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Judging China: The Chinese Legal System in U.S. Courts

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JUDGING CHINA: THE CHINESE LEGAL SYSTEM IN U.S. COURTS

*Donald Clarke**

Working Paper

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Abstract

How should American courts understand China's legal system? How *do* they understand it, and are they doing a good job? These questions have become important as economic and social ties between China and the United States have mushroomed since China's days of Maoist isolation. The answers have implications not just for China-related cases, but for way U.S. courts treat authoritarian and illiberal legal systems more generally.

This Article presents the first attempt to answer these questions empirically through an intensive study of all cases in which parties either sought dismissal to China on *forum non conveniens* grounds or sought enforcement of a Chinese judgment. Both types of cases require courts to assess China's legal system. Because it attempts both to collect all relevant cases *and* to read all the relevant underlying party filings and interlocutory as well as final judgments, this Article presents the most complete picture to date of what U.S. courts and litigation parties are actually doing—certainly in China-related cases, and likely to some degree in other transnational cases.

The Article finds that by and large courts do not get good information and often reach questionable conclusions. It finds that the adversarial system is not functioning well, with the strength of party arguments bearing no correlation to outcomes. Moreover, the bad results tend to get baked into the system through their citation in subsequent cases. This has serious implications for the delivery of justice. The Article concludes by offering some paths to a solution.

A shorter version of this Article is forthcoming in the *University of Pennsylvania Journal of International Law*.

Keywords: forum non conveniens, enforcement of foreign judgments, China, Chinese law, civil procedure, transnational litigation

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A note on citation: This Article uses a large dataset of cases and their underlying filings involving motions for *forum non conveniens* dismissal to China and for the recognition and enforcement of Chinese judgments. Because documents other than judgments generally have long titles and can be clumsy to cite, this Article cites documents from the cases in the dataset using a code set off in angle brackets. Information on the reported judgment in each case is provided in Appendix B, and information about the various documents cited is provided in Appendix C.

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1 Introduction

How should American courts understand China's legal system? How *do* they understand it, and are they doing a good job? These questions have become important as economic and social ties between China and the United States have mushroomed since China's days of Maoist isolation, bringing the legal systems of the two countries into closer and more frequent contact. And the answers have implications not just for China-related cases, but for way U.S. courts treat authoritarian and illiberal legal systems more generally. This Article presents the first attempt to answer these questions empirically through an intensive study of all cases—not just judicial opinions, but also filings by the parties—in which parties either sought dismissal to China on *forum non conveniens* (FNC) grounds or sought enforcement of a Chinese judgment.¹ Both types of cases require courts to assess China's legal system. I find that by and large courts don't get good information and often reach questionable conclusions.

Why does this matter? For decades, American policymakers have worked under the assumption that China would be integrated into a set of global rules that were essentially those of the U.S.-dominated global system: there would be convergence. In the last few years, however, it has become increasingly clear that convergence is off the table. In the U.S., both government and non-governmental institutions are reconsidering whether Chinese organizations and procedures actually fit within their existing frameworks. Are employees of the Xinhua News Agency, for example, journalists, or are they instead lobbyists required to register under the Foreign Agents Registration Act?² Are Chinese student associations ordinary affinity groups or rather tools of a hostile foreign government?³

So far most of the attention has been focused on the political aspects of these questions. But the legal aspects are just as important. Legal institutions in the U.S. and elsewhere have generally accepted various types of Chinese entities—companies (including state-owned enterprises), NGOs, and government institutions, including courts—as more or less equivalent to their similarly-named counterparts in liberal democratic countries, or if not equivalent, at least evolving in that direction.

¹ A 2010 law student article examines the specific issue of FNC dismissal to China, arguing that Chinese courts generally constitute an adequate alternative forum, but does not systematically examine all the U.S. cases. See Courtney L. Gould, *China as a Suitable Alternative Forum in a Forum Non Conveniens Motion*, 3 TSINGHUA CHINA L. REV. 59 (2010). Professor Chenglin Liu, in a later article, looks at the same issue but takes the contrary view. See Chenglin Liu, *Escaping Liability via Forum Non Conveniens: ConocoPhillips's Oil Spill in China*, 17 U. PA. J.L. & SOC. CHANGE 137 (2014).

² See, e.g., Kate O'Keeffe & Aruna Viswanatha, *Justice Department Has Ordered Key Chinese State Media Firms to Register as Foreign Agents*, WALL ST. J., Sept. 18, 2018, <https://on.wsj.com/2m8Y4uo>.

³ See, e.g., Owen Churchill, *Chinese Students' Association Loses Status at Canadian University after Protest of Uyghur Activist's Talk Was Allegedly Coordinated with Chinese Consulate*, SOUTH CHINA MORNING POST, Sept. 26, 2019, <https://www.scmp.com/news/world/united-states-canada/article/3030395/student-union-canadian-university-revokes-status> [<https://perma.cc/FWM7-YGDZ>].

Convergence implies that contradictions and ambiguities will gradually decrease, and China will become a regular participant in existing multinational structures. But now that assumption has been thrown into question.

How should the U.S. legal system treat the activities and outputs of the Chinese legal system? How should we understand the significance of court judgments, legislative enactments, and Chinese government statements about what Chinese law does or does not require? These questions are of more than merely theoretical interest. In a wide variety of policy realms—trade and investment, national security, and individual rights, to name a few—U.S. courts and other government institutions increasingly need to decide how to treat the acts and decisions of Chinese legal institutions. Should they automatically enforce Chinese court judgments the way they might enforce Canadian court judgments, or should they insist on taking a fresh look at the case? If a Chinese government agency says that Chinese law requires, does not require, or prohibits some act, should U.S. courts and government agencies take that statement as definitive?⁴ How much power does the Chinese state exercise over ostensibly private firms such as Huawei, and how does it exercise that power?⁵

In principle, these questions are not unique to China; they are specific instances of the more general issues identified by Mark Jia in a recent article on the dilemmas faced by U.S. courts dealing with the laws of authoritarian legal systems:

For an unacquainted jurist, such laws can appear at once familiar but strange, accessible yet elusive. Consider one example. Authoritarian legal systems can contain documents that present as “laws” but are not practically enforced. In such systems, there can exist other norms or prescripts that lack the traditional hallmarks of legality but nonetheless bind with the force of law. Where should judges locate law when the rules as written are not the norms that bind? Do they observe formality and interpret a “law,” even a constitution, that local

⁴ The question of the degree of deference owed to Chinese government statements about its own law, which had been contradictory, went to the Supreme Court in the case of *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018). For a discussion of this case, see Donald Clarke, *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.: Respect but Verify: Foreign Government Statements of Foreign Law Do Not Get Conclusive Deference*, GEO. WASH. L. REV. ON THE DOCKET (October Term 2017), June 21, 2018, <https://www.gwlr.org/animal-science-products-inc/> [<https://perma.cc/6B96-7NKM>]; see also Brief of Amici Curiae Donald Clarke and Nicholas Calcina Howson in Support of Petitioners, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220, slip op. (U.S. June 14, 2018), 2018 WL 1202843 [<https://perma.cc/QBF3-C9FZ>].

⁵ I discuss this question more fully in Donald Clarke, *The Zhong Lun Declaration on the Obligations of Huawei and Other Chinese Companies under Chinese Law* (March 28, 2019), <https://ssrn.com/abstract=3354211> [<https://perma.cc/YLG4-HRC5>].

courts would not dare apply? Or do they apply other prescripts, even if they are unpublished, unwritten, or in other ways so un-law-like as to offend basic legal sensibilities?⁶

China presents this problem in perhaps its most extreme form. And even if there is some decoupling between the U.S. and the Chinese economies, commercial relations are and will remain important, ensuring that these questions will remain salient; questions of Chinese law face U.S. courts vastly more often than questions of the law of other authoritarian countries,⁷ and answering them requires an understanding of China's legal system.

The legal and policy answers to these questions implicate pragmatic considerations of judicial efficiency, international comity, and national security. But they also implicate critical values of fundamental justice. When treating parties fairly requires U.S. courts and other government institutions to assess the Chinese (or any other) legal system, that assessment should be based on facts, not formalisms. But the fundamental issues underlying these questions remain remarkably unexamined within the U.S. legal system. Both legislation and case law dealing with foreign legal systems developed in an era when most transnational litigation involved countries with similar legal systems. Thus, nobody thought it necessary to ask whether the institutions in Germany, France, or Italy with names translated as “court” really were courts, or whether officials labeled “judges” in fact met some satisfactory definition of “judge.” Nobody thought about whether the default presumption should be that a foreign country has a comparable legal system, with the burden of proof on the party claiming otherwise, or instead the other way around.

The post-Mao political and economic emergence of China in the world presents a special challenge to these long-overlooked issues. Elite American opinion seems divided, although surprisingly more on institutional than on ideological lines. In the mainstream press such as the *New York Times*, the *Wall Street Journal*, and the *Washington Post*, it is commonplace to read that Chinese judges do whatever they are told by political superiors and that there is no meaningful judicial independence.⁸ And in a prominent 1992 article, Anne-Marie Slaughter suggested that in cases involving authoritarian states like China,

⁶ Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1687-88 (2020).

⁷ See *id.* at 1696, Table 1 (finding 3,960 cases involving Chinese law, with cases involving Turkish and Russian law coming in second and third at 1,405 and 1,361 cases respectively, in a list of authoritarian countries).

⁸ To take just a few examples from over the years: Stanley B. Lubman, *What China's Wrongful Convictions Mean for Legal Reform*, WALL ST. J., July 17, 2013, <https://www.wsj.com/articles/BL-CJB-18184> (“Judge Zheng accurately described the [current judicial] system as heavily influenced by an ‘outdated Soviet-style model that treats the courts as just another government agency’ in which judges’ decisions are reviewed by court superiors and the courts are financed by local governments, which can interfere with the outcomes of specific case.”); Josh Chin & James T. Areddy, *China Vows to Strengthen Judicial System*, WALL ST. J., Oct. 23, 2014, <https://www.wsj.com/articles/china-vows-to-strengthen-judicial-system-1414065032> (“courts,

[t]he combination of fundamental ideological conflict, the shadow of actual military conflict, and the difficulty of judicial dialogue might reasonably push the courts of liberal states toward the conclusion that cases involving the laws of nonliberal states are literally “beyond law.” Such cases should instead be referred to the political branches for resolution. This initial impulse can in turn give rise to a range of specific outcomes in individual cases, depending on the position of the political branches.⁹

police and prosecutors are controlled by the party”); Julie Makinen, *China’s Ruling Communists Take up “Rule of Law”—Their Way*, L.A. TIMES, Oct. 19, 2014, <https://www.latimes.com/world/asia/la-fg-china-communists-rule-of-law-20141019-story.html> (“introducing Western-style rule of law that would subject the one-party system to independent checks by the judiciary is out of the question”); Tommy Yang, *Chinese Court Posthumously Clears 18-Year-Old Executed for Murder*, L.A. TIMES, Dec. 15, 2014, <https://perma.cc/RS7K-RHGY> (“the judiciary remains under the firm control of the party”); Stanley B. Lubman, *Questions Loom Over China’s Legal Reform Drive*, WALL ST. J., March 17, 2015, <https://www.wsj.com/articles/BL-CJB-26225> (“top judge Zhou Qiang, a supposed reformer, emphasized the need to reject Western notions of ‘judicial independence’ and ‘separation of powers’”); Simon Denyer, *A Broken Lawyer and a Hawkish Judge Cast Deep Pall over China’s Legal System*, WASH. POST, Jan. 21, 2017, <https://perma.cc/7LB7-F8MW?type=image> (“the Communist Party is in firm control of the legal system is hardly new”); Michael Forsythe, *China’s Chief Justice Rejects an Independent Judiciary, and Reformers Wince*, N.Y. TIMES, Jan. 18, 2017, <https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html> [<https://perma.cc/9J7P-Z8N9>] (“Mr. Xi’s comments at a Communist Party work conference two days before the chief justice’s speech had made it clear that he was demanding obedience from the judiciary.”); Gerry Shih, *China Holds a Secret Trial for a Rights Lawyer after 3 Years in Detention. It Backfired*, WASH. POST, Dec. 27, 2018, <https://perma.cc/K6H3-7U56?type=image> (“the Communist Party uses layers of secrecy and a pliant court system to enforce its will”); Gerry Shih, *In China, Many Are Impressed that, Yes, You Can Sue the U.S. Government*, WASH. POST, March 8, 2019, <https://perma.cc/T3XZ-6JWB?type=image> (there are “no independent courts” in China; “There’s no rule of law [in China], only the Party’s law.”); Chris Buckley, *‘Drive the Blade In’: Xi Shakes Up China’s Law-and-Order Forces*, N.Y. TIMES, Aug. 20, 2020, <https://www.nytimes.com/2020/08/20/world/asia/china-xi-jinping-communist-party.html> (“The core goal of cleaning up the political and legal system is also to obey Xi in everything.”). Indeed, so firmly is this idea embedded in the conventional wisdom, not just outside of China but also within it, that Chong-En Bai, a well-known Chinese economist at Tsinghua University, one of China’s top two universities, and by no means a dissident, casually writes in an English-language paper that China lacks “an independent judiciary that enforces contracts and adjudicates commercial disputes[,]” and does not even consider it necessary to back up the statement with a citation. See Chong-En Bai, Chang-Tai Hsieh & Michael Zheng, *Special Deals with Chinese Characteristics* (National Bureau of Economic Research Working Paper No. 25839, May 2019), at 3.

I offer these examples not to prove that what they say is correct, but simply to demonstrate what a consumer of mainstream serious media would read about the Chinese legal system.

⁹ Anne-Marie Burley, *Law among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUMBIA L. REV. 1907, 1921; see also *id.* at 1927-28. While she expressed an interest in “what actually motivates courts and other government officials to treat nonliberal states differently from liberal states[,]”

In his study of illiberal law in U.S. courts, Mark Jia agrees: “Courts are likelier to reject *forum non conveniens* arguments or to make ‘inadequacy’ determinations when the alternative forum is not a liberal democracy.”¹⁰

This Article examines a specific subset of the above issues: how U.S. courts evaluate the Chinese courts, and the Chinese legal system more generally, when the litigation context requires them to do so. It examines a hand-collected dataset of all U.S. federal and state cases in the post-Mao era until mid-2022 in which a party requested dismissal on FNC grounds, with China as the proposed alternative forum. After various exclusions, the dataset contains 60 cases. It also examines a hand-collected dataset of all cases in the same period—fifteen cases, dating from 2009 to 2022—in which U.S. courts were asked to recognize Chinese judgments in some way.¹¹ I read not only the opinions at each level in each case, but also the relevant underlying filings such as briefs and expert witness reports. To the best of my knowledge, no other study of FNC or judgment-enforcement cases attempts to collect all relevant cases *and* to read all the relevant underlying documents. Thus, this Article presents the most complete picture to date of what U.S. courts and litigation parties are actually doing—certainly in China-related cases, and likely to some degree in other transnational cases.

I find that whatever may be the case with other authoritarian states, when it comes to China, the expectations noted above do not appear to be borne out. American judges, who presumably regularly read the accounts in the mainstream press, in practice generally seem to take the opposite view: they tend to be skeptical of arguments that judicial independence is seriously compromised or that due process is denied,¹² even in the face of official State Department reports to the contrary, and have been willing to require plaintiffs to try their luck in Chinese courts even when they are suing the Chinese government or their claim would, if supported, be highly embarrassing to it.

This trend is troubling. The procedural and statutory norms followed by U.S. courts represent legislative and judicial choices about the correct trade-off among a number of values such as justice, efficiency, and liberty. There is no *a priori* reason to think that Chinese institutions have made the same choices, and in fact they have not. But U.S. courts are using (or declining to use) the

what this Article finds is that courts very often do *not* treat the nonliberal Chinese state differently from liberal states.

¹⁰ Jia, *supra* note 6, at 1706.

¹¹ My most recent search for cases was in the Westlaw database on June 12, 2022.

¹² See, for example, the discussion of the *Group Danone* case at p. 45, *infra*. In that case, a federal judge granted *forum non conveniens* dismissal to China, while stating that dismissal to another country would not be appropriate where the courts of that country were “controlled by a dictatorship”—thus implicitly making the startling finding either that China is not a dictatorship or that although it is a dictatorship, its government does not control the courts. See <FNC-012a Danone 090227>, at 24.

coercive power of the state to implement those choices, in circumstances in which they would not have the statutory or constitutional authority to do so in solely domestic cases.¹³

This Article proceeds as follows. Part 2 discusses general issues faced by U.S. courts when dealing with foreign legal systems, including the concept of comity and whether foreign law and legal systems should be considered issues of fact or of law. Part 3 briefly introduces key aspects of the Chinese legal system. Part 4 introduces the doctrine of *forum non conveniens* and its critics, and reviews a dataset of U.S. cases in which parties have sought dismissal on FNC grounds, arguing that China was a superior forum. I find that the criticisms are largely borne out empirically. Part 5 introduces the doctrines relating to the recognition and enforcement of foreign judgments (REFJ) and looks at a dataset of cases in which parties have asked U.S. courts to recognize a Chinese commercial judgment. I examine the evidence and reasoning in individual cases and find that, as in the FNC cases, courts are making decisions on very thin evidence. Part 6 provides a summary and proposals, and Part 7 concludes.

2 Foreign Legal Systems in U.S. Courts

China presents a specific instance of more general challenges posed to U.S. courts when faced with the products of foreign legal systems. Moreover, these challenges tend to run through all the areas of law canvassed in this Article. This Part will serve as a preface to the discussion of China-related issues by examining the general challenges that lie behind them.

2.1 *Comity: Does It Prohibit U.S. Courts from Passing Judgment on Foreign Legal Systems?*

The issue of comity often arises when U.S. courts and other governmental institutions are dealing with the Chinese legal system. Comity can be generally defined as “deference to foreign government actors that is not required by international law but is incorporated in domestic law.”¹⁴ In the context of this Article, comity is a slightly narrower concept; in the language of one court, it is “a principle in accordance with which the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect.”¹⁵

The key element is that its application by courts is essentially voluntary; it is a consideration that courts may, but need not, allow to drive their findings of fact and law. Comity does not require courts to make decisions a certain way in any of the circumstances discussed in this Article; it does

¹³ This is a general framing of a more specific and debated issue: whether U.S. courts may constitutionally enforce foreign judgments that would be unconstitutional if domestically sourced. See the discussion at note 404, *infra*.

¹⁴ William S. Dodge, *International Comity in American Law*, 115 COLUMBIA L. REV. 2017, 2078 (2015); *see also* Thomas Schultz & Niccolo Ridi, *Comity in U.S. Courts*, 10 NORTHEASTERN U. L. REV. 280 (2018).

¹⁵ *Bobala v. Bobala*, 33 N.E.2d 845, 849 (Ct. App. Ohio 1940).

not, for example, require courts to grant motions to dismiss on FNC grounds or to enforce foreign judgments, or to make particular findings of fact or law in the course of those proceedings.¹⁶

Why have comity? The justifications have shifted over time. Before the 20th century, comity was typically justified in terms of commercial convenience to private parties,¹⁷ but since the start of the last century, public interest rationales centering around foreign relations concerns have become dominant.¹⁸ Thus, Justice Holmes in *American Banana Co. v. United Fruit Co.*¹⁹ stated that the extraterritorial application of the Sherman Act “not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.”²⁰ In *Oetjen v. Central Leather Co.*,²¹ the Supreme Court said that the act of state doctrine rests “upon the highest considerations of international comity and expediency” and that to question the validity of a foreign act of state “would very certainly ‘imperil the amicable relations between governments and vex the peace of nations.’”²² And the foreign relations justification, often phrased in terms of reciprocity, is the one generally cited by present-day scholars:

As others have noted, a U.S. court’s characterization of a foreign judicial system as inadequate can have collateral consequences. It may antagonize the government in question, complicating its relations with the United States in unforeseeable and potentially unfortunate ways. It could provoke retaliation, including a refusal of that jurisdiction’s courts to enforce U.S. judgments.²³

It is important to understand not just the meaning of comity, but the justifications for it as well, in order to evaluate its invocation by courts in the cases canvassed in this Article. As we shall see, courts often pronounce themselves unwilling to assess, or even prohibited from assessing, the quality of a foreign legal system, or required to accord unquestioning deference to a foreign

¹⁶ See *id.* at 2122-23.

¹⁷ See generally *id.* at 2095-96.

¹⁸ See Dodge, *supra* note 14, at 2096-98.

¹⁹ 213 U.S. 347 (1909).

²⁰ *Id.* at 356.

²¹ 246 U.S. 297 (1918).

²² *Id.* at 303-04 (quoting, without citing, *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895)).

²³ Paul B. Stephan, *Unjust Legal Systems and the Enforcement of Foreign Judgments*, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 88 (Paul B. Stephan ed. 2014) (internal citations omitted). See also Brief for Amici Curiae George Bermann et al. in Support of Plaintiff-Appellant, Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co., Case No. 2021-01637 (N.Y. S. Ct. App. Div., Nov. 4, 2021) [hereinafter Yongrun Amicus Brief] (arguing that New York state court judgment denying recognition would, if not reversed, lead to non-recognition of U.S. judgments in China).

government's statements of its own law,²⁴ as to do otherwise would allegedly violate the principles of comity.

This raises at least three questions. First, how far does the principle of comity actually require such deference? Second, is there any reason to believe that the predicted adverse consequences of not being deferential will in fact follow?²⁵ Third, should the demands of comity ever override the demands of justice? It is important to recall that in virtually every FNC case, for example, the court already, under federal or state law duly enacted by representative legislatures and consistent with constitutional principles of due process, has jurisdiction. In other words, lawmakers thought it was appropriate for the court to exercise jurisdiction over the defendant.

Tracing the history of some of the common phrases used by courts in declining, on comity grounds, to evaluate a foreign legal system shows how bad law can become embedded in the system through the careless use of isolated phrases from cases that do not support the propositions in support of which they are adduced.

