the U.S. State Department produces Country Reports on Human Rights Practices.[78] In *Shanghai Yongrun*, the New York Supreme Court relied exclusively on the 2018 and 2019 Country Reports to conclude that China's courts suffer from a systemic lack of due process.[79] Indeed, the Court held that these reports "conclusively establish as a matter of law that the PRC judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law in the United States."[80] The Second Circuit has held that State Department Country Reports are admissible to show whether a foreign court system provides due process,[81] and a number of courts have considered such reports, although none prior to the *Shanghai Yongrun* decision relied on them exclusively or treated them as conclusive.[82] This Part considers the appropriateness of relying on Country Reports in this context, as well as the implications of doing so.

It is important to understand the purpose of these reports to evaluate the appropriateness of relying on them to assess foreign court systems for the purpose of recognizing foreign judgments.[83] Section 116 of the Foreign Assistance Act of 1961 bars development assistance "to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights."[84] Pursuant to this provision, the State Department is required to prepare reports on human rights practices with respect to all U.N. member states addressing a number of specific

78. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/ [hereinafter 2020 COUNTRY REPORTS].

79. Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Cap. Co., No. 156328/2020, 2021 WL 1716424, at *5 (N.Y. Sup. Ct. Apr. 30, 2021).

80. *Id.*

81. Bridgeway Corp. v. Citibank, 201 F.3d 134, 143 (2d Cir. 2000).

82. *See, e.g.,* Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1411-12 (9th Cir. 1995) (discussing other evidence); Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 609-14 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016) (relying on expert testimony); Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 278 n.2 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000) (listing other sources).

83. I am grateful to Professor David Stewart, who previously headed the section within the State Department's Office of the Legal Adviser that prepares the Country Reports, for explaining the process to me. Any errors in describing the process are my own.

84. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified at 22 U.S.C. § 2151n(a)).

matters.[85] Section 502B of the Act additionally prohibits security assistance "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."[86] Pursuant to this provision, the State Department must transmit a report with respect to each country for which it proposes security assistance covering various human rights topics.[87] Because of these statutory mandates, the Country Reports focus on human rights concerns and typically address foreign court systems within that context.[88] In fact, the country reports caution that "they do not state or reach legal conclusions with respect to domestic or international law."[89]

Given the Country Reports' focus on human rights, reliance on the reports to evaluate foreign court systems for other purposes may be misplaced. As Mark Jia has observed, authoritarian legal systems are often "bifurcated."[90] "In routine commercial, civil, and even criminal matters," Jia notes, "bifurcated legal systems will largely conform to modernist principles: the laws will be mostly written, consistent, and clear, and they will be applied by reasonably neutral and competent jurists," whereas "in matters that are more politically consequential, written laws may yield to secret commands and otherwise autonomous judges may begin to resemble political agents."[91] Indeed, China's party officials increasingly expect courts " to resolve a great many of their routine cases in a more consistent and expert fashion."[92] As the Appellate Division noted in *Shanghai Yongrun*, "the reports, which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters, do not

85. 22 U.S.C. § 2151n(d). These matters include the status of internationally recognized human rights; practices regarding coercion in population control; child labor practices; protections for refugees; violations of religious freedom; acts of anti-Semitism; the commission of war crimes, crimes against humanity, and genocide; extrajudicial killings; torture; recruitment of child soldiers; freedom of the press; trafficking in persons; child marriage; and other serious violations of human rights. *Id.* §§ 2151n(d), (f)-(g).

86. *Id.* § 2304(a)(2).

87. *Id.* § 2304(b). The topics include the commission of war crimes, crimes against humanity, and genocide; coercion in population control; violations of religious freedom; acts of anti-Semitism; extrajudicial killings, torture, and other serious violations of human rights; recruitment of child soldiers; and the protection of refugees.

88. *See, e.g.*, U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES HONG KONG, MACAU, AND TIBET) 15 (2021) (discussing Chinese court system under the heading entitled "Denial of Fair Public Trial"); *id.* at 58 (discussing corruption under the heading entitled "Freedom to Participate in the Political Process").