Consider the following example. In a 2016 case, a Florida district court granted dismissal to China on FNC grounds, rejecting the plaintiff's arguments about the inadequacy of China as a forum with the statement, "Absent a showing of inadequacy by a plaintiff, 'considerations of comity preclude a court from adversely judging the quality of a foreign justice system.'"²⁶

This statement is problematic in three ways. First, it gets the burden of proof in FNC doctrine wrong. It is for those moving for FNC dismissal (that is, defendants) to show that the foreign jurisdiction is adequate, not for plaintiffs to show that it is not. Second, it acknowledges that a plaintiff is allowed to make a showing of inadequacy, which means that the court could indeed end up adversely judging the quality of a foreign justice system; the statement says in effect that except when it does, it mustn't. Finally, as discussed below, a number of areas of law other than FNC motions do require courts to assess, and possibly to adversely judge, the quality of a foreign legal

²⁴ This was the position of the Second Circuit in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 837 F.3d 175 (2016), *rev'd and remanded*, 138 S. Ct. 1865 (2018); for a discussion of the difficulties in this case, which involved contradictory statements from the Chinese government about its own law, see note 4, *supra*.

²⁵ See, e.g., Diego Zambrano, *Foreign Dictators in U.S. Court*, 88 U. CHI. L. REV. 157, 163 (2022) ("Although courts worry about the separation of powers and the foreign affairs consequences of judging foreign dictators, there is no convincing evidence that these cases have presented difficulties in the past.").

²⁶ *Jiangsu Hongyuan Pharmaceutical Co. v. DI Global Logistics Inc.*, 159 F. Supp. 3d 1316, 1330 (S.D. Fla. 2016).

system—for example, REFJ cases²⁷ and deportation cases where a Convention Against Torture defense is raised.²⁸

Tracing the source of the quoted language shows just how inapposite it is. The entire quoted phrase comes from a 2009 Second Circuit case in which the court made that pronouncement while nevertheless reversing the lower court’s grant of FNC dismissal to Nigeria.²⁹ The Second Circuit in turn got its language from a 1998 Second Circuit case affirming FNC dismissal to Indonesia,³⁰ and that court cited *Flynn v. General Motors*, a 1992 case granting FNC dismissal to the courts of Trinidad and Tobago.³¹ *Flynn*, however, did not use abstract language, but instead referred specifically to the comity due to the courts of that particular country.

Finally, the *Flynn* court itself did not make up the proposition, but got it from *Murty v. Aga Khan*, a 1981 case involving FNC dismissal to France.³² The court stated, “Principles of comity *as well as common knowledge* preclude our characterizing the French judicial system as any less fair than our own; the French courts can be expected to protect American litigants.”³³ And it cited a book on the French judicial system that stated, “The French administration of justice, far more than the Anglo-American, has become a model abroad,”³⁴ as well as other complimentary sources.

In short, from the small acorn of a statement about the comity due to France, a country that the court viewed as having a model legal system, has grown an unruly oak of an abstract and general doctrine mandating that courts must not pass judgment on the legal system of any country, including China.

Alternatively, consider another oft-quoted phrase in FNC and REFC cases from a federal court in the 1976 case of *Jhirad v. Ferrandina*: “It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.”³⁵

²⁷ As Paul Stephan remarks, “Ever since *Hilton v. Guyot* crystallized U.S. doctrine on the recognition and enforcement of foreign judgments, a receiving court has had to evaluate the quality of the rendering court’s judicial system.” Stephan, *supra* note 23, at 84 (internal citations omitted).

²⁸ See text accompanying notes 51-53, *infra*. For a more exhaustive discussion of all the areas of law in which U.S. courts are called upon to pass judgment on foreign legal systems, see Zambrano, *supra* note 25.

²⁹ *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir.2009).

³⁰ *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 73 (2d Cir. 1998).

³¹ *Flynn v. General Motors*, 141 F.R.D. 5, 9 (E.D.N.Y. 1992).

³² *Murty v. Aga Khan*, 92 F.R.D. 478 (E.D.N.Y. 1981).

³³ *Id.* at 482 (emphasis added).

³⁴ HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 271 (3d ed. 1975).

³⁵ *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (1976).

As with the previous statement, this one is simply wrong as a descriptive matter. In many areas of law, it may well be the business of courts to “supervise the integrity of”—in other words, to evaluate or pass judgment upon—the judicial system of another sovereign nation.

Second, the statement was made in the context of an extradition case *governed by a treaty* between the United States and India. In other words, the President, with the approval of two-thirds of the Senate, had *already made a determination* that the legal system of India passed muster, so the court’s reluctance to find otherwise is not only understandable but perhaps even necessary. The quoted language was then used in a subsequent case, *Chesley v. Union Carbide Corp.*,³⁶ in which the plaintiffs cast doubt on the ability of the Supreme Court of India to competently manage a compensation fund for victims of the Bhopal disaster, who were of course also Indian. Again, the case for a U.S. court interposing itself between an Indian government institution and Indian citizens on a domestic Indian matter is quite weak.

But having made its way from *Jhirad* to *Chesley*, the language then appeared in a FNC case involving the question of whether the Russian legal system offered an adequate alternative forum. Quoting the language from *Jhirad* and *Chesley*, the court found that it would be “inappropriate for it to pass judgment on that system,” even while—remarkably—accepting as quite possibly true the defendant’s claims that “the Russian legal system is corrupt and riddled with political influence[.]”³⁷ And finally, the language ended up being cited hopefully in the plaintiff’s briefs in a case examined here about whether a Chinese judgment should be enforced.³⁸

Finally, some statements of judgment-enforcement doctrine itself contradict these court statements. For example, the *Restatement (Third) of the Foreign Relations Law of the United States* asserts that “[e]vidence that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition.”³⁹ And a federal court in 2015 stated that “United States courts routinely deny comity to courts in countries where the judicial system is well-recognized to be corrupt and lacks impartiality.”⁴⁰

³⁶ *Chesley v. Union Carbide Corp.*, 927 F.2d 60 (1991).

³⁷ See *Pavlov v. Bank of New York*, 135 F. Supp. 2d 426, 433-34 (S.D.N.Y. 2001).

³⁸ <ECJ-010 Global 121015>, at 9.

³⁹ *Restatement (Third) of the Foreign Relations Law of the United States*, Sec. 482, Comment b.

⁴⁰ *Commissions Import Export S.A. v. Congo*, 2015 WL 13667748, at *2 (D.D.C. July 6, 2015) (declining to recognize Congolese orders putting the plaintiff into liquidation because the orders “were the result of highly questionable, and perhaps even fraudulent, proceedings”).

2.2 Assessments of Foreign Legal Systems in U.S. Courts

As shown above, relevant doctrines clearly allow, and may even require, courts to pass judgment on foreign legal systems. And courts actually do so routinely and unapologetically.⁴¹ Courts have found entire legal systems wanting in Bolivia,⁴² Ecuador,⁴³ Liberia,⁴⁴ Indonesia,⁴⁵ Iran,⁴⁶ Morocco,⁴⁷ and Nicaragua.⁴⁸ And noted Seventh Circuit judge Richard Posner, in a 2000 opinion,⁴⁹

⁴¹ See, e.g., Clopton, *infra* note 127, at 22 (“In sum, despite protestations against sitting in judgment of an act of state or public law, U.S. courts are willing to sit in judgment of an entire foreign legal system and, at times, deem it biased, corrupt, or uncivilized.”).

⁴² *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla.) (holding that corruption in Bolivian justice system precluded dismissal of action on FNC grounds).

⁴³ *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445, 455-56 (D. Del. 1978). Judge Rakoff of the Southern District of New York also expressed considerable concern about the independence and fairness of Ecuadorian courts in *Aguinda v. Texaco, Inc.*, 2000 WL 122143 (S.D.N.Y. 2000) (memorandum order).

⁴⁴ See *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999) (Liberian “justices and judges served at the will of the leaders of the warring factions, and judicial officers were subject to political and social influence”).

⁴⁵ See *In re Perry H. Koplik & Sons, Inc.*, 357 B.R. 231, 239-44 (Bankr. S.D.N.Y. 2006) (citing State Department report establishing that the judicial system was systematically corrupt).

⁴⁶ See *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1409 (9th Cir. 1995). The *Bank Melli* case is somewhat limited; by its terms, it condemns the Iranian legal system as unable to provide due process, but it is possible to read its holding as applying only with respect to the specific defendant, the sister of the former Shah.

⁴⁷ See *DeJoria v. Maghreb Petroleum Expl. S.A.*, 38 F. Supp. 3d 805 (W.D. Tex. 2014). The court commented:

[T]he Moroccan royal family’s commitment to the sort of independent judiciary necessary to uphold the rule of law has and continues to be lacking in ways that raise serious questions about whether any party that finds itself involved in a legal dispute in which the royal family has an apparent interest—be it economic or political—in the outcome of the case could ever receive a fair trial.

⁴⁸ See *Osorio v. Dow Chemical Co.*, 635 F.3d 1277 (11th Cir. 2011). In *Osorio*, the 11th Circuit upheld a District Court ruling denying recognition to a Nicaraguan judgment for \$97 million in favor of 97 Nicaraguan agricultural workers against Dow Chemical Company and Dole Food Company for pesticide injuries. The District Court found, among other infirmities, that the judgment was “rendered under a system which does not provide . . . procedures compatible with the requirements of due process of law” and that it was “rendered under a system which does not provide impartial tribunals,” in both cases using the language of the relevant statute. The 11th Circuit, in upholding the ruling, specifically declined to adopt the District Court’s finding regarding “impartial tribunals,” but did not specifically decline to adopt its finding about the system’s lack of due process. See *id.* at 1279.

⁴⁹ See text accompanying note 191, *infra*.

casually condemned Cuba, North Korea, Iran, Iraq, and Congo as nations “whose adherence to the rule of law and commitment to the norm of due process are open to serious question[.]”⁵⁰

In deportation proceedings, federal courts must evaluate claims under the Convention Against Torture⁵¹ that the judicial system to which the deported party will be subject is one that is likely⁵² to torture him. In so doing, they may end up saying something offensive about a foreign legal system. To see what courts were saying about China, I found and examined twelve cases involving appeals from administrative findings of deportability to China. In five of the twelve cases, the administrative finding was upheld and the petitioner was deported. All other cases were remanded to fix whatever error in the proceedings the appeals court had identified.

Very few petitioners made much of an effort to press Torture Convention claims. They raised them desultorily and often failed to include arguments about them in their briefs. But the issue of the Chinese legal system still came up, because the courts were often considering claims for asylum at the same time. They showed no reluctance to talk about evidence of torture and lack of due process in the Chinese system. The word “comity” appeared in no cases, and “respect” only in the phrase “with respect to.” Richard Posner in particular pulled no punches:

China has a dismal human-rights record, and Lian . . . presented evidence, none of which the immigration judge mentioned, that, in the words of Amnesty International, “torture is widespread and systemic” in China.⁵³

In short, the claim the U.S. courts must not pass judgment on the legal systems of China or other nations is simply incorrect both as a matter of doctrine and as a description of actual practice.⁵⁴

⁵⁰ *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

⁵¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention].

⁵² The United States Senate voted to ratify the Torture Convention with the specific understanding that “substantial grounds” should mean “more likely than not,” see 136 CONG. REC. 36,198 (1990), and it is settled law that the standard also applies to Torture Convention assessments in deportation proceedings. See *Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004).

⁵³ *Yi-Tu Lian v. Ashcroft*, 379 F.3d 457, 460-61 (7th Cir. 2004) (internal citations omitted).

⁵⁴ It is worth noting that courts in other common-law jurisdictions have not shied away from making assessments of China’s judicial system when the context required it. In *Minister of Justice v. Kim*, [2021] NZSC 57, <https://perma.cc/NV85-37UV>, New Zealand’s Supreme Court undertook a detailed analysis of the possibility of torture in China. The case is discussed in Donald Clarke, *New Zealand’s Troubling Precedent for China Extradition*, LAWFARE, June 15, 2021, <https://www.lawfareblog.com/new-zealands-troubling-precedent-china-extradition> [<https://perma.cc/W9QV-QS4F>], and Anna High & Andrew Geddis, *Diplomatic Assurances as a Basis for Extradition to the People’s Republic of China*, 2021 NEW ZEALAND L.J. 226, <https://perma.cc/L8VK-ANML>.

2.3 Foreign Legal Systems: Fact or Law?

Whether an issue is one of fact or law can make an important difference in legal proceedings. Factual issues generally cannot be settled before trial on the basis of the pleadings alone, and cannot be appealed after it. Legal issues, by contrast, can be settled by the court itself without the necessity of a trial; the court may consult “any relevant material or source,” in the language of Federal Rule of Civil Procedure 44.1, and such consultation can take place at the pre-trial stage. It is simple enough to say that whether Chinese contract law adopts the mailbox rule is a question of law. But what about the questions critical to FNC and REFJ proceedings: the fairness of the Chinese legal system or specific proceedings within it. Is that a question of fact or of law?

In the case of *Global Material*,⁵⁵ the defendant argued that the determination of whether the specific Chinese proceedings in question were fair was a quintessentially factual matter that could be decided only after the taking of evidence, and therefore should not be resolved on the basis of the pleadings alone—a pre-trial stage. The court agreed that the fairness of the specific proceedings was a factual issue, but held that it was not relevant: “The focus, rather, should be on the procedures afforded by the Chinese judicial system as a whole.” And it held at the same time that whether a particular judicial system *as a whole* is fundamentally biased or unfair is not a question of fact; it is a question about the law of a foreign nation.⁵⁶

This holding, as applied by the court, cannot be correct. First, it is hard to square with the holding that the fairness of particular proceedings is a question of fact. But more importantly, it reflects a mistaken assumption that the law reflects actual practice in some meaningful even if imperfect way. It is reasonable to think about a foreign country’s *law*—whether, for example, there is a law prohibiting this or that—as a question of law suitable for an American judge to decide. But whether a foreign *judicial system* offers fair procedures and an independent judiciary are not questions of foreign law, because the point is not whether the foreign system *promises* fair procedures and an independent judiciary in its law. The point, for a court deciding whether to enforce a foreign judgment, is whether those fair procedures and independent judiciary were *actually present* when the foreign judgment was made. It cannot be that an inquiry into whether bribery or extrajudicial

Less recently, Canada’s court system had to grapple with the same issue in the case of *Lai Changxing. See Sing [sic] v. Canada*, 2011 CarswellNat 2846, 2011 CarswellNat 4333, 2011 FC 915, 2011 CF 915, 205 A.C.W.S. (3d) 189, 36 Admin. L.R. (5th) 183 (2011) and the case history cited therein. On the Lai story generally, see Mark MacKinnon, *Lai’s Sentencing Marks the End of China’s Great Gatsby*, GLOBE & MAIL, May 18, 2012, <https://www.theglobeandmail.com/news/world/lais-sentencing-marks-the-end-of-chinas-great-gatsby/article4186792/> [<https://perma.cc/865K-3EN3>].

⁵⁵ <ECJ-010 Global>. The case is discussed more fully below at text accompanying note 250.

⁵⁶ See <ECJ-010 Global 150501> at 8 (citing *Society of Lloyd’s v. Ashenden*) (citing F.R.C.P. 44.1); *Pittway Corp. v. United States*, 88 F.3d 501, 504 (7th Cir.1996); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2446 (1995)).

interference affected the outcome can be short-circuited by a showing that the law of the country in question forbids bribery and extrajudicial interference.

Nor do the Federal Rules of Civil Procedure require otherwise. It is true that Rule 44.1 says that questions of foreign *law* shall be considered, for procedural purposes, as questions of law:

In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

But Rule 44.1 does *not* state that whether a foreign legal system is impartial, provides adequate due process, is incorrupt, etc. are questions of foreign law. To view these as questions of law is to hold that if the law of a foreign country *says* proceedings shall be impartial, then it must be that they are. But the point of the inquiry called for by the Uniform Acts is not to find out what is *supposed* to be true; it is to find out what is *actually* true. It is impossible to suppose that the drafters or enactors of the Uniform Acts would approve of enforcing judgments from countries where the tribunals are not *actually* impartial and do not *actually* provide due process. This is a quintessentially factual question.

Moreover, the sources cited in the *Global Materials* opinion in support of its conclusion do not actually support it. The primary source cited, *Society of Lloyd's v. Ashenden*,⁵⁷ does indeed support its conclusion.⁵⁸ But *Ashenden* is itself flawed because the authorities it cites for that proposition do not actually support it. Instead, they simply support the banal proposition that questions of foreign law are questions of law that may be resolved by resort to “any relevant material or source.” They do not say that whether a foreign legal system is impartial or offers adequate due process is itself a question of law.

This unfortunate conflation of “law” with “judicial system” is reflected in the sometimes excessive emphasis courts give to written law. Fortunately, in federal courts at least, the problem is mitigated by the fact that Rule 44.1, while deeming matters related to a foreign country's legal system to be matters of law instead of fact, nevertheless provides that those matters may be proved by “any relevant material or source.” This means that parties can bring before the court not just their arguments, but also sworn statements from expert witnesses or others with knowledge of the case as well as documents of various kinds, such as news reports, academic articles, legal texts, and governmental reports. But a court must be willing to pay attention.

Importantly, it also means that the court can conduct its own research and need not rely on submissions from the parties. But courts are unlikely to have the time and resources to conduct this research in a way that does more than scratch the surface.

⁵⁷ 233 F.3d 473 (7th Cir. 2000).

⁵⁸ *Id.* at 477.

Ultimately, the best statement on this issue comes from Justice Harlan in his concurrence in *Zschernig v. Miller*,⁵⁹ when he stated, with reference to state courts, “When there is a dispute as to the content of foreign law, the court is required under the common law to treat the question as one of fact and to consider any evidence presented as to the actual administration of the foreign legal system.” At that time Rule 44.1 was already in effect for federal courts, but his reference is to the common law, and in any case Harlan’s main point is not about the distinction between law and fact, but rather that courts are required in many circumstances to inquire into how a foreign legal system actually operates. He specifically included the recognition of foreign judgments among those circumstances.

3 China’s Legal System: A Brief Introduction

Because this Article is about how courts assess the Chinese legal system, a brief description of salient aspects of that system—in particular the courts—for those unfamiliar with it is in order.⁶⁰

China is a highly authoritarian, one-party Leninist state, and the one party is the Chinese Communist Party (CCP or Party). The Party sits above and controls all of the Chinese government, including the judiciary,⁶¹ monopolizing state political power to the extent that scholars often refer to the Chinese “party-state” precisely because of the uselessness of attempting to draw a line between the two.

There are no checks and balances on the CCP’s power. There is no separation of powers or independence between government institutions, including the judiciary, and the CCP. When a decision is made by the CCP (or a CCP official in a suitably authoritative position), that decision is to be executed, including by the judiciary.

⁵⁹ 389 U.S. 429, 461 (1968). In *Zschernig*, the Supreme Court reversed the Oregon Supreme Court’s application of an Oregon statute on inheritance on the grounds that the statute “seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own” and “illustrate[s] the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.” 389 U.S. at 440, 441. According to Professor Swaine, *Zschernig* is not generally followed and is essentially a dead letter. See Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1145 (2000). Professor Carodine disagrees. See Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1193-95 (2007) and sources cited therein.

⁶⁰ This Article is not the place for a fully developed account of China’s legal system. I state my own views more fully in *Order and Law in China*, 2022 U. ILL. L. REV. 541. For a brief account of scholarly debate with citations to sources, see *id.* at 546.

⁶¹ See, e.g., Ling Li, *The Chinese Communist Party and People’s Courts: Judicial Dependence in China*, 64 AM. J. COMP. L. 37 (2016); Yu Xingzhong, *Judicial Professionalization in China: From Discourse to Reality*, in PROSPECTS FOR THE PROFESSIONS IN CHINA 78, 87-88 (William P. Alford, Kenneth Winston & William C. Kirby eds. 2011) (“The CCP exercises total control of the courts, treating them as useful instruments for the realization of its policies and goals.”).

The very structure of the Chinese legal system, and the political system of which it is a part, do not provide for an independent judiciary. This is a matter not of accident or mistake, or of the unavoidable imperfections of any human institution. It is a matter of deliberate design. The principles of separation of powers and mutual checks and balances in general, and that of judicial independence in particular, are officially denounced as “wrong ideology from the West” that must be resisted.⁶²

From whom or what are Chinese courts not independent, then? First and foremost, courts are not independent of the CCP. This is true both as a matter of fact and as a matter of openly declared policy. The Party explicitly asserts its leadership over all state affairs—indeed, over all of society, whether state-affiliated or not. China’s top leader, Xi Jinping—who combines the largely ceremonial role of President with the much more significant position of General Secretary of the CCP—made this unmistakably clear in a recent speech:

Party leadership in all matters must be upheld. In the Party, in the government, in the military, in civil society, in education; north, south, east, west, and center—the Party is to lead everything.⁶³

In May of 2013, an article by a prominent Chinese law professor appeared in an official Party journal, stating that any judicial independence is qualified by the requirement that courts “in politics, ideology, and organization accept the leadership of the Communist Party.” The article went on to deny that courts should simply put the law and the constitution first; courts also had to give a primary position to the Communist Party’s mission and to “the interests of the people.”⁶⁴ So

⁶² See Liu Caiyu, *Top Justice Warns Against “Western Trap” of Judicial Independence*, GLOBAL TIMES (China), Jan. 15, 2017, <https://perma.cc/3E68-Q95A> (reporting speech by Supreme People’s Court President Zhou Qiang; Michael Forsythe, *China’s Chief Justice Rejects an Independent Judiciary, and Reformers Wince*, N.Y. TIMES, Jan. 18, 2017, <https://nyti.ms/2k3yPH7>; Li Xiaowei (李晓伟), “*Sifa Duli*” Haishi “*Duli Sifa*”: *Zuo Gao Fa Lingchen Fa Bo Chanming Zhengjie* (“独立司法”还是“司法独立”: 最高法凌晨发博阐明正解) [*“Independent Adjudication” or “Judicial Independence”: The Supreme People’s Court Tweets in the Early Hours to Expound the Correct Understanding*], ZHONGGUO QINGNIAN WANG (中国青年网) [CHINA YOUTH NET], Jan. 16, 2017, <https://perma.cc/9SVP-5ZLB>.

⁶³ Xi Jinping (习近平), *Juesheng Quanmian Jiancheng Xiaokang Shehui, Duoqu Xin Shidai Zhongguo Tese Shehuizhuyi Weida Shengli—Zai Zhongguo Gongchan Dang Di Shijiu Ci Quanguo Daibiao Dahui de Baogao* (决胜全面建成小康社会 夺取新时代中国特色社会主义伟大胜利—在中国共产党第十九次全国代表大会上的报告) [Decisively and Completely Establish a Moderately Prosperous Society, Seize a Great Victory for Socialism with Chinese Characteristics in the New Era—Report at the Nineteenth National Congress of the Communist Party of China], Oct. 18, 2017, <https://perma.cc/PHF2-J94H>.

⁶⁴ See Yang Xiaoqing (杨晓青), *Xianzheng yu Renmin Minzhu Zhidu zhi Bijiao Yanjiu* (宪政与人民民主制度之比较研究) [*Comparative Studies on Constitutionalism and People’s Democratic System*] (May 21, 2013, 14:29), http://news.xinhuanet.com/politics/2013-05/21/c_124742859.htm [<https://perma.cc/88WA-MEFZ>, <https://perma.cc/3ZQA-95YW> (screenshot view)].

fundamental is the principle of non-independence that teachers in China are now under official pressure to stop even talking about judicial independence.⁶⁵

In short, both the facts on the ground as well as statement after official statement by the government amply show that judicial independence is not an actual or even potential feature of China's judicial system. Moreover, both the executive and the legislative branches of the United States federal government concur. As the 2017 Annual Report of the Congressional-Executive Commission on China notes, “[T]he Party continued to exert power over the judiciary, undermining the independence of courts and the rule of law in China[.]”⁶⁶ The State Department's Bureau of Consular Affairs states flatly that “[t]he judiciary [in China] does not enjoy independence from political influence.”⁶⁷

Chinese judges, therefore, are not independent arbiters of fact and law. They do not occupy a special position within the government that is beyond or separate from the government itself. They are bureaucrats not essentially different from bureaucrats in other government departments.⁶⁸ In the words of Kwai Hang Ng and Xin He, the authors of the most comprehensive study on Chinese courts, based on extensive fieldwork, including participant observation and interviews:

[T]he Chinese judiciary cannot even be described as being subservient to the executive, in the way that some European courts are It *is* part of the executive, and above all, a weak executive branch.⁶⁹

The CCP exercises its control over the judiciary through a variety of institutional channels. Among these are the Party's Political-Legal Committees (PLCs), which exist at various administrative levels of the party-state. A given PLC has jurisdiction and effective control over all the state organs of coercion—including courts, police, and prosecution—at its same administrative level,

⁶⁵ See Benjamin Carlson, *7 Things You Can't Talk About in China*, GLOBAL POST (June 3, 2013), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/china/130529/censorship-chinese-communist-party> [<https://perma.cc/55RT-F3HX>]; Chris Buckley, *China Takes Aim at Western Ideas*, N.Y. TIMES, Aug. 19, 2013, <http://nyti.ms/QKwXzS> [<https://perma.cc/78KH-HVJ3>].

⁶⁶ CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, ANNUAL REPORT 2017 (2017), at 235.

⁶⁷ U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, *Country Information: China*, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/China.html> [<https://perma.cc/H4DL-JGF7>] (last visited Jan. 22, 2022).

⁶⁸ See Yu, *supra* note 61, at 90 (“[T]he Chinese judiciary is more like an administrative system than a judicial system composed of independent courts and independent judges.”).

⁶⁹ KWAI HANG NG & XIN HE, EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA 168 (2017) (emphasis added).

and its responsibility is to direct and coordinate the actions of such organs.⁷⁰ To take an analogy from American institutions at the federal level, it is as if the federal courts, the FBI, and federal prosecutors all took orders from the same body. In the Chinese system, they are all seen as engaging in the same task, something that might for the sake of efficiency suggest a division of labor, but not a separation of powers.

Local political authorities typically exercise their power over courts and other coercive arms of the Party-state through PLCs, but the larger point is that local political authorities, whether or not acting through PLCs, have traditionally had control over all aspects of court operations, including appointment of judges, operating expenses, judges' salaries, and housing and employment for judges' family members.⁷¹ A Chinese judge of a particular court has no security of tenure and holds office at the pleasure of Party-state authorities at the same administrative level; their appointment and dismissal is subject to the control of the Party's personnel appointment system. Thus, court officials, including judges, must listen to CCP leaders and others with political clout. These facts are well known to all scholars of the Chinese legal system.

Study after study has shown that courts favor locally powerful interests. In one case studied by Ng and He, a prominent local company was involved in a contract dispute with a defendant from another province, and therefore with no local influence. So arrogant was the locally-powerful plaintiff that it refused even to send a representative to court proceedings; court officials had to go to the plaintiff's office and beg executives there to sign various court documents.⁷² Another scholar analyzed a 4,000-case dataset, supplemented with interviews with officials, judges, firm managers, and lawyers, to conclude that in commercial litigation, "firms use voice and exit to influence court decisions, and . . . judges bow to the pressures of local fiscal imperatives."⁷³ He writes,

⁷⁰ See, e.g., Yuhua Wang, *Relative Capture: Quasi-Experimental Evidence from the Chinese Judiciary*, 51 COMP. POLITICAL STUDIES 1012, 1014 (2018) ("China has a fragmented bureaucratic structure in which the judiciary answers to the territorial party-state (horizontal authority) rather than a higher level court (vertical authority).") (internal citations omitted); see also *id.* at 1017-18.

⁷¹ This system is currently undergoing some experimental reform, with control over judicial appointments and court budgets being moved to superior levels of government. These reforms have so far been carried out only in certain places, and have not reached the point where the relevant laws, which currently provide for fully local control, have been amended. The reforms do not change the picture of accountability and subservience to political authority; at most they change the *level* of political authority to which a given court and its judges are accountable and subservient.

⁷² See NG & HE, *supra* note 69, at 102-03.

⁷³ Wang, *supra* note 70, at 1015.

My interviews with government and court officials indicate that they are largely responsive to these business requests, especially when the businesses are important taxpayers. A judge explicitly told me, “You need to follow the money.”⁷⁴

A 2015 analysis of over 3,000 commercial litigation cases found

robust empirical evidence that firms’ political connectedness, in the form of state ownership or management’s personal political ties in private firms, is associated with better court outcomes. This likely reflects the fact that the state uses its nonindependent judiciary to redistribute wealth from parties that are not politically favored to those that are.⁷⁵

Judges are also subject to the directions of superior officials within their court. Chinese courts at all levels have within them, as part of their inherent structure, Adjudication Committees composed of the President of that court, other senior judges and court officials, and in at least some cases local Party officials from outside the court system entirely.⁷⁶ Adjudication Committees are the highest decision-making body within any given court, and they have the power to make final decisions regarding the substantive resolution of cases—even if their views override the views of the trial judge who actually presided over the trial. As a result, there is a common phrase that commentators on the Chinese judiciary frequently recite: “Those who try the case do not decide it, and those who decide the case do not try it” (*shenzhe bu pan, panzhe bu shen*). As Prof. Ji Weidong put it bluntly, “Internally, judges have no independence in ruling on individual cases.”⁷⁷

Adjudication Committees exist not to resolve knotty legal problems, but rather to provide political oversight to court decisions in order to ensure that such decisions conform to political and bureaucratic imperatives. Legal considerations are at best secondary. Indeed, senior court officials are typically *less* qualified to tackle legal issues than junior officials: empirical research shows that as seniority goes up within a court, the importance of professional credentials such as education goes down.⁷⁸ As one scholar has noted, “committee membership signifies high social status, [but] it cannot necessarily reflect one’s legal qualifications” because “many members of the adjudication committee have never had formal legal education and are not career judges.”⁷⁹

⁷⁴ *Id.* at 1033.

⁷⁵ Haitian Lu, Hongbo Pan & Chenying Zhang, *Political Connectedness and Court Outcomes: Evidence from Chinese Corporate Lawsuits*, 58 J. L. & ECON. 829, 857 (2015).

⁷⁶ See NG & HE, *supra* note 69, at 107.

⁷⁷ Ji Weidong, *The Judicial Reform in China: The Status Quo and Future Directions*, 20 IND. J. GLOBAL LEGAL STUD. 185, 189 (2013). Professor Ji is the Dean of KoGuan Law School at Shanghai Jiao Tong University.

⁷⁸ See *id.* at 189.

⁷⁹ Chenglin Liu, *Escaping Liability via Forum Non Conveniens: ConocoPhillips’s Oil Spill in China*, 17 U. PA. J.L. & SOC. CHANGE 137, 167-68 (2014). It is worth noting tangentially that in the case discussed in this article, in which the author served as an expert witness, the defendant escaped liability not via *forum non*

A study by one scholar who was (quite unusually) granted access to the records of an entire year's worth of Adjudication Committee proceedings in one court found that, in fact, the court president was almost the sole decision-maker on the committee, and that committee decisions were driven heavily by what local Party and government officials wanted. In other cases, political elites would simply call court leaders directly and the order would be passed on to the judges hearing the case, bypassing the committee altogether. The study found no evidence that the quality of judicial decisions was improved through review by the Adjudication Committee.⁸⁰

Adjudication Committees (like PLCs) are supposed to limit their review to cases that are sensitive, complex, or otherwise difficult. But, as with PLCs, this is a vague standard that allows Adjudication Committees to address whatever cases they consider appropriate.

The combination of political, economic, and institutional factors described above means that PLCs and powerful officials can literally instruct Chinese courts how to handle particular cases, and superior officials within a court can tell the judges actually hearing a case how to handle it. As one judge reported to academic researchers,

I once heard a division head say the following in a division meeting: “When you sit on a trial, you report to me, I report to the president. We always report to our superiors. Don’t try to think that since you’re the judge, you can make the decision. If that’s the case, what’s the point of having me as the head?”⁸¹

This practice of interference is common and indeed normal. Judges interviewed by Ng and He for their book on courts regularly spoke of such interference and made no attempt to hide its existence. When instructions do come from a superior to a court or a specific judge, they are typically result-oriented and without legal reasoning. The due process problems inherent in a judicial system that allows cases to be decided in a result-oriented manner, without legal reasoning, by persons not presiding over the case, are obvious.

In addition to the pressures to which they are subject for political reasons, Chinese judges are also subject to pressures for personal reasons. Corruption and bribery are serious problems,⁸² to which a relaxed attitude to the boundaries between the personal and the professional is a major contributor. *Ex parte* contacts are common:

conveniens but rather through the plaintiffs’ failure to state a claim. See *Peiqing Cong v. ConocoPhillips*, 250 F. Supp. 3d 229 (S.D. Tex. 2016) (dismissing for failure to state a claim without discussion of FNC motion).

⁸⁰ See Xin He, *Black Hole of Responsibility: The Adjudication Committee’s Role in the Chinese Court*, 46 LAW & SOCIETY REV. 681 (2012).

⁸¹ NG & HE, *supra* note 69, at 117.

⁸² See, e.g., Ling Li, *Corruption in China’s Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS IN GLOBAL RULE OF LAW PROMOTION 196 (Randall Peerenboom ed. 2010); see also Ling Li, *The “Production” of Corruption in China’s Courts: Judicial Politics and Decision-Making in a One-Party State*, 37 LAW & SOCIAL INQUIRY 848 (2012).

For example, when judges visit litigants at home to conduct an investigation, they are often invited to stay for a banquet with litigants. Many scholars studying the Chinese legal system, including ourselves, have seen and reported the practice of judges meeting over dinner with disputants and their counsel to talk informally about business related to the case.⁸³

Even when no money changes hands, Chinese courts and judges are embedded in a web of social and professional relations, both with their superiors within the court and with persons outside the court, including relatives, friends, and (for example) former professors. These relationships cannot be ignored. Just as a request from a superior in the court to decide a case a certain way cannot be ignored, so must requests from close friends and relatives be accommodated if at all possible. This bias is such a normal part of the system that judges freely acknowledge it to outside academic researchers such as Ng and He:

One judge with eight years of experience in a Shenzhen court said, “I have friends, fellows from the same home town, and classmates too; so does everyone. They may contact me for procedural convenience or substantive favors. But overall, the requests are reasonable and I will try my best. In most situations no money is involved in return.” . . . Another young judge from Shanghai said, “In some cases, I have to tilt toward a particular party because they are friends of relatives or friends of friends.” . . .

Another judge in his early 50s from an urban court said, “I feel both obligated and obliged for requests from my supervisors. If I cannot satisfy the requests, it seems that I did not do my job well. But if I do, it is good for me and my development. For requests from my strongly tied friends, I feel bad if I cannot help.”⁸⁴

It is difficult to predict whether any specific institution or person will interfere with any specific case, but cases that commonly trigger interference include cases that have international ramifications, cases that could have an impact on social stability, politically sensitive cases, cases involving parties with economic, social, or political clout, and cases for which there are no clear rules, regulations, or policies. In international cases, external interference almost always favors the local party.

The point of this summary and necessarily selective description of features of the Chinese legal system is not to suggest that Chinese courts can never provide due process or deliver justice. It is to show that in any given case, regardless of how innocuous or apolitical it may appear, the mechanisms for improper and undetectable interference are present, whether or not they are actually used.

⁸³ NG & HE, *supra* note 69, at 143.

⁸⁴ NG & HE, *supra* note 69, at 156-57, 159.

4 Forum Non Conveniens

In this section of the Article, I examine cases where a party moves for dismissal of a lawsuit on FNC grounds, arguing that the case is more appropriately heard in a Chinese court. The purpose is twofold. First, I want to see how U.S. courts understand the Chinese legal system. What materials do they use, and do they get it right? Second, I want to see to what extent various critiques of the doctrine of FNC are borne out in the China cases.

4.1 Introduction: The Doctrine of Forum Non Conveniens

4.1.1 Outline of the doctrine

Forum non conveniens is the name for a doctrine under which a court may, at the judge's discretion, dismiss a case over which it has jurisdiction⁸⁵ because it believes the case is better heard in a different court. In other words, the dismissal is not for want of jurisdiction over the subject matter or the parties—which would mean the court *could not* hear the case—but rather because the court *does not wish* to hear the case.⁸⁶

That a court could decide at its own discretion not to hear a case over which the law has given it jurisdiction may sound strange, and indeed the doctrine has been criticized on those grounds.⁸⁷ But that is at present the law in the United States.

The Latin name is a *faux ami*. The doctrine is not—or at least did not start out as—a doctrine about convenience. It has its roots in 19th-century Scottish case law, where it was originally pleaded by defendants under the name of *forum non competens*. But that was also a misleading name, since the arguments advanced under this name were not about the competence of the tribunal to hear the case, but rather about whether it was the *appropriate* or *suitable* (not “convenient”) forum; *forum non conveniens* was about not mere inconvenience, but actual injustice.⁸⁸ The doctrine was rechristened “*forum non conveniens*” by 1883, but the test remained the same: “The burden of proof

⁸⁵ In *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), the Supreme Court resolved a circuit split by ruling that a court could dismiss on FNC grounds before deciding the issue of personal jurisdiction, but in general personal jurisdiction exists in FNC cases.

⁸⁶ In the more legalistic language of a leading American case, “The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

⁸⁷ Those trained in the civil law jurisdictions of continental Europe, for example, “find this idea abhorrent. For them, it is anathema that a judge entrusted with the competence and responsibility to decide a dispute should have the option to decline to fulfil that function. They regard it is being a simple matter, if a judge has jurisdiction then he must exercise it. For the civilian lawyer, a judge either is or is not competent to hear a case.” David Cluxton, *Getting FNC Back on the Right Track: A Critical Re-Evaluation of the Federal Doctrine of Forum Non Conveniens*, 41 U. HAWAII L. REV. 72, 73 (2018).

⁸⁸ See *id.* at 76-77; Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 414-15 (2017).

rested on the defendant and the threshold for sustaining the plea was high, a hardship, or unfair disadvantage, amounting almost to an injustice was required and, as such, its successful pleading was to be exceptional.”⁸⁹

In 1947, the Supreme Court, in *Gulf Oil Co. v. Gilbert*,⁹⁰ endorsed the use of *forum non conveniens* in federal courts. *Gilbert* was a domestic, interstate dispute: a Virginian plaintiff sued a Pennsylvanian corporation in New York over a warehouse fire in Virginia. Affirming the lower court’s dismissal of the case on FNC grounds, the Court stated the test still used in federal courts today.

Starting from the premise that the plaintiff’s choice of forum “should rarely be disturbed,” the Court set forth a non-exhaustive list of public and private interest factors that should be balanced to determine whether dismissal is warranted.⁹¹

A 1981 case, *Piper Aircraft v. Reyno*,⁹² extended the domestic doctrine to transnational cases by modifying the initial presumption in two ways. First, it held that a foreign plaintiff should receive less deference than a domestic plaintiff in its choice of forum. Second, and more importantly for the purposes of this Article, it held that the foreign forum must be *adequate* and *available* before a case could be dismissed for FNC. Adequacy and availability has thus become the first prong of the FNC test, which must be passed before moving to the second prong of private and public interest balancing.

The Court made this test easy to meet, however. Availability is satisfied if the defendant is “amenable to process,” and is typically satisfied if the defendant promises not to contest jurisdiction.⁹³

Adequacy is satisfied unless the potential remedy offered by the proposed alternative forum is “so clearly inadequate . . . that it is no remedy at all,” such as “where the alternative forum does not permit litigation of the subject matter of the dispute.”⁹⁴ This, in the *Piper* court’s view, would be so

⁸⁹ Cluxton, *supra* note 87, at 78.

⁹⁰ 330 U.S. 501 (1947).

⁹¹ See Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 403 (2017) (quoting *Gilbert*, 330 U.S. at 508) (private interest factors); *id.* at 404 (quoting *Gilbert*, 330 U.S. at 508-09) (public interest factors); see also Cluxton, *supra* note 87, at 90.

⁹² 454 U.S. 235 (1981).

⁹³ See Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUMBIA L. REV. 1444, 1456-57 (2011). This can be an empty promise if, in the foreign court, any element of jurisdiction is not an affirmative defense that must be raised by the defendant, but rather a matter that a court may or must determine on its own regardless of the parties’ wishes, like subject-matter jurisdiction in U.S. federal courts.

⁹⁴ *Id.* at 1457 (quoting *Piper*).

only “[i]n rare circumstances.”⁹⁵ The fact that the remedy may be limited and less than that available in the plaintiff’s original chosen forum is not decisive.⁹⁶

As the foreign forum in *Piper* was Scotland, the Court’s application of concepts such as “amenable to process” and “availability of remedy” to the foreign forum as if they would yield knowledge of reality was understandable. But as we shall see, to apply such concepts uncritically to a very different and poorly understood legal system such as that of China is much more dangerous.

Moreover, by the time *Piper* was decided, the intuitive (but wrong) translation of the Latin term “*conveniens*” had entirely overwhelmed its original meaning. *Piper* stated that “the central focus of the *forum non conveniens* inquiry is convenience.”⁹⁷ Thus, the burden on defendants is considerably less than when the doctrine originated.⁹⁸

Sometimes plaintiffs will make broader arguments about the foreign forum’s procedures—for example, that courts do not provide due process, lack impartiality, or are corrupt or otherwise subject to improper influences (for example, from powerful government officials). In response to such allegations, courts have generally adopted a “no-scrutiny” approach or a “minimal scrutiny” approach.⁹⁹

The no-scrutiny approach, as the name suggests, simply refuses to consider such arguments, considering it off-limits to inquire into the quality of another nation’s court system: “Provided that some remedy is potentially available there, the adequacy standard is satisfied—even if the foreign judiciary is corrupt or incompetent, or lacks independence or due process, or is otherwise unlikely to offer a fair hearing.”¹⁰⁰ In a 2004 case, for example, a federal court refused to consider social science data about the Argentine judiciary on the grounds that to do so would constitute impermissible supervision of “integrity of the judicial system of another sovereign nation[.]”¹⁰¹ It insisted that “[o]nly evidence of actual corruption in a particular case will warrant a finding that an alternate forum is inadequate”¹⁰²—but of course such evidence could not be found in any case at the FNC

⁹⁵ *Id.* at 1457.

⁹⁶ See Gardner, *supra* note 91, at 405.

⁹⁷ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981); see also *id.* at 256 (“[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient . . .”).

⁹⁸ See Gardner, *supra* note 88, at 415.

⁹⁹ See Whytock & Robertson, *supra* note 93, at 1457-58.

¹⁰⁰ *Id.* at 1458.

¹⁰¹ *Warter v. Bos. Sec., S.A.*, 380 F. Supp. 2d 1299, 1310-11 (S.D. Fla. 2004). The provenance of this language and the inaccuracy of the statement are discussed at text accompanying note 35, *supra*.

¹⁰² *Id.*

stage, since it has not yet been heard in the foreign forum.¹⁰³ Evidence of corruption in one court is not, in FNC cases, accepted as evidence that it could happen in the court to which the case is to be dismissed.

The minimal scrutiny approach is a bit more sympathetic to plaintiffs:

[O]ne court has suggested that whether a foreign judiciary is adequate for *forum non conveniens* purposes depends on whether the plaintiff is “able to have his claims adjudicated fairly (i.e. is the judiciary corrupt)” and whether plaintiff can “litigate his claims safely and with peace of mind (i.e. free from threats of violence and/or trauma connected with the particular claims).” According to another, a foreign court may fail the adequacy standard if “conditions in the foreign forum . . . plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein.”¹⁰⁴

But this is a hard row for plaintiffs to hoe. In an evolution away from *Piper*, courts have, as a matter of practice and regardless of the doctrine, imposed on plaintiffs the burden of showing inadequacy.¹⁰⁵ Sometimes they have even openly done so as a matter of law: in one case involving China, the district court said approvingly, “Many courts have presumed the adequacy of the alternative forum and placed at least the burden of production on the plaintiff to establish otherwise.” This statement was deemed unobjectionable on appeal.¹⁰⁶ Another federal court in a case involving China stated:

In this Circuit, an alternative forum is “presumed ‘adequate’ unless the plaintiff makes some showing to the contrary,” through, for example, “substantiated . . . allegations of serious corruption or delay.” . . . [W]hile defendants do have the “ultimate burden of persuasion” to establish adequacy, they bear this burden only where the plaintiff substantiates its allegations of corruption or delay.¹⁰⁷

¹⁰³ As one scholar remarked of this Kafkaesque result,

The current construction of the *forum non conveniens* test creates a paradox for the plaintiff: to rebut the defendant’s assertion, the plaintiff has to show specific evidence that the proposed foreign court will not provide due process in the case at issue before the trial takes place. How can the plaintiff prove something that has yet to occur?

Liu, *supra* note 79, at 140.

¹⁰⁴ Whytock & Robertson, *supra* note 93, at 1458-59 (internal citations omitted).

¹⁰⁵ See 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3828.3, at 684-85 (3d ed. 2007); Megan Waples, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475, 1497 (2004).

¹⁰⁶ <FNC-026 Synutra 100329>.