89. 2020 COUNTRY REPORTS, *supra* note 78, APPENDIX A.

90. Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1720 (2020).

91. *Id.*

92. Mark Jia, *Specialized Courts, Global China*, 62 VA. J. INT'L L. 559, 609 (2022).

utterly refute plaintiff's allegation that the civil law system governing this breach of contract business dispute was fair."[93]

It is also worth noting the implications of relying on State Department Country Reports to judge the quality of foreign court systems for countries other than China. In *Shanghai Yongrun*, the New York Supreme Court focused specifically on statements in the 2018 and 2019 Country Reports for China concerning limitations on judicial independence and corruption.[94] The 2020 Country Reports, published in March 2021, expressed similar concerns in one or both of these areas for 141 countries apart from China, including several countries that do significant business with the United States and often produce judgments that parties seek to enforce in the United States.[95] With respect to judicial independence, the 2020 Reports express concerns about 102 countries,[96] including Mexico,[97] Brazil,[98] and Argentina.[99] With respect to corruption, the 2020 Reports express concerns about 133 countries,[100] including Italy,[101] Japan,[102] South Korea,[103] and

93. Shanghai Yongrun Inv. Mgmt Co. v. Maodong Xu, 203 A.D.3d 495 (N.Y. App. Div. 2022).

94. Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Cap. Co., No. 156328/2020, 2021 WL 1716424, at *5 (N.Y. Sup. Ct. Apr. 30, 2021).

95. *See* Baumgartner & Whytock, *supra* note 40, at 149, Appendix A, Figure A-1 (compiling states of origin of foreign judgments for which recognition was sought in the United States between 2000 and 2017).

96. *See Shanghai Yongrun* Amicus Brief, *supra* note 4, Appendix B.

97. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: MEXICO 13 (2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/ ("Although the constitution and law provide for an independent judiciary, court decisions were susceptible to improper influence by both private and public entities, particularly at the state and local level, as well as by transnational criminal organizations.").

98. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BRAZIL 13 (2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/brazil/ ("While the justice system provides for an independent civil judiciary, courts were burdened with backlogs and sometimes subject to corruption, political influence, and indirect intimidation.").

99. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ARGENTINA 7 (2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/argentina/ ("The law provides for an independent judiciary, but government officials at all levels did not always respect judicial independence and impartiality.").

100. *See Shanghai Yongrun* Amicus Brief, *supra* note 4, Appendix C.

101. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ITALY 12 (2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/italy/ ("Officials sometimes engaged in corrupt practices with impunity. There were numerous reports of government corruption during the year.").

102. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: JAPAN 18 (2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/japan/ ("Independent academic experts stated that ties among politicians, bureaucrats, and businesspersons were close, and corruption remained a concern.").

103. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SOUTH KOREA 17 (2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-

Spain.[104] Of course, one might argue that the State Department's concerns are milder for some countries than for others. But this would require U.S. courts to develop standards for telling when the concerns about judicial independence and corruption are sufficiently grave to amount to systemic lack of due process, something courts seem ill-equipped to do.[105] If courts were to take the Country Reports at face value and treats them as conclusive, as the New York Supreme Court did in *Shanghai Yongrun*, the number of countries whose judgments would become unenforceable in the United States would grow considerably.

IV. ALTERNATIVES TO SYSTEMIC REVIEW

If the State Department's Country Reports are unreliable in the context of judgments as Part III has argued, what are the alternatives? It is likely true, as Zachary Clopton has argued that only the federal political branches are institutionally well-equipped to make the kind of systemic judgments that the Uniform Acts call for.[106] Paul Stephan has raised the possibility that courts might look to other lists maintained by the federal government, such as U.S. Treasury sanctions.[107] But such sources have the same drawbacks as the Country Reports because they are not prepared for the purpose of determining whether foreign judgments should be enforced. Donald Clarke has suggested that the federal government could prepare reports targeted to the judgments context.[108] However, such a solution seems impractical without federal legislation. One must recall that *state* law governs the recognition and enforcement of foreign judgments in the United States. Systemic determinations by the federal government would not be binding under the existing Uniform Acts.