¹⁰⁷ <FNC-049 Hongyuan 160205>.

Under this standard, it is clear that the more opaque a foreign court system is, the easier it will be for the court to find adequacy, since plaintiffs will be unable to carry their burden. How, for example, could a plaintiff substantiate to a court's satisfaction allegations that courts in North Korea, a notoriously opaque jurisdiction combining elements of Leninism with those of absolute monarchy, were subject to political influence and lacked independence? Although the standard is contrary to the spirit of a recent Supreme Court pronouncement that the degree of deference owed to a foreign legal system should depend in part on that system's transparency,¹⁰⁸ courts tend to demand allegations and evidence about the specific court that will hear the case and do not welcome statements about the system in general.¹⁰⁹ In the words of the Eleventh Circuit, "[T]he argument that the alternative forum is too corrupt to be adequate 'does not enjoy a particularly impressive track record.'"¹¹⁰

Scholars have found that the law of FNC is somewhat inconsistent. State courts generally follow the federal doctrine, but there is significant variation among states¹¹¹ and the federal doctrine itself is applied differently in different circuits.¹¹² The briefs in the cases reviewed for this Article make it clear that there are plenty of cases supplying language that defendants can quote suggesting that the bar for FNC dismissal is quite low, and there are plenty of cases that plaintiffs can quote suggesting the opposite.

4.1.2 Critiques of FNC

The doctrine of FNC has long been criticized, with one scholar recently suggesting its outright abolition.¹¹³ In particular, the extension of its application from domestic to transnational

¹⁰⁸ See *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865, 1873 (2018).

¹⁰⁹ 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3828.3, at 682 (3d ed. 2007).

¹¹⁰ *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2002).

¹¹¹ See William A. Dodge, Maggie Gardner & Christopher Whytock, The Many State Doctrines of *Forum Non Conveniens* 6 (Feb. 21, 2022), <https://papers.ssrn.com/abstract=4060356>:

Even today, when the majority of states use a doctrine similar or identical to that of [the federal courts], a third of the states continue to chart their own doctrinal course.

For example, New York and Delaware permit FNC dismissal even if there is no adequate alternative forum. See *id.* at 7. The authors argue that state FNC doctrines are converging. It is important to recognize, however, that the doctrines enunciated by state appellate courts do not necessarily describe what state courts are actually doing. To take a simple example, doctrine in most jurisdictions states that FNC dismissals should be "rare". But everyone who has systematically reviewed the cases has found they are not. See notes 125-126, *infra*, and accompanying text.

¹¹² Cluxton, *supra* note 87, at 74 & 152-53.

¹¹³ Gardner, *supra* note 91. For a list of scholarly sources critical of FNC, see *id.* at 395 n.23; Liu, *supra* note 79, at 143 n.52 (2014).

cases has been faulted on the grounds that the easy assumption that procedures and remedies are largely similar and fair across state lines cannot be uncritically applied to other countries, and courts lack the institutional capacity to inform themselves to the degree necessary for a critical application. As one scholar observed,

Transnational litigation is complex, both factually and legally. Judges face institutional constraints in trying to identify, for example, how much discovery a foreign court would permit or what a foreign sovereign's interests are in a particular case. Those institutional constraints—of time and resources and information—are particularly acute in the context of threshold procedural questions. Yet *forum non conveniens*, a threshold procedural inquiry, asks judges to make a whole series of complex evaluations about the availability of foreign evidence, the level of foreign interest in a case, and the content of foreign law. Further, those determinations are left to the judge's broad discretion and are subject only to highly deferential review. That fundamental combination of complexity, institutional constraints, and discretion will pressure the doctrine to evolve towards excluding too many cases from U.S. courts.¹¹⁴

To the issues of law in the above quotation should be added a number of what are essentially factual issues, in particular the likelihood that the court to which the case is dismissed will in practice be able to give the plaintiff a fair hearing, untainted by corruption, political influence, or simply judicial incompetence. It is a lot to ask judges to figure this out. The strain on judicial capacity leads judges to rely on holdings or even dicta in prior opinions, “leading to string citations that can lock in those factors.”¹¹⁵ This is particularly true in the China cases, with briefs and expert declarations amassing dozens of lines of string citations. The very structure of common law reasoning—its path dependency—means that an ill-considered decision or principle in one case becomes stronger, not weaker, over time:

This learning effect is not limited to hierarchical authority, either; district court judges routinely consider how other district court judges have handled similar cases, whether out of efficiency concerns, habit, reputational effects, or a professional commitment to the consistent development of the common law. This path dependence is the vehicle through which the choice of rubrics, the miscalibration of tests, and the ossification of difficult factors become baked into the doctrine itself.¹¹⁶

¹¹⁴ Gardner, *supra* note 91, at 418 (internal citations omitted).

¹¹⁵ *Id.* at 421.

¹¹⁶ *Id.* at 421-22 (footnotes omitted); see also Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 989 (2017) (“[C]ourts have set a high bar for finding another country's courts to be inadequate and then relied on prior decisions' findings of foreign court adequacy, leading to a self-reinforcing cycle based largely on judges' intuitions.”); see generally Oona Hathaway, *Path Dependence in the Law*, 86 IOWA L. REV. 101 (2001).

This phenomenon is clearly visible in the China cases, which frequently invoke *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*,¹¹⁷ a Supreme Court case resolving a circuit split over an obscure point of civil procedure in which the adequacy of China as a forum was neither before the Court nor the subject of any argument or evidence offered by the parties. Nevertheless, largely because of a single sentence—dictum at that—in Justice Ginsburg’s opinion,¹¹⁸ it has become the poster child for dismissal on FNC grounds to China.¹¹⁹ And although adequacy of the foreign forum is technically considered a matter of law and not—as I believe it should be—a matter of fact, current Supreme Court doctrine considers the decision to be within the discretion of the trial court, reversible only for a clear abuse of discretion,¹²⁰ even though matters of law are ordinarily reviewable on a *de novo* basis.

The result of all this has been some questionable decisions. For example, in one 2012 case, a federal district court in California held that Pakistan offered an adequate alternative forum despite the plaintiff’s quite reasonable concerns about kidnappings and terrorism targeted at U.S. citizens there.¹²¹ In a 2008 case, survivors of a terrorist attack in Egypt were told to go back to the site of the attack to pursue their claims.¹²² In 2009, a district court in Florida found Colombia to be an adequate (albeit “imperfect”) forum in spite of credible allegations that a paramilitary group was threatening lawyers and judges.¹²³ In 2000, the First Circuit even found Cali, Colombia to be an adequate forum despite a State Department warning against travel to Colombia and to Cali in particular.¹²⁴

If courts are finding foreign fora adequate in such cases, it stands to reason they are probably finding them adequate in less extreme cases as well. And indeed, despite the doctrinal instruction that FNC dismissal is to be granted “rarely,” in practice it seems far from rare. Empirical studies have

¹¹⁷ 549 U.S. 422 (2007).

¹¹⁸ “This is a textbook case for immediate *forum non conveniens* dismissal.” 549 U.S. at 435. The element that made it a textbook case was not, however, that dismissal was to China, but rather related to the issue before the Court: whether the question of personal jurisdiction should be decided prior to the question of FNC dismissal.

¹¹⁹ See the discussion at text accompanying note 166, *infra*.

¹²⁰ See *Piper Aircraft v. Reyno*, 454 U.S. 235, 257 (1981) (“The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion[.]”); Gardner, *supra* note 91, at 422-23; Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 749-52 (1982).

¹²¹ See *Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1075 (C.D. Cal. 2012).

¹²² See *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 336-37, 347 (S.D.N.Y. 2008).

¹²³ See *In re West Caribbean Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. 2009).

¹²⁴ See *Irragori v. International Elevator, Inc.*, 203 F.3d 8 (1st Cir. 2000).

found a FNC dismissal rate in federal courts of between 40 and 50 percent.¹²⁵ Furthermore, given that courts can deny FNC dismissal for reasons other than inadequacy, courts find foreign fora adequate 82 percent of the time, denying for inadequacy only 18 percent of the time.¹²⁶

In assessing the cases of FNC dismissal to China, it is worth keeping in mind for comparative purposes cases where plaintiffs have succeeded in getting the FNC motion denied on grounds of inadequacy of the foreign forum.¹²⁷ In 1982, a court denied dismissal because of concerns over the independence of the Chilean judiciary,¹²⁸ and in 1983, a district court judge wrote, “I have no confidence whatsoever in the plaintiffs’ ability to obtain justice at the hands of the courts administered by Iranian mullahs.”¹²⁹ In 1995, Indian courts were found to have “intolerable” delay;¹³⁰ in 1997, Croatia was found inadequate due to instability and delay;¹³¹ in 1997, the Bolivian judicial system was found to be “too corrupt”;¹³² in 2007, the Philippine judicial system was found inadequate due to excessive filing fees;¹³³ And both Ghana¹³⁴ and Indonesia¹³⁵ were found too risky to send plaintiffs there to try their luck.

Most intriguingly, in 1997, a federal court found that Taiwan was not an adequate forum because the defendant was 48%-owned by the Taiwanese government, and the court for that reason

¹²⁵ See Gardner, *supra* note 116, at 984 (“[S]cholars worry that courts grant motions to dismiss for forum non conveniens close to 50% of the time.”); Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT’L L. 157, 168 (2012) (48% dismissal rate between 2007 and 2012); Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 INDIANA L.J. 1059, 1077 n.108 (2010) (41% dismissal rate between 1982 and 2007).

¹²⁶ See Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICHMOND J. GLOBAL L. & BUS. 513, 526, tables 4 & 5 (2009).

¹²⁷ The cases in this paragraph are cited in Zachary D. Clopton, *Judging Foreign States*, 94 WASH. U. L. REV. 1, 20 (2016). I have not independently researched further cases.

¹²⁸ See *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1342-43 (S.D.N.Y. 1982).

¹²⁹ *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff’d*, 767 F.2d 908 (2d Cir. 1985).

¹³⁰ *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995).

¹³¹ See *Sablic v. Armada Shipping Aps.*, 973 F. Supp. 745, 748 (S.D. Tex. 1997).

¹³² *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085 (S.D. Fla. 1997).

¹³³ See *Henderson v. Metro. Bank & Trust Co.*, 502 F. Supp. 2d 372 (S.D.N.Y. 2007).

¹³⁴ See *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996).

¹³⁵ See *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 29 (D.D.C. 2005).

openly doubted the ability of the judiciary to adjudicate the case fairly.¹³⁶ As we shall see, more recently courts have had no difficulty in dismissing to China even though Chinese government interests, both economic and political, were involved, and even though Chinese courts are incomparably less independent now than Taiwanese courts were in 1997, ten years after martial law had been lifted and Taiwan was already considerably into its democratic transition.

These problems matter because despite the courts' comforting themselves that plaintiffs can still get their day in court abroad, the fact is that dismissal for FNC often means dismissal, period. Plaintiffs typically do not refile in foreign courts after FNC dismissal; they either settle on terms favorable to the defendants or they give up. One (admittedly old) study found that only 14.5 percent of personal injury plaintiffs and 16.6 percent of commercial plaintiffs filed suit abroad after losing FNC motions at home.¹³⁷

4.2 Description of Dataset

This Article looks at U.S. FNC cases involving China. The dataset is a hand-collected set of all U.S. federal and state cases in the post-Mao era until mid-June 2022 in which a party requested dismissal on FNC grounds, with China as the proposed alternative forum. While I cannot be sure I have found all cases, I am confident that I have found all or the vast majority of reported cases.¹³⁸ I have even found a few unreported cases. I am aware of only one case that was a likely candidate for the dataset but for which I have been unable to find more information.¹³⁹

Occasionally I came across cases that had been cited in briefs or decisions as China cases, but that in fact involved dismissal in favor of Hong Kong or Taiwan, which are of course quite different legal jurisdictions. In one case the defendant argued successfully for dismissal to Japan, with neither

¹³⁶ See *Sangeorzan v. Yangming Marine Transp. Corp.*, 951 F. Supp. 650, 654 (S.D. Tex. 1997) (“The Court means no disrespect to the Taiwanese courts, but it has doubts about the ability of the government courts to fairly and justly decide claims against a government money-making enterprise.”).

¹³⁷ See David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction”*, 103 LAW QUARTERLY REV. 398 (1987).

¹³⁸ By “reported cases,” I mean any case a report of which appears in the Westlaw database.

Reported FNC cases do not, of course, give us a complete picture of what we would like to see. Some decisions are not reported and cannot be found. At other times, a party may perceive that such a motion would be a waste of money, and so does not bring it at all. Nevertheless, neither of these problems is fatal. First, there is no reason to believe that the non-reported cases differ systematically from the reported cases. Second, the focus of this article is precisely *how courts decide these cases*. Thus, the cases that are not brought are of no interest in this particular study.

¹³⁹ The case is *Shaklee (China) Company Limited v. Nature's Sunshine Products*, heard by the Third Judicial District Court, Salt Lake City County, Utah, and probably decided in 2018. An email to one of the attorneys involved in the case has so far gone unanswered, and I can find no trace of it on Westlaw or on the Bloomberg Law database.

parties' briefs even mentioning China, but the court in its decision found China as well as Japan to be an adequate alternative forum.¹⁴⁰ As neither the parties nor the court presented any arguments or evidence for this finding, I did not include the case in my dataset.

The decision to include or exclude certain other cases required a more subjective judgment. In some federal cases, the defendant brought a FNC dismissal motion but won on the grounds of lack of diversity. Generally, I was unable to find a subsequent refiling by the plaintiffs in state court, although it is not clear to me why plaintiffs would not try their luck there. Where the FNC motion was not judged on its merits, I did not include the case.

In twelve cases, the plaintiff was suing on a contract that had a forum selection clause, either in China or in the United States.¹⁴¹ In all cases, the courts followed the forum selection clause in either granting (seven cases)¹⁴² or denying (five cases)¹⁴³ the FNC motion. Both the results of the cases and an examination of the opinions show that in all but one case courts considered the forum selection clause to be decisive, and paid little or no attention to arguments about the adequacy of China as a forum.¹⁴⁴ This is consistent with the doctrine: where a forum selection clause is involved, the court in considering a FNC motion may assess only the public interest factors, not private interests or adequacy.¹⁴⁵ Consequently, I have (with the exception noted below) excluded those cases from the dataset.

In one of those cases, which involved a forum selection clause designating China,¹⁴⁶ the court granted the motion to dismiss on FNC grounds and not on the grounds of the forum selection clause. This is a curious approach, since the forum selection clause offered an easy solution to the case, whereas deciding on FNC grounds requires much more information and analysis. Although it

¹⁴⁰ See *Quanta Computer Inc. v. Japan Communications Inc.*, 2016 WL 11620515 (Cal. Super. 2016), *aff'd*, 21 Cal. App. 5th 438, 230 Cal. Rptr. 3d 334 (Cal. App. Ct. 2018).

¹⁴¹ These cases end up as FNC cases because if a forum selection clause specifies jurisdiction X and the plaintiff files suit in jurisdiction Y, the procedural way for the defendant to enforce the forum selection clause is to make a FNC motion. See *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Ct. for the W. Dist. of Texas*, 571 U.S. 49 (2013).

¹⁴² See <FNC-049 Hongyuan>, <FNC-074 Liu>, <FNC-084 Rattler>, <FNC-085 Genzon>, <FNC-086 Willis>, <FNC-088 Zurich>, <FNC-089 Lu>.

¹⁴³ See <FNC-021 Fairchild>, <FNC-023 Celanese>, <FNC-031 Instep>, <FNC-048 Masimo>, <FNC-059 IntelliCAD>.

¹⁴⁴ In some decisions, the term “adequacy” or “adequate” did not appear at all. See, e.g., <FNC-086 Willis 210125>, <FNC-088 Zurich 220418>.

¹⁴⁵ See *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Ct. for the W. Dist of Texas*, 134 S. Ct. 568, 582 (2013).

¹⁴⁶ <FNC-074 Liu>.

is hard to believe that the forum selection clause played no role in the decision, I am obliged to take it as it presents itself, and therefore have not excluded it from the dataset.

I have also excluded from the dataset two cases in which the plaintiff sought enforcement of an arbitration award.¹⁴⁷ In both those cases, the court denied the motion, reasoning that in agreeing to arbitration, the defendant had made its own bed and must lie in it, and that FNC, or its constituent factors, were not in any case valid defenses to the enforcement of an arbitration award. Therefore, the court did not seriously consider the adequacy issue and a finding either way would be dictum.

I excluded from the dataset one case I came across in which, although the court's analysis in substance canvassed the factors in FNC doctrine, neither the parties nor the court appear ever to have raised it, and the court dealt with the issues solely in terms of a motion to dismiss—which it denied—for lack of personal jurisdiction.¹⁴⁸ If included, this case would count as a precedent against FNC dismissal to China. I also excluded other cases in which defendants moved for FNC dismissal but the court dismissed the case on other grounds, either denying the motion as moot, granting it as a tacked-on alternative basis for dismissal but without discussing of any of the FNC factors, or simply not addressing it at all.¹⁴⁹

After these exclusions, the dataset contains 60 cases; in two of these cases (one federal and one state), the court decided in favor of FNC dismissal in the case of one defendant or issue and against it in another, so when I am discussing the outcome of motions instead of cases the numbers will in some circumstances add up to 62. Federal cases greatly outweigh state cases 49 (82%) to 11 (18%); in almost all of the federal cases, jurisdiction was based upon diversity.

Once I found a case, I tried to read as much of the filings related to the FNC motion as I could. In most cases, the relevant filings were available in the Bloomberg Law database, which extracts documents from the PACER system. (In some cases a few filings were available on Westlaw, but that availability was spotty and inconsistent.) I then coded the cases for various characteristics. Some of these characteristics were objective: was the motion granted or not? Some were subjective:

¹⁴⁷ *Crescendo Maritime Co. v. Bank of Communications*, 2016 WL 750351 (S.D.N.Y. 2016); *Estate of Ke Zhengguang v. Stephany*, 2020 WL 886146 (D.C. Md. 2020).

¹⁴⁸ *See American Induction Technologies v. KBK, Inc.*, 2012 WL 12888112, at *10 (C.D. Cal. Apr. 17, 2012) (questioning whether a party could obtain an effective remedy in a Chinese court).

¹⁴⁹ *See Kim Man Wai v. York Yuan Yuan Zhu*, 2021 WL 214207 (N.D. Cal.) (dismissing for lack of proper service and denying FNC motion as moot); *Peiqing Cong v. ConocoPhillips*, 250 F. Supp. 3d 229 (S.D. Tex. 2016) (dismissing for failure to state a claim without discussion of FNC motion); *BP Chemicals v. Yankuang Group*, Docket No. 2:03-cv-08167 (C.D. Cal., March 22, 2004) (dismissing for lack of subject-matter jurisdiction); *KIC Suzhou Automotive Products v. Xia Xuguo et al.*, Docket No. 1:05-cv-1158-LJM-WTL (S.D. Ind., Sept. 6, 2006) (dismissing for lack of personal jurisdiction).

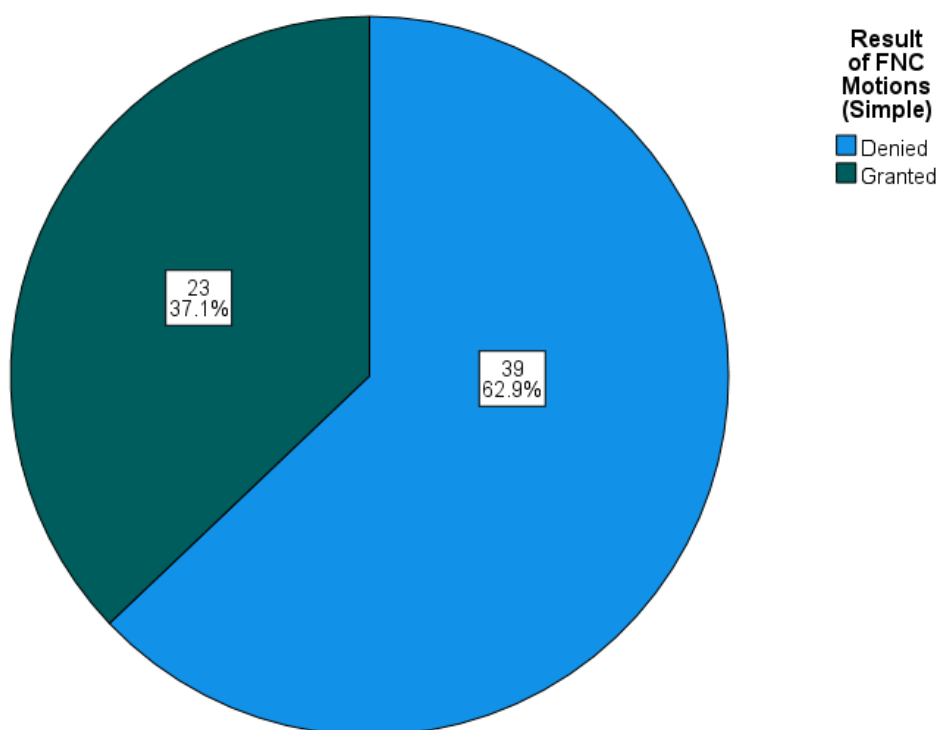
how strong was the expert testimony in favor of or in opposition to FNC dismissal? A full description of the variables is in Appendix A.

In order to provide some comparative context, I gathered a dataset of all cases between 2011 and 2020 inclusive¹⁵⁰ involving a motion for FNC dismissal either to the United Kingdom or to Japan. I chose the U.K. because it has a legal system quite familiar to U.S. judges but, like China, is geographically quite far from the U.S., and Japan because, like China, it has a legal system quite unfamiliar to U.S. judges but unlike China generally considered to be incorrupt and not subject to political interference. As with the main dataset, I then removed cases where there was a forum selection clause involved. There were no FNC cases involving the enforcement of judgments or arbitration awards. In the following discussion I refer to this dataset as the U.K. dataset (14 cases), the Japan dataset (13 cases), or the U.K.-Japan dataset, depending on the context.

4.3 Summary of Findings

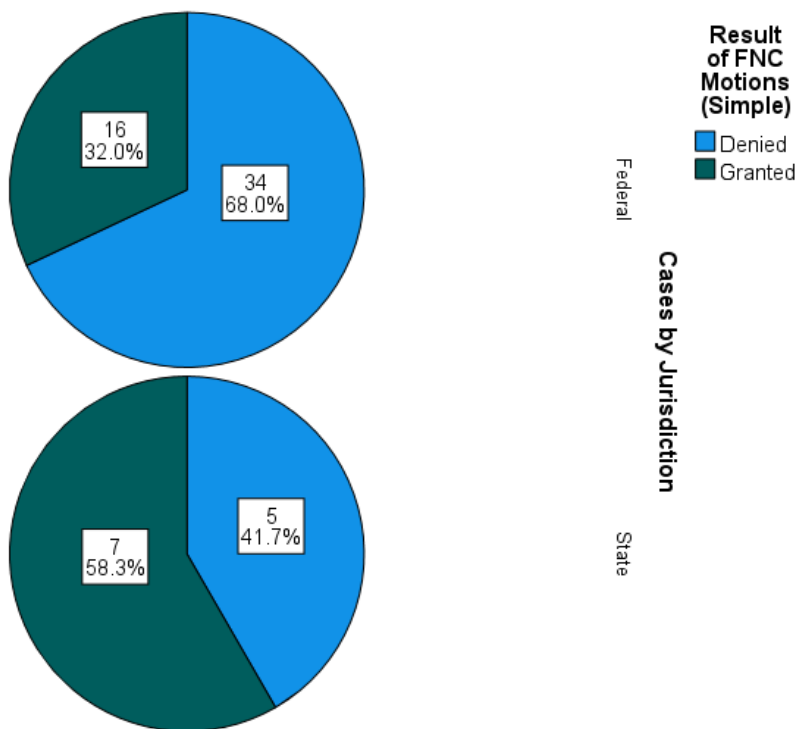
My main purpose in examining the cases in the dataset was to find out what U.S. courts were saying about the Chinese legal system and how they were arriving at those conclusions. Secondly, it was to find out how courts were actually implementing the FNC doctrine and the degree to which practice matched the stated norms.

The first major finding is that FNC dismissals to China are granted 37 percent of the time. As will be discussed in the following section, this is in one sense a high number and in one sense not.



¹⁵⁰ I chose those particular dates in order to avoid overwhelmingly large numbers.

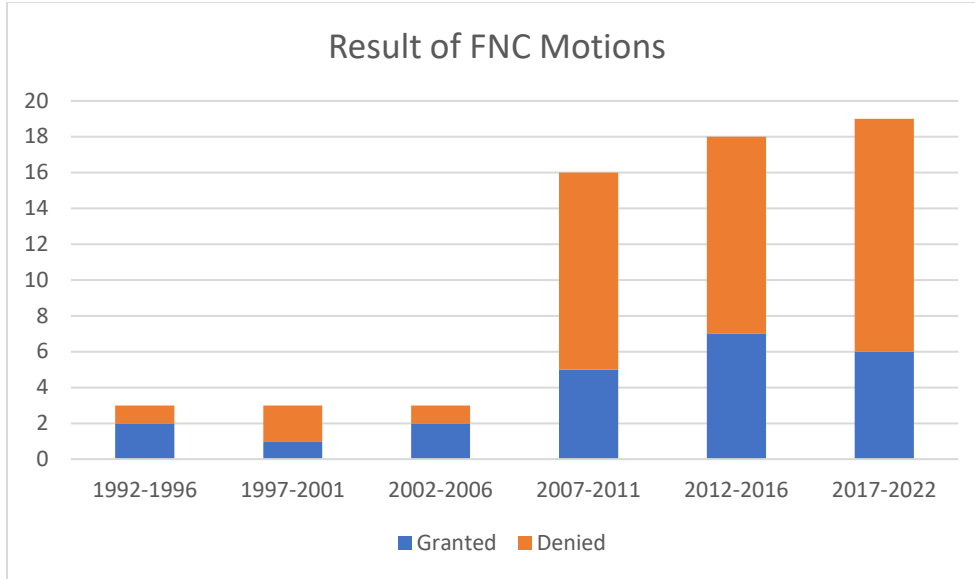
State courts have clearly been more generous than federal courts in granting FNC dismissals. Federal courts granted dismissals in a little under one third of the cases; state courts granted dismissals in almost three fifths of them. This does not, however, necessarily mean that states as a whole are more generous; state law on FNC varies, and some states do not recognize the doctrine at all.¹⁵¹ The state cases we see are those in which the plaintiff thought it to their advantage to sue in state court and the defendant was unable or unwilling to remove the case to federal court on diversity grounds.¹⁵² It is very hard to know which way this selection bias cuts.



The grant rate does not show any obvious trend over time, although the number of motions clearly increases. I found no cases before 1992; from 1992 to 2004, there were only nine cases—too few from which to draw any firm robust conclusions—whereas there is quite a jump beginning in 2007 (the adjusted dataset has no cases for 2005 and 2006).

¹⁵¹ See William A. Dodge, Maggie Gardner & Christopher Whytock, *The Many State Doctrines of Forum Non Conveniens* (Feb. 21, 2022), <https://papers.ssrn.com/abstract=4060356>; Brian J. Springer, *An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants to Escape State Court Jurisdiction*, 163 U. PENN. L. REV. 833, 860 Table 1 (showing different state formulations of FNC doctrine).

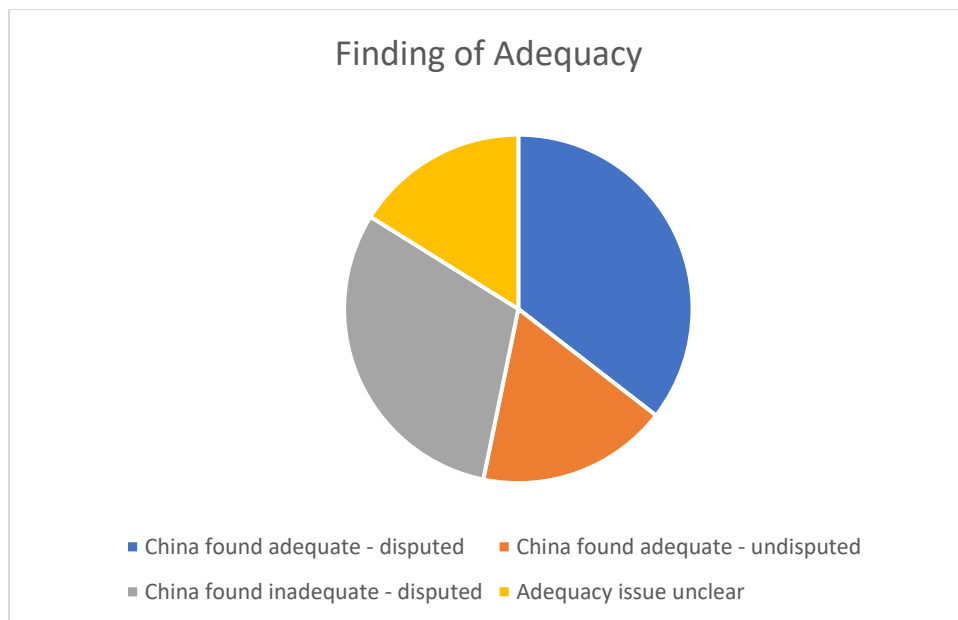
¹⁵² See Springer, *supra* note 151, at 840-45.



	<i>Granted</i>	<i>Denied</i>	<i>% Granted</i>
<i>1992-1996</i>	2	1	66.7%
<i>1997-2001</i>	1	2	33.3%
<i>2002-2006</i>	2	1	66.7%
<i>2007-2011</i>	5	11	31.3%
<i>2012-2016</i>	7	11	38.9%
<i>2017-2022</i>	6	13	31.6%

A key question of interest for me is the degree to which courts are finding China an adequate forum, and their basis for doing so. It is important to remember that in many cases the plaintiff did not dispute the adequacy of China as a forum, and instead opposed the FNC motion on the basis of the second prong of the doctrine: the public and private interests involved in hearing the case in the United States as opposed to China. Moreover, even when the parties disputed adequacy, they did so with varying degrees of competence. Sometimes they simply asserted their positions in their briefs, citing previous cases that had found China adequate or inadequate; at other times they offered evidence in the form of affidavits or declarations from expert witnesses.

The basic results on adequacy findings are below.



	<i>China found adequate - disputed</i>	<i>China found adequate - undisputed</i>	<i>China found inadequate - disputed</i>	<i>Adequacy issue unclear</i>
<i>Number of decisions</i>	22	11	19	10
<i>Percent</i>	35%	18%	31%	16%

Here we see that China was found to be an adequate forum in 33 out of 62 decisions—about half. Moreover, when the issue was disputed it was also found to be adequate in slightly over half the cases: 22 to 19. Since denials overall outnumber grants, it follows that China was found adequate in a number of cases where the FNC motion was denied for other reasons. Typically the reason was that the defendant had been unsuccessful on the second prong of the doctrine: the public and private factors.

Of the 39 denials, 19 (49%) involved a clear finding that China was an inadequate forum; in 10 cases, the finding on adequacy was unclear. In the remaining 10 cases, the court found China adequate, but denied the motion on other grounds.

In many cases, the decisions on adequacy are being made on the basis of very little evidence. The tables below show that in 23 out of 49 cases (47%) in which the issue of China’s adequacy as a forum was disputed—almost half—the parties did nothing more than assert their position in their

briefs,¹⁵³ without offering any actual evidence, even in the form of affidavits from interested parties, let alone expert witnesses.

China found adequate - disputed

	Frequency	Percent
Disputed in briefs only	7	11.3
Disputed with affidavits or other evidence	15	24.2

China found inadequate - disputed

	Frequency	Percent
Disputed in briefs only	10	16.1
Disputed with affidavits or other evidence	9	14.5

Adequacy issue unclear

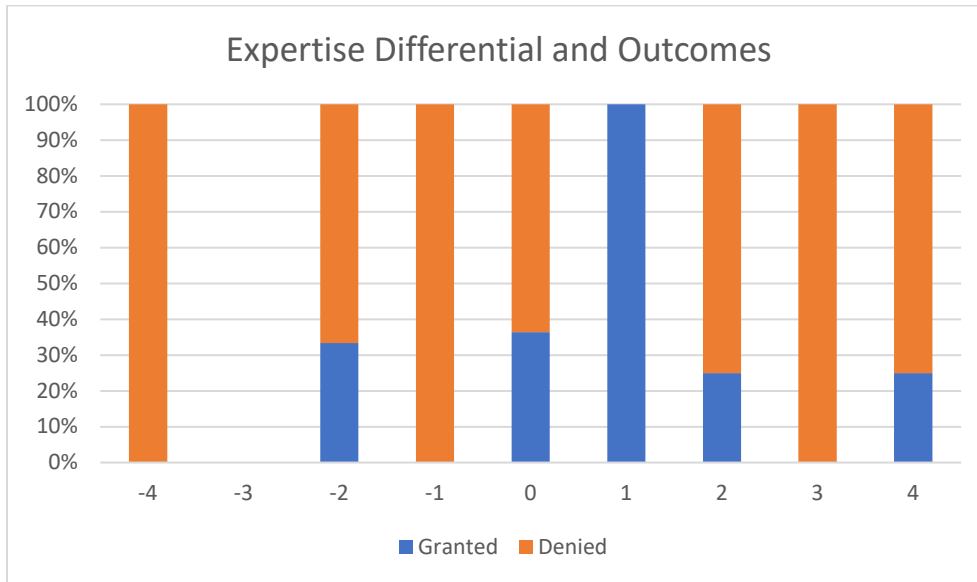
	Frequency	Percent
Disputed in briefs only	6	9.7
Disputed with affidavits or other evidence	2	3.2
Not disputed	2	3.2

¹⁵³ I have counted affidavits offered by the parties' own lawyers as equivalent to assertions in briefs.

China found adequate - undisputed

	Frequency	Percent
China found adequate - undisputed	11	17.7

Furthermore, when the parties did offer evidence—most typically in the form of affidavits or declarations from expert witnesses—*that evidence had no discernible effect on outcomes*.¹⁵⁴ In order to test this hypothesis, I rated the quality of expert evidence offered by each side on a scale of 0 to 4 (see Appendix A for a more detailed explanation). I then calculated an expertise differential by subtracting the quality of evidence offered by the party opposing FNC dismissal from the quality of evidence offered by the moving party. A zero therefore implies that the quality of evidence offered by the two parties was about equal; a positive number up to a maximum of 4 indicates the relative strength of the pro-FNC evidence, and a negative number up to a maximum of -4 indicates the relative strength of the anti-FNC evidence. The results are shown below. In order to make them more visible, they are shown as percentages of total cases, not as raw numbers. The raw numbers are provided in the accompanying table.¹⁵⁵



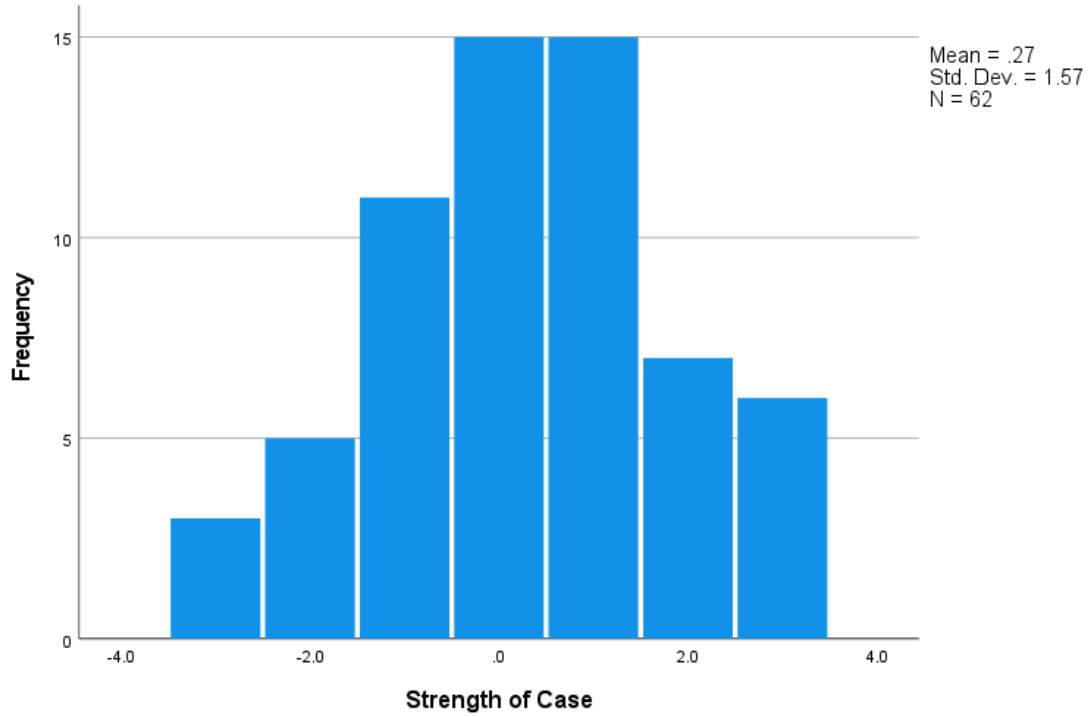
¹⁵⁴ In statistical terms, when measuring the correlation coefficient between expertise differential and the grant or denial of the FNC motion, Spearman’s *rho* is 0.095, below the 0.1 threshold needed to be deemed even a weak correlation by statistical convention. See JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES (1988).

¹⁵⁵ One case, <FNC-003 Robinson> (*Robinson Helicopter*, discussed at text accompanying note 237, *infra*), is excluded because while the defense submitted expert testimony in favor of FNC dismissal, I was unable to determine from the available filings whether any expert testimony was submitted on behalf of the plaintiff.

<i>Differential</i>	<i>Granted</i>	<i>Denied</i>
-4	0	1
-3	0	0
-2	1	2
-1	0	1
0	16	28
1	1	0
2	1	3
3	0	1
4	1	3

In the vast majority of cases, there was no significant expertise differential. Remarkably, a *lower* percentage of FNC motions was granted when the expertise differential in favor of FNC was at its *highest*—four—than when it was at the weaker levels of 2, 0, and -2. Of course, the number of cases is much too small to draw any firm conclusions. What one can say, however, is that the hypothesis that expertise, or an expertise differential, makes a difference is not supported. Very possibly there are simply too many other factors that go into the decision.

Because it is the practice of both movants and opponents to cite long strings of cases allegedly supporting their position, I attempted to gauge the strength of a particular FNC decision on adequacy—that is, its appropriateness for citation as a genuine precedent—by evaluating the quality of the parties’ argumentation and the court’s reasoning. I scored cases from -3 for strongly anti-FNC to 3 for strongly pro-FNC. If, for example, a court said nothing about adequacy while denying the motion, I scored that as neutral. If it came to a conclusion about China’s adequacy after strong submissions by experts and advocates on both sides and took their arguments into account in a reasoned decision, then I scored the decision as -3 or 3, depending on the result, regardless of whether I agreed. Needless to say, all decisions granting FNC must necessarily involve a finding that China is an adequate forum, while those denying the motion do not necessarily involve a finding that China is inadequate. In looking at the results, it must be remembered that my scoring here is subjective. The results are still interesting.



<i>Strength of Case</i>	<i>Frequency</i>	<i>%</i>
Very anti-FNC	3	4.8
Moderately anti-FNC	5	8.1
Weakly anti-FNC	11	17.7
Neutral	15	24.2
Weakly pro-FNC	15	24.2
Moderately pro-FNC	7	11.3
Very pro-FNC	6	9.7
Total	62	100.0

Bearing in mind the relative paucity of cases, the distribution is a fairly symmetrical bell curve. The mean value is 0.27, which means that overall, the strength of the population of cases is very weakly pro-FNC. Two thirds of the decisions (66.1%) are in the three middle categories of weakly pro-FNC, neutral, or weakly anti-FNC. Only a very few cases are strongly pro-FNC (6) or strongly anti-FNC (3).

4.4 Discussion of Findings

4.4.1 Grant rate

The grant rate of 37 percent (23 out of 62 decisions overall, and 7 out of 12 decisions in state courts) is in one sense remarkably high. As discussed earlier, a standard element of FNC doctrine is that courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them,”¹⁵⁶ and that dismissal on FNC grounds is “an exceptional tool to be employed sparingly,”¹⁵⁷ appropriate only “in rather rare cases”¹⁵⁸ and “in rare circumstances[.]”¹⁵⁹ There is no reasonable way to understand a 37 percent grant rate as “rare” or “exceptional.” It seems that courts are essentially ignoring this element of the doctrine.

Moreover, these dismissals are not to countries with similar legal systems, such as Canada or the United Kingdom. They are dismissals to China, a country whose legal system, even when it operates as it is supposed to and is not tainted by political interference or corruption, is vastly different from that of the United States. While it is a standard part of FNC doctrine that such differences—for example, the lack of discovery procedures or juries—do not necessarily by themselves constitute *per se* bars to FNC dismissal, one might expect they would make courts at least more attentive to the part of the doctrine calling for dismissals to be rare.

At the same time, as noted above,¹⁶⁰ a 37 percent grant rate is consistent with that found in other studies of FNC not confined to China. The picture is slightly different when we look at specific countries. In the U.K. dataset, 10 of 14 FNC motions (71%) were granted, whereas in the Japan dataset, only 4 of 13 motions (30%) were granted.

A 37 percent grant rate is in a sense not surprising, because—as the labor-intensive quality of this project demonstrates—courts do not have a good way of knowing what other courts are doing. Judges know only what they themselves have done, and do not have access to a nationwide pattern. If they see few FNC cases, it is easy to convince themselves that each individual case qualifies for that rare and exceptional grant. Moreover, movants’ attorneys and their experts are citing strings of cases in which FNC dismissal was granted. Thus, in a kind of forensic jiu-jitsu, movants assert that FNC dismissals are frequent and routine, and therefore should not trouble the court, in order to convince the court to do something that is supposed to happen rarely.

¹⁵⁶ Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

¹⁵⁷ Dole Food Co. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002) (quoting Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000)) (internal quotations omitted).

¹⁵⁸ Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

¹⁵⁹ Karim v. Finch Shipping Co., 265 F.3d 258, 268 (5th Cir. 2001).

¹⁶⁰ See note 125, *supra*, and accompanying text.

4.4.2 Basis for decisions

My review of the filings indicates that courts are making these decisions—and building up a body of precedent that will, for better or worse, be cited as grounds for further decisions—on the basis of very little evidence. As noted above, in 23 out of 49 cases (47%) in which the issue of China’s adequacy as a forum was disputed, the parties did nothing more than assert their position in their briefs,¹⁶¹ without offering any actual evidence.

4.4.3 Findings of inadequacy

Interestingly, courts found China adequate as a forum in 53 percent (33 out of 62) of the decisions,¹⁶² and in 45 percent (22 out of 49) of the cases in which adequacy was disputed. (The numbers might be higher, since in eight cases the issue was disputed but the court’s assessment was not clear.) This contrasts with a finding that courts find foreign fora adequate 82 percent of the time, finding inadequacy only 18 percent of the time.¹⁶³ The higher figure for foreign fora overall is no doubt attributable to the fact that many FNC motions involve dismissal to countries with familiar legal systems. A study covering cases from 1982 through 2006 found that although 105 different countries were offered as alternative fora, over one quarter of the cases proposed dismissal to the United Kingdom (14%) or Canada (12%).¹⁶⁴ The U.K.-Japan dataset confirms this. In that dataset, not a single case found the proposed forum to be inadequate, even though the issue was disputed in 9 of the 14 U.K. cases and 8 of the 13 Japan cases.

As noted above, in 10 out of 39 denials, the court stated that China was an adequate forum. This statement cannot be called a holding, since it did not determine the case; it is dictum, and therefore of lesser value than a finding of adequacy when a motion is granted, since such a finding is a necessary condition of the grant. A reading of the cases shows a marked reluctance on the part of courts to cast doubt on the quality of a foreign judicial system, in some cases explicitly motivated by a concern for comity.¹⁶⁵

4.5 Discussion of Cases

Although this Part is concerned more with the big picture than with individual cases, some of the cases deserve specific mention.

¹⁶¹ I have counted affidavits offered by the parties’ own lawyers as equivalent to assertions in briefs.

¹⁶² Note that the rate of grants of dismissal on FNC grounds need not match this rate, since courts can find a foreign forum to be adequate and still deny the motion based on their weighing of the public and private interests.

¹⁶³ See Lii, *supra* note 126, at 526, tables 4 & 5.

¹⁶⁴ See *id.* at 525, table 1.