It makes more sense for U.S. courts to abandon the attempt to determine whether a foreign court system provides impartial tribunals and procedures compatible with due process and to focus instead on the case-specific grounds for nonrecognition. These include lack of jurisdiction, lack of notice, fraud, public policy, conflict with another final judgment, and

practices/south-korea/ ("Nonetheless, officials sometimes engaged in corrupt practices with impunity, and there were numerous reports of government corruption. Ruling and opposition politicians alike alleged that the judicial system was used as a political weapon.").

104. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SPAIN 22 (2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/spain/ ("Corruption was a problem in the country.").

105. *See supra* notes 56-57 and accompanying text.

106. Clopton, *supra* note 57, at 31-32.

107. Stephan, *supra* note 49, at 88-89.

108. Clarke, *supra* note 74 (manuscript at 93); *see also* Clopton, *supra* note 57, at 40 (citing State Department Country Reports and terrorist financing lists as potential models).

conflict with a dispute resolution clause.[109] In the twenty-nine states that have adopted the 2005 Uniform Act, the case specific grounds also include lack of integrity in the rendering court (*e.g.* corruption) and lack of due process in the particular proceeding.[110] Unlike systemic evaluation, this kind of case-specific analysis falls squarely within the competence of the U.S. courts.[111] It may well be that the case-specific analysis will result in the recognition of fewer judgments from less reliable legal systems.[112] But the case-specific approach avoids the over-inclusiveness of denying recognition on systemic grounds when there are no defects in the judgment before the court.

V. CONCLUSION

The systemic review of foreign court systems is an idea whose time has gone. It might have made sense when *Hilton v. Guyot* was decided in 1895 or even when the first Uniform Act was drafted in 1962. But today, it stands as an "artifact of an age when it was thought that it made sense to split the world up into civilized and uncivilized nations and treat their judgments accordingly."[113] Even if the world was once capable of such clean divisions, it is much messier today. As the examples in Part III show, democratic systems can suffer from a lack of judicial independence and corruption, while autocratic systems can run reliable court systems for commercial cases.

U.S. courts can screen out foreign judgments undeserving of recognition and enforcement by applying the large range of case-specific grounds available under the Uniform Acts. Even if systemic lack of due

109. *See* 2005 UNIFORM ACT, *supra* note 1, § 4; 1962 UNIFORM ACT, *supra* note 2, § 4.

110. *See* 2005 UNIFORM ACT, *supra* note 1, § 4(c)(7)-(8).

111. Clarke objects that courts can use case-specific grounds to police against unfairness "only when they have adequate information." Clarke, *supra* note 74 (manuscript at 90). But if the party resisting recognition cannot prove unfairness in the specific proceeding it is not clear why it should win. Clarke concedes that "not all judgments from China or other illiberal legal systems are tainted," which means that "simply ceasing the enforcement of such judgments will mean injustice to deserving plaintiffs." *Id.* (manuscript at 93).

112. Baumgartner and Whytock found a correlation between indicators for the rule of law, judicial independence, and control of corruption and the recognition of foreign judgments in the United States between 2000 and 2017. Given the rarity of decisions denying recognition on systemic due process grounds, the correlation cannot be explained by direct application of that ground. Baumgartner & Whytock, *supra* note 40, at 143.They suggest that another possibility, the most plausible in my view, is that case-specific defects are less likely to occur in more reliable legal systems and more likely to occur in less reliable ones. *Id.* at 145.

113. Kelly, *supra* note 56, at 582; *see also* Stephan, *supra* note 49, at 87 ("[A]s decolonization took hold around the world, the distinction between civilized and uncivilized countries, and hence between good and bad judicial systems, seemed increasingly untenable").

process remains on the books as a ground for nonrecognition, U.S. courts should give up trying to make such determinations. Indeed, the rarity of U.S. decisions denying recognition on this basis[114] indicates that, for the most part, they already have.

114. *See supra* notes 39-55 and accompanying text.