¹⁶⁵ I discuss the question of comity more fully in Part 2.1.

*Sinochem*¹⁶⁶

The star witness for defendants seeking dismissal to China, and a case often cited by courts granting it, is the Supreme Court’s judgment in *Malaysia International Shipping Corp. v. Sinochem International Co.* (“*Sinochem*”). In this case, a federal district court granted the defendant’s motion for FNC dismissal to China (thus necessarily finding China to meet the criteria of adequacy and availability), but did so *before* finding that it had personal jurisdiction over the defendant.¹⁶⁷ This was a controversial move because FNC is generally predicated on the court’s having jurisdiction, but declining in its discretion to exercise it. The plaintiff appealed to the Third Circuit *on that issue*, arguing that a court must first determine personal jurisdiction before making any FNC decision. When the plaintiff won that appeal,¹⁶⁸ the defendant then appealed to the Supreme Court. The Supreme Court reversed the Third Circuit, holding that it was permissible to make a FNC determination before making a finding about personal jurisdiction.¹⁶⁹

That is all the Supreme Court ruled on. It was not presented with any arguments or evidence about the adequacy of China as a forum, and the issue was not in front of it.¹⁷⁰ Consequently, the

¹⁶⁶ *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007).

¹⁶⁷ *Malaysia Int’l Shipping Corp. Berhad v. Sinochem Int’l Co. Ltd.*, 2004 WL 503541 (E.D. Pa. Feb. 27, 2004). As the personal jurisdiction issue was complex, the court saw no point in trying to figure it out if it was going to dismiss on FNC grounds in any case.

¹⁶⁸ *Malaysia International Shipping Corp. v. Sinochem International Co.*, 436 F.3d 349 (3rd Cir. 2006).

¹⁶⁹ *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007).

¹⁷⁰ At least one court has recognized that the Supreme Court’s decision in *Sinochem* is of very limited scope and does not address the issue of adequacy:

In [*Sinochem*], the Supreme Court granted certiorari “to resolve a conflict among the Circuits on whether forum non conveniens can be decided prior to matters of jurisdiction.” . . . Instead of ordering limited discovery [for the purpose of settling the question of jurisdiction], the district court determined that the case could be adjudicated adequately and more conveniently in the Chinese courts and dismissed it on *forum non conveniens* grounds. On review, the Supreme Court held that the district court was not required to first establish its own jurisdiction before dismissing the suit on grounds of forum non conveniens. *Sinochem offered no opinion on the adequacy of China as a forum generally*; it merely recognized that the district court had found the forum adequate.

Inventus Power, Inc. v. Shenzhen Ace Battery Co., 2021 WL 1978342, at *2-*3. (N.D. Ill. 2021) (internal citations omitted; emphasis added). But misreading of the case by courts and movants remains common. *See, e.g., Yancheng Shanda Yuanfeng Equity Investment Partnership v. Wan*, 2021 WL 8565991, at *11 (C.D. Ill. 2021) (“In *Sinochem*, the U.S. Supreme Court upheld a district court order that China was the best place, under *forum non conveniens*, to resolve a fraudulent misrepresentation claim that had originally been filed in China.”); <FNC-082 Ma 210202a>, at 5 (movant’s brief misstating *Sinochem* as “holding” that China is an appropriate alternative forum); <FNC-081 Luya 190712b>, at 13 (stating that in *Sinochem* the Supreme

proper way to present *Sinochem* as a precedent for China as an adequate and available forum is to cite the district court case, along with subsequent case history. Defendants and their experts, however, as well as courts that use this case—possibly because it is too complex to read carefully—routinely cite only the Supreme Court proceedings (sometimes even using the word “finding” or “holding”),¹⁷¹ thus making it look as though the Supreme Court has actually ruled on the issue of China’s adequacy—a hard precedent to challenge indeed.

This practice is indefensible.¹⁷² First-year law students are taught that “[a] citation consisting only of the core items represents that a clear holding of a majority of the court stands for the proposition with which the writer has associated it.”¹⁷³ The only court in the three *Sinochem* cases to hold that China was an adequate alternative forum was the district court, and thus only the district court opinion can be properly cited in support of that proposition.

Moreover, the district court opinion is of little precedential value. The plaintiffs *did not dispute* the fairness or integrity of the Chinese courts; they disputed only the adequacy of certain procedures. Again, even first-year law students know that in a system that relies on adversarial argument, a court’s finding on an undisputed issue is of little value. The only informed testimony was submitted by Chinese lawyers representing each party, not independent experts. And the district court disposed of the adequacy issue in just two sentences, asking only whether the parties were amenable to process in China.

If the value of a precedent lies in the quality of adversarial argumentation and judicial reasoning behind it, the district court decision in *Sinochem* must therefore be accounted of low value. The inflation of this low-value district court case into what purports to be a mighty Supreme Court precedent is probably the single most distorting element in China-related FNC cases.

Group Danone *and* Synutra

The *Group Danone* and *Synutra* cases stand out for the way in which the court, while apparently crediting the disturbing testimony of the witnesses for the plaintiffs opposing dismissal,

Court “ruled” that China was an adequate alternative forum). What the Supreme Court upheld was the district court’s decision to decide the FNC issue before the personal jurisdiction issue.

¹⁷¹ See, e.g., <FNC-062 Netease 200817b>, ¶ 65; <FNC-056 Atricure 190321>, at 13; <FNC-035 Mercury 130128a>, at 16; <FNC-026 Synutra 090615a>, at 9.

¹⁷² Cf. Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOKLYN L. REV. 219, 221 (2010):

[T]oo often lawyers argue for, and judges treat, extraneous statements made in a prior case—that is, dicta—as holding. This ratcheting up of persuasive law into binding law is problematic on a number of fronts. To the extent that courts treat dicta as holding, they are more likely to reach incorrect decisions, to exceed their judicial authority, and to generate illegitimate results.

¹⁷³ Legal Information Institute, *Introduction to Basic Legal Citation*, <https://www.law.cornell.edu/citation/2-200> [<https://perma.cc/RCH7-KBZG>] (last visited Feb. 5, 2022).

nevertheless granted it anyway. In *Group Danone*,¹⁷⁴ the plaintiff's expert, Stanley Lubman, a noted and credible witness, expressed concerns about the likelihood that the defendant, wealthy businessman Zong Qinghou, could bring extrajudicial pressures to bear on a Chinese court. The court did not say it disbelieved Lubman; instead, it stated that the presence of corruption of this kind did not mean that the plaintiff had *no* remedy. Even more surprisingly, the court stated that there *would* be a case for denying FNC dismissal in a case where the courts of another country were controlled by a dictatorship, thus apparently making the startling finding either that China is not a dictatorship or that although it is a dictatorship, its government does not control the courts.¹⁷⁵

The *Synutra* case¹⁷⁶ was brought against the defendant corporation by victims (or their next of kin) of a milk-poisoning scandal in China, in which milk producers had added melamine to milk, thus producing sometimes fatal kidney stones in babies.¹⁷⁷ Parents who tried to bring lawsuits in China were intimidated and lawyers willing to take their cases were threatened. It was clear that the government had set its face against a resolution of liability issues in court, even though the law clearly permitted such lawsuits. When plaintiffs tried suing in the United States, Chinese lawyers, including noted human rights activist Xu Zhiyong, submitted sworn declarations—at considerable risk to themselves—about the intimidation to which they had been subjected when they tried to represent plaintiffs in China in this very matter, to the point where one of them had been dismissed from his firm under pressure from local authorities.

In spite of all this, the court found that China was an adequate forum for plaintiffs to pursue their claims. While not stating that it disbelieved the Chinese lawyers' statements, the court preferred to credit an official statement from China's Supreme People's Court saying that Chinese courts were ready to hear such cases, and dismissed the case.

It is not clear whether these particular plaintiffs ever succeeded in filing, much less winning, a case in China. Xu later reported about five court cases resulting in a total of about one million yuan (about \$155,000) in compensation for all plaintiffs.¹⁷⁸ The largest compensation amount was 350,000 yuan (\$54,000).

¹⁷⁴ <FNC-012a Danone 090227>.

¹⁷⁵ *See id.* at 24.

¹⁷⁶ *Tang v. Synutra International*, 2010 WL 1375373, *aff'd*, 656 F.3d 242 (4th Cir. 2011).

¹⁷⁷ *See* Jing Gong, *Spilling the Blame for China's Milk Crisis*, CAIJING, Oct. 10, 2008, <https://perma.cc/M7FL-PZAK?type=image>; Barbara Demick, *Parents' Voice Stifled in China Milk Issue*, L.A. TIMES, Jan. 3, <https://perma.cc/T2CF-8RQC>.

¹⁷⁸ *See* Xu Zhiyong (许志永), *Sanjuqing'an Naifen Shijian Weiquan Jilu* (三聚氰胺奶粉事件维权记录) [*A Record of Rights Defense in the Melamine Milk Powder Incident*], in XU ZHIYONG WENJI (许志永文集) [COLLECTED WRITINGS OF XU ZHIYONG] (2012), <https://perma.cc/4RTC-F8RS>.

Confusion about Taiwan

Well into this millennium, occasionally courts and parties still get confused about the distinction between the People’s Republic of China and the Republic of China in Taiwan. In 2014, a court cited a case of FNC dismissal to Taiwan¹⁷⁹ as though it were about FNC dismissal to China,¹⁸⁰ as did one defendant in a different case in the same year¹⁸¹ and another defendant in 2018.¹⁸²

Failure to require movant to bear burden of proof

Although it is a standard part of FNC doctrine that the moving party bears the burden of showing that the necessary elements, including adequacy of the foreign forum, are met,¹⁸³ courts in a few cases demanded little or literally nothing from defendants by way of showing adequacy.¹⁸⁴ In *Tongfang Global Limited v. Element Television Company*,¹⁸⁵ the court found adequacy on the basis of virtually no showing by the movant. In another case—one that did not even make it into my data set because the defendant did not propose China as an alternative forum—the court nevertheless remarkably found China, as well as Singapore and Taiwan, to be adequate alternative fora despite not having heard a single word of argument or evidence about them.¹⁸⁶

4.6 What the Cases Show

The cases bear out the critique that courts are granting FNC dismissals far too often under current doctrinal standards. The 37 percent grant rate for China cases, roughly in line with the grant

¹⁷⁹ *Nai-chao v. Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982).

¹⁸⁰ See <FNC-044 Warner 141231>.

¹⁸¹ See <FNC-041 Six Waves 140103>, at 14.

¹⁸² See <FNC-054 Melaleuca 180129c>, at 6.

¹⁸³ A particularly strong case on this point is <FNC-080 Amimon 211130>, at *7-*8.

¹⁸⁴ One court went to so far as to *reverse* the burden of proof on the issue of adequacy, quite contrary to accepted doctrine: “Although Defendants are entitled to the presumption that China is an adequate alternative forum, Plaintiff may rebut that presumption by a contrary showing.” <FNC-081 Luya 200505>, at *4. Although the court cited *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) in support, the citation does not in fact support the proposition, and defendants are entitled to no such presumption.

¹⁸⁵ <FNC-060 Tongfang>.

¹⁸⁶ See *Quanta Computer Inc. v. Japan Communications Inc.*, 2016 WL 11620515 (Cal. Super. 2016), *aff’d*, 21 Cal. App. 5th 438, 230 Cal. Rptr. 3d 334 (Cal. App. Ct. 2018). Equally egregiously, the court dismissed on FNC grounds to Japan, even though a contractual forum selection clause specified California (where the plaintiff had brought suit), and the negotiating history showed that the plaintiff had specifically rejected Japan, while the defendant itself had proposed California.

rate for all cases, cannot be squared with a doctrine that calls for dismissals to be rare and exceptional.

The phenomenon of string citations and the lock-in effect of prior decisions is also quite strongly evident, particularly with the *Sinochem* decision.

The cases also bear out the critique that courts do not want to look too closely at foreign legal systems, and are especially reluctant to make any ruling that could be construed as disparaging a foreign legal system. The impulse behind this reluctance is one of comity and of concern over interfering with the foreign affairs prerogatives of the executive branch, but it operates even when the court has no way of knowing whether the foreign system reciprocates such comity, and when the executive branch itself has made disparaging comments about the foreign system (in, for example, State Department reports on human rights abuses).

It may be that courts are in fact finding China inadequate *sub rosa*; instead of saying so openly, however, they deny dismissal on the public/private interest balance.

5 Enforcement of Chinese Judgments

In this Part I examine cases in which plaintiffs sought in U.S. court proceedings to recognize and enforce judgments obtained in Chinese courts. As will be shown, current American doctrine on recognition and enforcement of foreign judgments (REFJ) allows defendants to object on the grounds that the proceedings that produced the judgment were tainted by some kind of unfairness, or indeed on the grounds that the entire legal system in question cannot be trusted to produce an untainted judgment. As with the FNC cases, I want to see how courts proceed when such defenses are raised.

5.1 *Legal Bases for Recognition and Enforcement*

5.1.1 Introduction

Foreign judgments don't enforce themselves.¹⁸⁷ The winner of a foreign judgment may wish to enforce it in the United States because that's where the defendant's assets are, and so the

¹⁸⁷ This Article restricts its analysis to foreign judgments in commercial cases—almost all money judgments—and does not look at foreign judgments in areas such as family law (notably, divorce and child custody) for a number of reasons. First, requests for enforcement of money judgments are more numerous and present more common issues. Second, commercial law is in general more law-like than family law, which tends to be highly discretionary. Third, there is a large body of statutory law, including two Model Acts, as well as case law regarding the recognition and enforcement of money judgments.

judgment holder has to go before a U.S. court to seek recognition and enforcement of the judgment.¹⁸⁸

When a request for REFJ is brought before a U.S. court, the court faces a dilemma. On the one hand, while customary international law imposes no obligation on states to give effect to the judgments of other states, American courts have a long-standing policy of favoring in principle the recognition of foreign judgments.¹⁸⁹ Indeed, under the current rules governing REFJ, it is not even necessary to show reciprocity; most state courts will enforce foreign judgments even when the foreign country in question does not enforce the judgments of U.S. courts.

The necessary consequence of a policy of recognizing foreign judgments is that courts should not inquire into the merits of the case or pass judgment on the judgment itself. To do so would be to force the plaintiff to relitigate the case, and that would mean that the court was *not* enforcing the foreign judgment after all, but instead just conducting its own retrial of the case.

On the other hand, some kind of inquiry into the circumstances of the foreign judgment cannot be avoided. When enforcing the judgments of a sister state, a U.S. state court can, and indeed must, take for granted that the overall process leading to the judgment was fair and satisfied state and federal constitutional standards. But that clearly cannot be the practice when a court is confronted with a judgment from another country. The court may have no idea what the other country's judicial system is like. Indeed, how can it even know, in the absence of inquiry, that the document in question is properly characterized as a judgment, and that it comes from an institution properly characterized as a court? Thus, some inquiry into the circumstances of the foreign judgment—both the overall system and the particular proceedings that produced it—is necessary.

At this point, as with FNC cases, a key procedural question is: *what will the default presumptions be?* Should it be up to the party seeking REFJ to show that the foreign legal system in general, and the judgment in particular, is fair and deserves the same respect as the judgment from another state court—failing which, the court will assume the contrary? Or should it be up to the defendant to show that the foreign legal system, and the particular judgment it produced, was tainted by unfairness—failing which, the court will assume it was not? And should the burdens be allocated the same way no matter which country produced the foreign judgment? Should judgments from, say, Canada be viewed with the same skepticism as a court viewed judgments from Ethiopia?¹⁹⁰ According to Judge Richard Posner, the answer is no:

¹⁸⁸ The two terms recognition and enforcement are often used interchangeably, but can be meaningfully distinguished. A judgment can be recognized without the need for enforcement. For example, a foreign judgment might be recognized for the purpose of establishing a fact in dispute in U.S. legal proceedings, even if the foreign judgment is not enforced.

¹⁸⁹ The seminal Supreme Court case is *Hilton v. Guyot*, 159 U.S. 113 (1895).

¹⁹⁰ See *Mulugeta v. Ademachew*, 407 F. Supp. 3d 569 (2019).

It is true that no evidence was presented in the district court on whether England has a civilized legal system, but that is because the question is not open to doubt. We need not consider what kind of evidence would suffice to show that a foreign legal system “does not provide impartial tribunals or procedures compatible with the requirements of due process of law” if the challenged judgment had been rendered by Cuba, North Korea, Iran, Iraq, Congo, or some other nation whose adherence to the rule of law and commitment to the norm of due process are open to serious question[.]¹⁹¹

In practice, U.S. courts generally start with the presumption that all countries have a functioning legal system with institutions properly characterized as courts that produce decisions entitled to recognition by U.S. courts. All that the party seeking REFJ has to show is that the decision in question is a court judgment that is final, conclusive, and enforceable under the law of the foreign country. To be sure, recognition also depends on whether the foreign country has a legal system capable of delivering an impartial judgment that meets basic standards of due process, and on whether the particular judgment was untainted in various ways. But in practice it is for the party resisting enforcement to present evidence about these elements; if they cannot carry their burden, the law assumes the elements are favorable to recognition.

This can present problems when courts deal with systems that are highly secretive. To use the North Korean example again, it may be that we know enough about its legal system to know that a particular document represents a court judgment that is final, conclusive, and enforceable. But given the pervasive secrecy surrounding all aspects of North Korean society, a party resisting enforcement might, if required to bear the burden of proof, be very hard put to produce solid evidence that the system was *not* capable of delivering an impartial judgment meeting basic standards of due process.

Finally, one important feature of U.S. law should be noted: the law regarding REFJ, such as it is, is virtually all state law, not federal law.¹⁹² Recognition and enforcement must generally be sought in state courts. If the plaintiff can find jurisdictional grounds to bring the case in a federal court, the federal court will still generally apply the law of the state where it sits. Thus, there is a risk of courts applying inconsistent standards and possibly complicating U.S. relations with foreign

¹⁹¹ *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

¹⁹² As two commentators recently complained:

The current law on recognition of foreign judgments in this country is governed by a patchwork of state statutes and common law principles. Despite the clear federal interest in regulating how U.S. courts treat judgments issued outside the United States, no federal law or treaty governs the conditions under which U.S. courts should—and should not—give full effect to foreign judgments, outside of the narrow category of foreign defamation judgments.

John B. Bellinger III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VA. J. INT'L L. 501, 502 (2014) (citation omitted); *see also id.* at 513 Fig. 1 (table showing state differences).

countries.¹⁹³ On the other hand, this risk is easy to overstate.¹⁹⁴ I know of no case where the denial of enforcement of a foreign judgment caused diplomatic difficulties, or indeed where the U.S. government retaliated in any way against a foreign government for the latter's failure to enforce a U.S. judgment.¹⁹⁵ In U.S.-China relations, lack of enforcement of each other's judgments is utterly a non-issue.

Efforts at codification of a federal statute have not gone far. In 2006, the American Law Institute (ALI) issued a proposed federal statute on the recognition and enforcement of foreign judgments in anticipation of an international convention on the matter, which would have required implementing legislation.¹⁹⁶ But the treaty negotiations stalled and no federal legislation was needed.¹⁹⁷ Codification efforts may, however, soon revive. In 2019, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters was finalized;¹⁹⁸ the U.S. signed it on March 2, 2022,¹⁹⁹ but it has not yet come into effect.²⁰⁰ China is not at present a signatory state.

¹⁹³ See Recognition and Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 3-17 (2011) (statement of Linda Silberman, Martin Lipton Professor of Law, New York University School of Law); Bellinger & Anderson, *supra* note 192, at 536.

¹⁹⁴ See Zambrano, *supra* note 25, at 163-64.

¹⁹⁵ For an extended argument that U.S. courts formerly, and properly, played a greater role in foreign relations and that they should be unafraid to take back what they have surrendered to the executive, see MARTIN FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS (2019).

¹⁹⁶ For commentary on the ALI's proposed statute, see generally S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. OF LITIGATION 45 (2014), and in particular the sources cited in note 28 therein.

¹⁹⁷ See Sarah E. Coco, *The Value of a New Judgments Convention for U.S. Litigants*, 94 N.Y.U. L. REV. 1209, 1217 (2019).

¹⁹⁸ Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, opened for signature July 2, 2019 [hereinafter Judgments Convention] (not yet in force), <https://perma.cc/TM29-AEWP>; Overview of the Judgments Project, <https://perma.cc/B44Z-XUJA> (describing the goals of the Judgments Convention).

¹⁹⁹ See Client Alert, *The United States Becomes the Sixth Signatory to the 2019 Hague Judgments Convention on the Recognition and Enforcement of Foreign Judgments*, GIBSON DUNN, March 19, 2022, <https://perma.cc/F5UG-98JR>.

²⁰⁰ On the Judgments Convention in general, see Coco, *supra* note 197.

5.1.2 Common law

Where there is no statute governing REFJ, U.S. courts apply state or federal common law doctrine. The basis for federal common law doctrine was laid in the 1895 Supreme Court case of *Hilton v. Guyot*.²⁰¹ In *Hilton*, a French citizen sought recognition of a French judgment in his favor against two U.S. citizens doing business in France. Relying on the concept of comity, the Court established the principle that foreign judgments should in general be recognized and set forth the conditions for doing so:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.²⁰²

Having laid down the general principle, however, the Court declined to enforce the French judgment: it found that France would not recognize a U.S. judgment in similar circumstances, and it apparently believed that reciprocity was a necessary precondition for comity.²⁰³

State courts took up the *Hilton*'s generally welcoming approach and comity principle, and at least New York went beyond it by rejecting *Hilton*'s requirement of reciprocity.²⁰⁴ State law took on even more importance after the 1938 case of *Erie Railroad Company v. Tompkins*,²⁰⁵ in which the Supreme Court held that federal courts sitting in diversity should not create and apply their own common law, but should instead apply state law. After *Erie*, federal courts have consistently held that state law governs the recognition and enforcement of foreign judgments in cases before them in

²⁰¹ 159 U.S. 113, 16 S. Ct. 139 (1895).

²⁰² *Hilton*, 159 U.S. at 158.

²⁰³ On the *Hilton* case in general, see Sarah E. Coco, *The Value of a New Judgments Convention for U.S. Litigants*, 94 N.Y.U. L. REV. 1209, 1214 (2019).

²⁰⁴ See Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 COLUMBIA J. TRANSNAT'L L. 277, 285-86 (2017); Coco, *supra* note 203, at 1214-15 (2019).

²⁰⁵ 304 U.S. 64 (1938).

diversity,²⁰⁶ and the federal common law approach of *Hilton* has atrophied, there being little call for it.²⁰⁷

The current state common-law rule is summarized in the 2018 *Restatement (Fourth) of Foreign Relations Law of the United States*. It states the general principle that subject to certain exceptions, “a final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition.”²⁰⁸ Although the Restatement does not explicitly say so, these elements must be shown by the party seeking recognition. As a practical matter, this burden is easily met.

The Restatement then provides for the exceptions, the existence of which must be shown by the party resisting recognition. The relevant ones for the purposes of this Article are essentially twofold. First, the judgment must be denied recognition if it “was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness.”²⁰⁹ Second, the judgment *may*, at the discretion of the court, be denied enforcement if “the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment,” or “the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.”²¹⁰ The Restatement doctrine also contains a reciprocity requirement, but as we shall see, that is not the rule in most states, which have adopted one of the Uniform Acts discussed below.

What exactly does “impartial tribunals” mean? *Hilton* supplied an answer that covers both the foreign legal system in general and the particular proceedings: the essential requirements of fair procedure are met

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

²⁰⁶ See Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 262 (1991); see also Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. a (1987) (noting that “in the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign country judgments is a matter of State law”).

²⁰⁷ See *Coco*, *supra* note 203, at 1214-15.

²⁰⁸ Restatement (Fourth) of Foreign Relations Law of the US (2018), § 481.

²⁰⁹ *Id.*, § 483.

²¹⁰ *Id.*, § 484.

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.²¹¹

This language is still important and regularly cited by courts.²¹²

What about “due process”? Here U.S. courts have made it clear that it is not a demanding standard; it means only “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations. . . . [It] mean[s] that the foreign procedures are ‘fundamentally fair,’”²¹³ and not that the foreign court conforms “to the latest twist and turn of our courts.”²¹⁴

The distinction made in the law between the overall fairness of a country’s legal system and the fairness of the specific proceedings leading to the judgment, reproduced (as discussed below) in the Uniform Acts, is important. In both REFJ and FNC cases, courts have in general proven extremely reluctant to make general condemnations of foreign legal systems. In the words of the Fifth Circuit in a 2015 case, “[A] judgment debtor must meet the high burden of showing that the foreign judicial system as a whole is so lacking in impartial tribunals or procedures compatible with due process so as to justify routine non-recognition of the foreign judgments.”²¹⁵ The bar is high indeed. In a 1999 decision, for example, a federal district court acknowledged that “the record does demonstrate that the Romanian judicial system is far from perfect. As [defendant] points out, ‘corruption remains a concern’ in Romania and there ‘is some evidence that [due process] guarantees are not always accorded.’”²¹⁶ Yet the court went ahead and recognized the judgment.

Overall, it seems fair to say that whether applying common law principles or statutory language, courts will more readily deny recognition to a foreign judgment on the grounds of flaws in the specific proceedings than on the grounds of flaws in the legal system that produced the judgment. In a 2019 case, a federal district court applying Virginia law denied enforcement to an Ethiopian judgment in favor of one of Ethiopia’s richest men against his former romantic partner.²¹⁷ The court wrote, “[W]hile there is evidence that certain types of Ethiopian judgments, such as those with political implications, may be suspect, there is not sufficient evidence before the Court to find that the Ethiopian judiciary suffers from systematic corruption depriving all of its judgments from eligibility for recognition.” Nevertheless, it went on, “[t]he record before the Court is sufficient . . .

²¹¹ *Hilton*, 159 U.S. at 202.

²¹² A search on Westlaw for the phrase “a system of jurisprudence likely to secure an impartial administration of justice” showed six courts, both federal and state, citing it in 2019 alone.

²¹³ *The Society of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000) (internal citations omitted).

²¹⁴ *Id.* at 476.

²¹⁵ *DeJoria v. Maghreb Petroleum Exploration, S.A.*, 804 F.3d 373, 382 (5th Cir. 2015).

²¹⁶ *S.C. Chimexim S.A. v. Velco Enters. Ltd.*, 36 F. Supp. 2d 206, 214 (S.D.N.Y. 1999).

²¹⁷ *Mulugeta v. Ademachew*, 407 F. Supp. 3d 569 (2019).

to demonstrate that the particular judgments in this case were ‘rendered in circumstances that raise substantial doubt about the integrity of the rendering court[s] with respect to the judgment[s].’²¹⁸

Although most states have adopted one the Uniform Acts discussed below, state common law still has a role to play, because the Uniform Acts cover only money judgments. One of the cases discussed in this Article, *Beijing Zhongyi Zhongbiao Electronic Information Technology Co. v. Microsoft*,²¹⁹ was outside of the scope of the relevant Uniform Act and was therefore governed by state common law.

5.1.3 Statutory law

Although a common-law doctrine exists to handle questions of recognizing foreign judgments, most states—including the internationally important jurisdictions of California, Illinois, New York, Texas, and Washington, D.C.—have adopted, either *in toto* or with only modest changes, one or both of the 1962 Uniform Foreign Money-Judgments Recognition Act (1962 Uniform Act)²²⁰ or the 2005 Uniform Foreign-Country Money Judgments Recognition Act (the 2005 Uniform Act).²²¹ Attempts to codify a federal standard have so far failed.²²² Both Uniform Acts provide that a final foreign money judgment should generally be recognized and enforced. But there are many exceptions—some mandatory, meaning recognition must be denied, and some discretionary, meaning enforcement may be denied.

The 1962 Uniform Act

The 1962 Uniform Act applies to non-U.S. court judgments granting or denying the recovery of a sum of money except for judgments for taxes, fines or penalties, and support judgments in marriage and family cases. A judgment may be recognized provided that it is “final, conclusive, and enforceable where rendered” even though an appeal is pending or allowed.²²³ The party seeking enforcement bears the initial burden of showing that these requirements are satisfied.

The 1962 Uniform Act then sets forth grounds for non-recognition, both mandatory and discretionary. At this point, the burden shifts to the party resisting recognition to show that these

²¹⁸ *Id.* at 584.

²¹⁹ <ECJ-008 Beijing Zhongyi>.

²²⁰ Uniform Foreign Money-Judgments Recognition Act (1962), <https://perma.cc/5W7E-HYSE?type=image>. A list of states that have adopted the 1962 Uniform Act is available at <https://bit.ly/1962UniformAct>.

²²¹ Uniform Foreign-Country Money Judgments Recognition Act (2005), <https://perma.cc/HUB9-QBWU>. A list of states that have adopted the 2005 Uniform Act is available at <https://bit.ly/2005UniformAct>.

²²² See Burton S. deWitt, *A Judgment Without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards*, 50 TEXAS INT’L L.J. 495, 499 (2015).

²²³ See THOMAS A. DICKERSON, RODNEY E. GOULD & MARK CHALOS, LITIGATING INTERNATIONAL TORTS IN U.S. COURTS § 6:5 (Westlaw. Aug. 2020 update) (footnotes omitted).

grounds exist. Mandatory grounds include that “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process.”²²⁴

The 1962 Uniform Act also sets forth discretionary grounds for non-recognition. Again, the burden of proof is on the party resisting recognition. These factors include matters such as insufficient time for the defendant to respond to the foreign lawsuit or an allegation that the judgment was obtained by fraud, but do not go to the overall fairness of the foreign legal system. Nor do they cover, for example, an allegation that some external political force directed the court to come to a particular decision. That is not fraud, and it does not fit entirely comfortably into an allegation that the foreign system does not provide impartial tribunals or procedures compatible with due process.

The 2005 Uniform Act

The 2005 Uniform Act is similar in structure to the 1962 Uniform Act. It sets forth minimal conditions for recognition (to be pleaded by party seeking recognition), then sets forth mandatory and discretionary grounds for non-recognition (to be pleaded by the party resisting recognition). It echoes the mandatory exception of the 1962 Uniform Act: that “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.” But to the discretionary exceptions it adds two important elements that go to the fairness of the specific court proceeding: that “the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment” or that “the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.” This makes it easier for those resisting enforcement to offer grounds.

5.2 Enforcement of Chinese Judgments in the United States

5.2.1 Introduction

This article sets out both to describe and to evaluate. What are American courts actually doing when faced with requests to enforce Chinese judgments? To answer that question, I searched for all cases in the post-Mao era in which U.S. courts were asked to recognize Chinese judgments in some way. The total is small: only fifteen cases, dating from 2009 to 2022.²²⁵ The results are mixed, and how to characterize them is somewhat subjective. For the purposes of this paper, I am interested in how courts treat arguments about the quality of the Chinese legal system and of specific proceedings within it. Yet in many cases, while such arguments may have been made, the courts ended up deciding the case on other grounds.

²²⁴ Uniform Foreign Money-Judgments Recognition Act (1962), § 4, <https://perma.cc/5W7E-HYSE?type=image>.

²²⁵ The cases are listed in Appendix B.

In terms of pure numbers, recognition was granted in six of the fifteen cases. But the numbers by themselves are unilluminating. Recognition may be granted or denied for procedural reasons that have nothing to do with the parties' arguments about, or the court's assessment of, the Chinese legal system, or the general disposition of courts toward the recognition of foreign judgments in general or Chinese judgments in particular. Thus, a close reading of the filings and the decisions is necessary.

Overall, I classify seven cases as favorable in varying degrees to those seeking recognition of a Chinese judgment, while four cases are unfavorable. Three judgments are neutral. One case, *Shanghai Yongrun*,²²⁶ is still pending.²²⁷

In general, the cases show very little genuine inquiry into the nature of the Chinese legal system.²²⁸ The evidence on which courts are making decisions about recognition is very thin. This is not surprising, given that courts are not well equipped to engage in this kind of inquiry. More troubling is that as a substitute for empirical inquiry, they tend to rely on precedents, without inquiring too closely into what really went on in those precedents. A number of the cases cite the *Robinson Helicopter* case, discussed below, as a favorable precedent. But as we shall see, that case in fact involved *no finding* about the quality of the Chinese legal system, and the defendant *did not contend* that the Chinese system lacked due process or impartiality.

Because there are relatively few cases, the kind of statistical analysis performed on the FNC cases is unlikely to be meaningful. On the other hand, the very paucity of cases makes it possible for both the analyst and the reader to examine each one in detail, and thus to get a good sense of what kinds of arguments the parties make and how the courts come to their decisions.

The following sections will look first at the cases I have classified as favorable to those seeking recognition, then at those I have classified as favorable to those resisting recognition, then at those I have classified as neutral, and finally at the one case still pending. In each case, I look at the cases in chronological order, from oldest to newest.

²²⁶ <ECJ-014 Yongrun>.

²²⁷ Each case is identified and described in more detail below.

²²⁸ No case shows anything close to the level of analysis undertaken by the New Zealand Supreme Court in *Minister of Justice v. Kim*, [2021] NZSC 57, in which the court undertook a detailed analysis of the possibility of torture in China. The text of the opinion is available at <https://perma.cc/NV85-37UV>.

5.2.2 Cases favorable to those seeking recognition

1. ECJ-006: *KIC Suzhou Automotive Products v. Xia*²²⁹

KIC Suzhou is the first case in which an American court recognized and enforced a Chinese judgment.²³⁰ As a precedent, however, it is wanting because the quality of the Chinese judicial system was unexamined. Moreover, both the plaintiff and the defendant were Chinese, and the case was about events that occurred in China. Thus, the potential unfairness of enforcing a Chinese judgment was at its absolute minimum.

The defendant, Xia, had been a manager of the plaintiff company in China and apparently stole a large amount of money. Because Xia had assets in Indiana, the company sued him there on a variety of federal and state claims. After extensive procedural maneuvering, the court obtained personal jurisdiction over Xia, who argued that the case should be dismissed on FNC grounds, China presenting an adequate alternative forum. Xia's key argument: plaintiff had already won a judgment in the Chinese courts against the defendant.²³¹ Thus, the adequacy and availability of Chinese courts was not even speculative; it had been proven in action.

Before the court could rule on Xia's FNC motion, however, the plaintiff brought a motion to enforce the Chinese judgment.²³² Unusually, the motion seems to have been premised on the basis not of state law, which would have applied had the basis for federal jurisdiction been solely diversity, but rather of federal law: the criteria set forth in the 1895 Supreme Court case of *Hilton v. Guyot*.²³³ But there was no real argument about whether the criteria were met. The plaintiff alleged that they were. It argued moreover that Xia "has made the argument to this Court that China is an adequate, alternative forum for the parties to litigate their disputes. If this is true, then [Xia] must also agree that the judgments rendered by that Chinese court where the matter has been litigated must also be capable of enforcement, including enforcement with this Court."²³⁴ Thus, argued the plaintiff, "[b]y arguing that this matter should be dismissed in favor of litigation in China, [Xia] has admitted that the judgments rendered against him in China are valid and enforceable."²³⁵

²²⁹ 2009 WL 10687812 (S.D. Ind. 2009).

²³⁰ The *Robinson Helicopter* case, discussed later, is commonly considered to be the first and is much better known. But *KIC Suzhou* was in fact decided on June 3, 2009, whereas the initial decision in *Robinson Helicopter* was issued on July 22, 2009.

²³¹ < ECJ-006 KIC Suzhou 081126b >, at 9.

²³² < ECJ-006 KIC Suzhou 090302 >.

²³³ This case is discussed above at text accompanying note 201.

²³⁴ < ECJ-006 KIC Suzhou 090302 >, at 2. It is possible to construct an argument that the two positions are not inconsistent, see Whytock & Robertson, *supra* note 93, at 1449-50, but courts have understandably been skeptical.

²³⁵ < ECJ-006 KIC Suzhou 090302 >, at 4.

Curiously, Xia answered none of these arguments, resting his defense on arguments about jurisdiction. The court in turn mentioned only those arguments in its opinion, rejecting them.²³⁶ It said nothing about the Chinese legal system. The result is that the first U.S. case recognizing a Chinese judgment did not hear any evidence about, or engage at all with the issue of, whether the essential elements of fairness and impartiality were met, either in the legal system as a whole or in the particular proceedings.

2. *ECJ-007: Hubei Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Company*²³⁷

This case is the granddaddy of Chinese judgment enforcement cases. Widely (but wrongly) considered the first such American case (the first is *KIC Suzhou*, discussed above), it is so well known that it has even been cited by Chinese courts as providing the necessary reciprocity that allows Chinese courts, in the absence of a treaty, to recognize U.S. judgments.²³⁸ Yet as a precedent, it suffers from the same infirmities as *KIC Suzhou*.

First, the defendant had argued in prior FNC proceedings that Chinese courts were an adequate alternative forum to U.S. courts and invited the plaintiff to sue it there. Second, in the subsequent judgment-recognition proceedings in the U.S., the defendant *did not argue* that the Chinese legal system was incapable of providing impartial courts or due process, or that the particular proceedings had been tainted by corruption or bias. As the court wrote,

[Robinson] 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. [Robinson] cannot avail itself of this particular exception based on a challenge to the judgment at issue.²³⁹

The court also noted that in the FNC proceedings, Robinson Helicopter had “argued the PRC was a more suitable and convenient forum for the litigation, that the PRC has an independent judiciary, that the Chinese legal system follows due process of law.”²⁴⁰

The defendant appealed, but the appeals court affirmed in a brief opinion in March 2011.²⁴¹ That opinion did seem to take into account the inconsistency of Robinson’s arguments at the FNC

²³⁶ < ECJ-006 KIC Suzhou 090603a>.

²³⁷ <ECJ-007 Robinson>.

²³⁸ See Donald Clarke, *Chinese Court Enforces US Judgment*, THE CHINA COLLECTION, Sept. 3, 2017, <https://perma.cc/V2E8-F3DZ>; Jie (Jeanne) Huang, Reciprocal Recognition and Enforcement of Foreign Judgments in China: Promising Developments, Prospective Challenges and Proposed Solutions 4 (University of Sydney Law School Legal Studies Research Paper Series, No. 19/23, March 2019), <https://ssrn.com/abstract=3359349>.

²³⁹ <ECJ-007 Robinson 090722>, at 6 (emphasis added).

²⁴⁰ <ECJ-007 Robinson 090722>, at 1.

²⁴¹ <ECJ-007 Robinson 110329>.

stage with its arguments at the enforcement stage. The court found that “[Robinson]’s failure to pay the final PRC judgment was ‘clearly inconsistent’ with [its] stipulation to the California court that it would ‘abide by any final judgment rendered in the civil action commenced in China[,]’” and that “[Robinson]’s stipulation to the California court that it would ‘submit to [the] jurisdiction of the appropriate civil court in China’ bars it from arguing for nonrecognition of the PRC judgment on the basis of the PRC court’s alleged lack of personal jurisdiction.”²⁴²

As in *KIC Suzhou*, the issue of the quality of the Chinese judicial system never received an adversarial airing. Not even the fairness of the particular proceedings (other than the issue of notice, on which Robinson lost) was at issue in this case. Remarkably for a case that is so often now cited for its supposed finding that the Chinese legal system provides impartial courts and due process, it appears that none of the courts involved heard *any evidence whatsoever*—no expert testimony, no governmental reports, no news stories, not even unsupported allegations by counsel—about the quality of the Chinese legal system. I have examined the filings: this remained true through all the proceedings: the original adjudication,²⁴³ the appeal, the adjudication on remand, and the second appeal. It is a textbook example of a case being wrongly cited for a proposition that it never established.

3. *ECJ-013: Fusion Company Ltd. v. Jebao Electrical Appliance Co. Ltd.*²⁴⁴

In this case, the plaintiff won a default judgment in the United States enforcing a contested judgment in China. In 2004, Fusion Company (Fusion), a Hong Kong corporation, had sued Jebao Electrical Appliance Company (Jebao), a Chinese corporation, in the Zhuhai Intermediate Court in China; following an appeal and a remand, a final judgment in the case was issued on July 23, 2006. In 2010, Fusion filed suit in federal district court in the state of Washington against Jebao seeking recognition and enforcement of the Chinese judgment.²⁴⁵ The complaint alleged that the various requirements of impartiality and due process contained in the 2005 Uniform Act adopted by Washington had been met.

Jebao did not respond, and Fusion moved for recognition and enforcement on August 6, 2010.²⁴⁶ The following November, however, its case was dismissed: the court found that it had no

²⁴² <ECJ-007 Robinson 110329>, at 1.

²⁴³ I was unable to access all the filings from the original adjudication leading to the federal court’s dismissal of the motion to enforce on March 22, 2007. That judgment, however, made no reference to issues of the quality of the Chinese legal system. It was decided on wholly different grounds.

²⁴⁴ Superior Court, King County, Washington, Docket No. 11-2-15510-2 (April 28, 2011) (unreported).

²⁴⁵ <ECJ-013 Fusion 100712>.

²⁴⁶ <ECJ-013 Fusion 100806>.

subject-matter jurisdiction because there was not the necessary diversity between the parties, both being foreign.²⁴⁷

The plaintiff then turned to Washington state courts, filing another case in 2011. I have been unable to obtain the filings in this case, but the plaintiff evidently quickly received a default judgment in its favor in April 2011.²⁴⁸ It then moved to enforce the Washington judgment in California.²⁴⁹

This case is moderately favorable to those seeking to enforce Chinese judgments in that the Washington state court readily did as it was asked. It is, of course, considerably devalued by the fact that the judgment was not the result of any adversarial process, let alone a well-informed, competently argued one.

4. *ECJ-010: Global Material Technologies, Inc. v. Dazheng Metal Fibre Co.*²⁵⁰

This case is favorable to those seeking to enforce a Chinese judgment, but like the others is a less than perfect precedent. A close reading of the filings suggests the court may simply have decided wrongly on the facts and the law. Moreover, the party seeking enforcement and its attorney committed serious misconduct, leading ultimately to their being sanctioned by the extraordinary remedy of a default judgment against them even though they had not actually defaulted.

The case began in February 2011, when Global Material Technologies (GMT) filed a complaint against Dazheng Metal Fibre, a Chinese company (DMF), a DMF subsidiary (Tru Group), and DMF's president, Dong Juemin.²⁵¹ The suit claimed that DMF and Dong had appropriated confidential business information arising from GMT's long-standing business relationship with DMF,²⁵² in which it held a 25% ownership interest, to improperly freeze out GMT and steal its customers by directing business to Tru Group.

In a motion to dismiss filed on June 5, 2012, the defendants pointed out that on Feb. 28, 2011, the same day that GMT filed suit in the U.S., a Chinese court officially accepted for hearing a previously-filed complaint by GMT against DMF on similar issues, and that the Chinese court had

²⁴⁷ <ECJ-013 Fusion 101129>. As this lack of diversity was clear from the beginning, it is not clear to me why the plaintiff first filed in federal court. It may be that it hoped nobody would notice.

²⁴⁸ <ECJ-013 Fusion 110428>.

²⁴⁹ <ECJ-013 Fusion 111025>.

²⁵⁰ <ECJ-010 Global>.

²⁵¹ <ECJ-010 Global 110228>.

²⁵² GMT's relationship with DMF seems almost a textbook example of how not to protect your business secrets. GMT allowed certain DMF employees to communicate directly with its customers, even using email addresses with GMT's domain name, and for thirteen years, it allowed DMF to export directly to GMT customers. See <ECJ-010 Global 110916>, ¶¶ 16, 18.

rendered judgment on March 9, 2012.²⁵³ They requested the court to abstain from taking jurisdiction on the grounds that duplicative proceedings were already taking place elsewhere. A later filing showed that in the Chinese case, the court had awarded GMT 1.36 million yuan (about \$207,300 at contemporary exchange rates) from the defendants. This was a Pyrrhic victory, however, because in the same proceedings, the court had awarded the defendants 14.3 million yuan (about \$2.18 million at contemporary exchange rates) on their counterclaim against GMT.²⁵⁴ GMT appealed, with the Zhuhai Intermediate People’s Court accepting jurisdiction on July 23, 2012. The appeal was decided on December 6, 2012, largely in DMF’s favor.²⁵⁵

There was substantial argument between the parties as to whether the court should consider the Chinese lawsuit. There were procedural reasons for the court not to consider it. GMT argued that the consent of DMF’s board chairman was necessary for DMF to file its countersuit, and such consent had never been obtained; moreover, the chairman had explicitly disclaimed consent to the suit by himself and DMF’s board.²⁵⁶ (It had apparently been carried on at the instance of DMF’s president, Mr. Dong.) GMT also asserted that the Chinese court had failed to consider critical evidence from GMT because such evidence needed to be authenticated by the Chinese Embassy in the U.S., and the Embassy failed, without explanation, to authenticate the evidence in time to meet the Chinese court’s deadline.²⁵⁷

DMF responded by citing cases to the effect that a foreign legal system need not provide all the features of due process as understood in the United States, as well as cases stating that “[i]t is not the business of our courts to assume responsibility for supervising the integrity of another sovereign nation.”²⁵⁸ It also cited extensively from *Robinson Helicopter*.

Ultimately the court considered the Chinese judgment only for the purposes of deciding whether it should abstain from taking jurisdiction on the grounds of duplicative litigation; it decided against abstention.

On August 27, 2013, DMF submitted a brief arguing that the court should recognize the Chinese judgment under Illinois’s Uniform Foreign-Country Money Judgments Recognition Act (substantially the 2005 Uniform Act), thus barring GMT from making any claims on which the Chinese court had found against it. DMF cited *Robinson Helicopter* for the proposition that the

²⁵³ < ECJ-010 Global 120605>.

²⁵⁴ <ECJ-010 Global 120629>.

²⁵⁵ < ECJ-010 Global 140508a>.

²⁵⁶ <ECJ-010 Global 120917>, ¶¶ 5-7. The document attached a signed statement by the chairman to this effect.

²⁵⁷ <ECJ-010 Global 120917>, ¶¶ 31-32.

²⁵⁸ <ECJ-010 Global 121015>, at 9 (citing *Pavlov v. Bank of New York Co.*, 135 F. Supp. 2d 426 (S.D.N.Y. 2001)). The provenance of this quotation, and its doubtful applicability to REFJ proceedings, is discussed above at text accompanying notes 35-38.

Chinese legal system was fair (the reader will recall that that issue was not disputed in *Robinson Helicopter*), and argued that GMT, having chosen to bring suit in China, could not now argue that the Chinese legal system was unfair.²⁵⁹

GMT responded by repeating earlier specific arguments it had offered regarding the unfairness of the Chinese proceedings—for example, its inability to present certain evidence because the court would not consider it without authentication from the Chinese Embassy, which for unexplained reasons would not provide it, as well as the court’s failing to take account of certain other evidence.²⁶⁰ GMT also noted that DMF had not provided a proper evidentiary foundation for the Chinese judgment, attempting instead to have the court take judicial notice of it.

After further procedural maneuverings, in May 2015 the court issued its opinion on the question of recognition of the Chinese judgment (now the second, appellate judgment), finding in DMF’s favor.²⁶¹ It agreed that it could take judicial notice of the judgment, whose authenticity was not seriously contested by GMT. It also found that the judgment was final and enforceable, thus presumptively entitling it to recognition. This meant that GMT now had the burden of showing why it should not be recognized.

Importantly, the court noted that “GMT does not allege that the Chinese judicial system as a whole is biased and incompatible with principles of basic fairness. Non-recognition, therefore, is not mandatory.” GMT’s argument instead was based on a discretionary basis for non-recognition: that the particular proceedings had been unfair.

The court may nonetheless decline to recognize the foreign judgment . . . if GMT can show that the particular proceeding at issue was problematic. This is the argument on which GMT hangs its hat: the Chinese judgment should not be recognized, says GMT, because the foreign proceedings in this instance were not fair or impartial, and the rendering court’s integrity in this case was suspect.

²⁵⁹ <ECJ-010 Global 130827>, at 10-15. Arguments that a defendant’s participation in the foreign lawsuit amounts to an implicit concession that the courts in question are impartial are common in actions to recognize a foreign judgment. But as the Second Circuit pointed out,

[the position that] voluntarily participating in litigation in a foreign tribunal is fundamentally inconsistent with the belief that the tribunal is unlikely to provide an impartial forum or one that comports with notions of due process . . . is without merit. Defending a suit where one has been haled into court, and suing where jurisdiction and venue readily exist do not constitute assertions that the relevant courts are fair and impartial.

Bridgeway Corp. v. Citibank, 201 F.3d 134, 141 (2d Cir. 2000) (holding that party’s voluntary participation in Liberian litigation, even as a plaintiff, did not constitute a concession that Liberian courts were fair and impartial).

²⁶⁰ <ECJ-010 Global 130917>.

²⁶¹ <ECJ-010 Global 150501>.

Importantly, GMT argued further that the determination of whether the specific Chinese proceedings in question were fair was a factual matter that could be decided only after the taking of evidence, and therefore should not be resolved on the basis of the pleadings alone.

Here is where we get to the legally troublesome point. The court, correctly enough, characterized GMT's position this way: "At bottom, what GMT seeks is an examination by a United States court of how exactly the Chinese court approached GMT's lawsuit abroad—and whether, with respect to certain aspects of that approach, the proceedings were fair enough to GMT." Oddly, however, it found such an examination *contrary* to the policy goals of Illinois's Recognition Act: "[T]he focus in this instance ought not to rest on the details of the individual proceeding in China, and nor does the statute require such parsing. The focus, rather, should be on the procedures afforded by the Chinese judicial system as a whole."²⁶²

This statement is simply wrong. The Illinois statute, the Recognition Act, *did* require such parsing, stating that a foreign judgment need not be enforced if "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."²⁶³ Moreover, the court specifically acknowledged that "[t]he court may nonetheless decline to recognize the foreign judgment if GMT can show that the particular proceeding at issue was problematic."²⁶⁴ It is hard to reconcile these two statements. The court's approach is also diametrically opposite to that of virtually all other courts asked to assess foreign legal systems, which generally are far more comfortable finding fault with specific proceedings than with condemning entire legal systems.

The court ultimately decided that the Chinese proceedings were not "obviously biased or unfair" based on the fact that GMT had been awarded at least something—a little over \$200,000—and that the appellate court had reduced GMT's obligation to DFM, even though the amount of the reduction, less than \$21,000, was trivial compared with the total award to DFM of over \$2 million.

In the end, citing the principle of "international comity, which reflects a general respect for the decisions of foreign judiciaries," the court decided to recognize the Chinese judgment for issue-preclusion purposes on one claim.

In summary, this case is favorable to plaintiffs, but with significant infirmities. On the favorable side, the Chinese judgment was recognized at least to the extent of having preclusive effect. Moreover, the court came to this conclusion on the basis of the pleadings—the paper filings of the parties—without the full development of evidence that trial proceedings would have produced. The court held in effect that it did not want to get into a detailed examination of the fairness of the particular legal proceedings in China, and would be satisfied only by a persuasive attack on the

²⁶² <ECJ-010 Global 150501>, at *8. The court also held that the latter question, unlike the former, was an question of law and not of fact. I argue that this is a mistake at text accompanying notes 56-59, *supra*.

²⁶³ 735 ILL. COMP. STAT. 5/12-664(c)(8).

²⁶⁴ <ECJ-010 Global 150501>, at *7.

fairness of the Chinese legal system as a whole. In effect, it simply ignored the part of the statute allowing the party resisting enforcement to attack the fairness of the specific proceedings. At the same time, however, it evoked the principle of comity and respect for foreign courts, suggesting that such a wholesale attack would have been unwelcome as well.

On the unfavorable side, the court did not—perhaps because it was not asked to do so—give full effect to the Chinese judgment in the sense of enforcing its findings of GMT’s net liability to DMF of almost \$2 million. Recognizing the judgment for purposes of issue preclusion only was an easier and less consequential step for the court to take, and it may have appealed to the court because it allowed it to get rid of one the issues.

5. ECJ-001: *Qiu v. Zhang*²⁶⁵

Of all the cases in which enforcement of a Chinese judgment was granted, this is the weakest. First, recognition and enforcement was granted in default proceedings: the defendant was not present to argue the other side. The means that the court was bound to take the plaintiff’s well-pleaded allegations as true. The defendants not having shown up, there was nobody to carry their burden of showing a lack of impartiality or due process in the system as a whole, or any problems with the specific proceedings. Second, the decision granting recognition and enforcement was later quashed in any case, although for procedural reasons not related to any assessment of the Chinese legal system.

According to the complaint,²⁶⁶ defendant Zhang borrowed 21 million yuan from plaintiff Qiu in China in 2013, with the loan being due in 2014. In July 2015, Qiu filed suit against Zhang and another defendant, Yu, in the Suzhou Industrial Park People’s Court in China, and a year later obtained a judgment for 20 million yuan. The judgment was affirmed in December 2015 by the Suzhou Intermediate-Level People’s Court.

In its October 2017 decision enforcing the Chinese judgment,²⁶⁷ the court found that the Chinese legal system met the standards of the 2005 Uniform Act, including that of due process:

The Court also concludes that Plaintiff has also met his burden of showing that the judgment in the China Action is entitled to recognition under the Uniform Foreign-Country Money Judgments Recognition Act *Plaintiff has also demonstrated that the Chinese court was an impartial tribunal* that had subject matter jurisdiction and personal jurisdiction over Zhang and X. Yu and that both defendants were afforded adequate due process in the China Action.²⁶⁸

²⁶⁵ <ECJ-001 Qiu>.

²⁶⁶ <ECJ-001 Qiu 170724>.

²⁶⁷ <ECJ-001 Qiu 171027>.

²⁶⁸ <ECJ-001 Qiu 171027> (internal citations omitted) (emphasis added).

The italicized language is important, for the docket for this case contains *no record of any evidentiary submission* by the plaintiffs showing that the Chinese court was impartial and that the defendants were accorded adequate due process.

It is of course important to remember that this was a default judgment; there was no defendant contesting these issues. And the subsequent history of the case shows how necessary it is to have an adversarial process. The defendants first got wind of the proceedings when the plaintiff levied on the bank account of one of them. They immediately went to court seeking to have the default judgment quashed and the enforcement proceedings terminated, alleging (correctly, as it turns out) that they had not been properly served or otherwise notified of the proceedings, and that the court had no jurisdiction in any case.²⁶⁹

The order for recognition and enforcement of the Chinese judgment was quashed on April 13, 2018.²⁷⁰ The defendants then moved to dismiss for lack of federal subject-matter jurisdiction, alleging a lack of diversity between the parties. When the court then asked the plaintiffs to respond to the allegation of lack of diversity, the plaintiffs, evidently seeing that it was hopeless, opted for a voluntary dismissal of their claims.

6. ECJ-002: *Liu v. Guan*²⁷¹

This was another *Robinson Helicopter*-like case. The defendants, having previously argued in FNC proceedings that the Chinese judicial system presented an adequate alternative to the American one, found it difficult to impugn it when the plaintiff sought to enforce a Chinese judgment against them.

On May 2018, plaintiff Huizhi Liu, a citizen and resident of China, brought suit in New York State Supreme Court against Guoqing Guan, his wife Xidong Fang, and their daughter Jianyun Guan, all residents of New York State, alleging non-payment of a loan.²⁷²

At the same time as his answer,²⁷³ Guan filed a motion to dismiss²⁷⁴ on several grounds. First, he noted the existence of a forum selection clause in the loan contract providing for disputes to be settled in Chinese courts under Chinese law. Second, he moved for dismissal on *forum non conveniens* grounds.

²⁶⁹ <ECJ-001 Qiu 180330>.

²⁷⁰ <ECJ-001 Qiu 180413>.

²⁷¹ <ECJ-002 Liu>.

²⁷² <ECJ-002 Liu 180514>.

²⁷³ <ECJ-002 Liu 180814a>.

²⁷⁴ <ECJ-002 Liu 180814b>.

The relevant section of New York State law²⁷⁵ is quite vague. It provides:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just.

Guan argued that the case had no connection to New York State. The loan contract was negotiated and executed in China. The plaintiff was a Chinese citizen and resident. The loan was for construction work in China. The loan called for the application of Chinese law and jurisdiction by Chinese courts. The Chinese forum would be “more convenient” to the plaintiff.

The question of whether the Chinese legal system was adequate was not joined by the parties; the real issue here was whether the defendant suffered any inconvenience from being forced to litigate in New York State, and whether the plaintiff could obtain a meaningful judgment in China, given the difficulty of service on the defendants by a Chinese court, the absence of assets in China, and the difficulty of enforcing any Chinese judgment in the United States.

In January 2019, the court granted the defendants’ motion to dismiss on FNC grounds, subject to the defendants’ agreeing to be sued in China.²⁷⁶ Although the judge rejected the defendants’ argument that appearing in New York would be inconvenient for them, he apparently accepted their argument that witnesses and the taking of evidence would be necessary, and that those witnesses and evidence were in China.

The judge noted that Chinese law would apply and that the forum selection clause appeared to require proceedings in China, but declined to resolve that issue on the merits since he had already decided to dismiss on FNC grounds. This is somewhat curious: the grounds for dismissing on the basis of the forum selection clause were much stronger than the grounds for FNC dismissal, given the plaintiff’s very plausible assertions about the difficulty of proceeding against the defendants in China. That difficulty is relevant for FNC purposes; it is not relevant for purposes of deciding the validity and effect of a forum selection clause freely agreed to by the plaintiff. Ultimately, the lack of any real connection to New York, other than the defendants’ residence there, seems to have been decisive.

The defendants proffered the necessary consent to be sued in China, and the plaintiff moved quickly, bringing an action the following month in the Basic-Level People’s Court of Xiangzhou District of Zhuhai in Guangdong Province. Here the plaintiffs won a default judgment; as they had predicted, the defendants did not show up. The Chinese judgment was issued on July 14, 2020, becoming final fifteen days later upon the defendants’ failure to appeal.

²⁷⁵ N.Y. C.P.L.R. 327(a).

²⁷⁶ <ECJ-002 Liu 190104>.

The plaintiff then moved promptly the following month to enforce the judgment in New York.²⁷⁷ In response, Guan stated that neither he nor his designated lawyer in China, whose name and contact information he had provided to the plaintiff, had ever received notice of the Chinese proceedings.²⁷⁸ Guan also argued that the plaintiff had not met her burden of showing that the Chinese legal system satisfied the elements of the New York statute on recognition of foreign judgments. That statute requires that the foreign system be one that provides impartial tribunals or procedures compatible with the requirements of due process of law. He also argued that the plaintiff was bound by her previous argument, unsuccessfully made in the FNC proceedings, that Chinese judgments did not meet the enforceability standards of New York law.

On the issue of the adequacy of the Chinese legal system, the defendant offered in evidence the 2018 *Country Report on Human Rights Practices for China* issued by the Department of State, quoting a number of passages asserting that the Chinese legal system lacks judicial independence, fair trials, and due process in judicial proceedings. He also cited cases in which other courts had explicitly relied on State Department Country Reports for Liberia and Nicaragua in declining to recognize judgments from those countries.

In response,²⁷⁹ the plaintiff argued that having previously implicitly asserted in the FNC proceedings that the Chinese legal system presented an adequate alternative forum, the defendant could not now be permitted to claim the contrary. This is precisely the problem encountered by the defendant in *Robinson Helicopter* when it attempted to resist enforcement in virtually identical circumstances: a victory at the FNC stage, a default judgment against it in China, and an attempt by the plaintiff to come back to the United States to enforce the judgment.

In January 2020, the court found in favor of the plaintiff and granted its motion to recognize and enforce the Chinese judgment.²⁸⁰ It stated, “Plaintiff’s submissions demonstrate that the Chinese legal system comports with the due process requirements and the public policy of New York.” Plaintiff did indeed bear the burden of showing that the factors precluding enforcement—for example, lack of impartiality or due process—did not exist, but had in fact submitted no evidence to that effect, and indeed had made virtually no arguments to that effect in her attorney’s briefs, so the court’s reference to the plaintiff’s “submissions” is curious.²⁸¹ The court also accepted the plaintiff’s argument that “[d]efendants, in the [*forum non conveniens*] action . . . , argued that the interest of

²⁷⁷ <ECJ-002 Liu 190809b>.

²⁷⁸ <ECJ-002 Liu 191015a>. It is difficult to tell from the pleadings whether Guan was playing games to avoid knowing about the suit, or the plaintiff was playing games to avoid giving Guan proper notice. Both interpretations are plausible.

²⁷⁹ <ECJ-002 Liu 191104a>.

²⁸⁰ <ECJ-002 Liu 200106>.

²⁸¹ This is the second case in which courts referred to evidence that apparently does not exist. See the discussion of *Qiu v. Zhang* at text accompanying note 265, *supra*.

substantial justice would be best served by adjudication of the matter in the People’s Republic of China, and they may not now cry foul.”

One has to sympathize with the plaintiff in this case. The defendants were pretty clearly moving heaven and earth to avoid paying their debt. The filings also indicate that the defendants in fact did know of the proceedings against them in China and chose not to contest them.

At the same time, however, the court did not set a good precedent in its uncritical acceptance of the adequacy of the Chinese judicial system. It found that the plaintiff had met her burden at the enforcement stage of showing that none of the factors calling for non-recognition were present, and yet the plaintiff in fact produced no evidence about this at all. She offered a single affidavit from her Chinese attorney regarding the issue of service on the plaintiffs. She offered nothing contradicting the State Department Country Report. And yet the court went ahead and recognized the Chinese judgment. It was understandably fed up with the defendants’ maneuverings, and the result may have served the interests of justice, but the broader principle it established is unfortunate.

7. *ECJ-016: Yancheng Shanda Yuanfeng Equity Investment Partnership v. Wan*²⁸²

According to the complaint of the plaintiff, Yancheng Shanda Yuanfeng Equity Investment Partnership (Yancheng), in 2018 and 2019 Yancheng entered into a series of agreements with the defendant Wan (apparently a naturalized U.S. citizen of Chinese origin who did extensive business in China) under which Wan would repurchase shares in Zmodo, a Chinese corporation whose shares Wan had in 2017 sold to Yancheng.²⁸³ The relevant dispute resolution provisions called for the application of Chinese law and jurisdiction in Chinese courts.²⁸⁴ Apparently Wan did not perform, for Yancheng successfully sued him in China, winning a judgment for the equivalent of about \$18.7 million. Wan did not appear at any stage of the Chinese proceedings, nor did he appeal.

In 2020, Yancheng brought proceedings in Wan’s home state, Illinois, seeking to enforce the Chinese judgment. Wan sought dismissal of the action on various grounds, including lack of notice of the Chinese proceedings and China’s lack of impartial courts and due process: “Defendant argues that China’s legal system lacks judicial independence because it is controlled by the Communist Party of China, does not have jury trials, is corrupt, and lacks the credibility and competence to administer justice fairly.”²⁸⁵ Wan’s motion was supported by citations to a number of law review articles but no expert testimony.

²⁸² <ECJ-016 Yancheng>.

²⁸³ Where not otherwise indicated, the account of this case is taken from the order granting enforcement of the Chinese judgment, <ECJ-016 Yancheng 220110>.

²⁸⁴ See <ECJ-016 Yancheng 210712>, at 3.

²⁸⁵ <ECJ-016 Yancheng 210108>, at *9.

While acknowledging that “China . . . is not a representative democracy, but rather is dominated by the Communist Party of China, to whom the courts are beholden, and those courts are subject to various external and internal influences,” the district court denied Wan’s motion. First, it criticized the law review articles as mostly over ten years old.²⁸⁶ Second, it noted the absence of

any supportive case law for [the defendant’s] argument that China’s courts lack basic fairness. Defendant has cited no case where an American court has refused to enforce a Chinese court judgment, let alone refused to enforce a Chinese court judgment on the basis of whether China’s courts are impartial. . . . In multiple . . . cases, American courts have enforced Chinese court judgments. “Indeed, U.S. courts consistently acknowledge the adequacy of due process in the [Chinese] judicial system.”²⁸⁷

The court also cited (and misread) the *Sinochem* case, stating that it involved the Supreme Court dismissing due to an alternative forum in China.²⁸⁸

In later proceedings,²⁸⁹ the court granted enforcement of the judgment. By this time, the defendant still lacked expert testimony, but was able to meet the court’s earlier implied challenge to cite at least one case as favorable precedent: *Shanghai Yongrun*.²⁹⁰ But the court was unimpressed:

The court . . . finds Defendant’s citation to the New York opinion, which relies entirely upon a U.S. State Department Annual Country Report for 2018 and 2019, unpersuasive. As noted by Plaintiff, neither Defendant, or the cited New York opinion, address the multiple federal cases cited by this court . . . where American courts enforced Chinese court judgments and/or acknowledged the adequacy of due process in the Chinese judicial system. Further, the opinions of New York state trial courts are not binding on this court.

Summary of the cases

The seven cases favoring recognition and enforcement are not as strong as their proportion (almost half) might seem. Two were default judgments, and in one of those cases the enforcement order was later quashed. (Because the quashing was for procedural reasons unrelated to the merits of the enforcement claim, I still count it as an enforcement case.) In three of the remaining five cases, the party resisting enforcement was in the awkward position of having argued in previous FNC

²⁸⁶ The court did not explain its basis for believing that assertions about the Chinese legal system in articles more than ten years old were not accurate today. Nobody would suspect that a decade-old article about the appointment process or professional incentives of U.S., British, or French judges was unreliable because of its age.

²⁸⁷ <ECJ-016 Yancheng 210108>, at *10 (citing, *inter alia*, *Robinson Helicopter* and *Sinochem*).

²⁸⁸ I discuss the *Sinochem* case above at text accompanying notes 166-173.

²⁸⁹ <ECJ-016 Yancheng 220110>.

²⁹⁰ I discuss the case below at text accompanying notes 357-373.

proceedings that the Chinese legal system was fine—that it presented, in the words of FNC doctrine, an “adequate alternative forum” for the case—and thus could hardly be taken seriously when it argued at the REFJ stage that the Chinese legal system was terrible. And in another case, *Yancheng*, the defendant’s position was considerably weakened by its having agreed contractually to dispute resolution by Chinese courts.

The one remaining case, involving recognition solely for the purpose of issue preclusion on one point, is troubling. The court essentially refused to consider evidence of serious due process issues in the Chinese proceedings, and the U.S. proceedings were so egregiously tainted by misconduct on the part of plaintiff and its attorneys that the court ended up granting the extraordinary remedy of a default judgment on the non-precluded issue, and recommended that the plaintiff’s lawyer, a member of the California bar, never again be given *pro hac vice* permission to appear in Illinois.

In *Yancheng*, the path dependency effect of common law reasoning was on full display. The court rejected the defendant’s arguments that Chinese courts did not provide due process, initially citing the defendant’s failure to cite any U.S. cases that had accepted such arguments, and then reading closely and critiquing the one case the defendant later found. The court did not subject the cases that had granted enforcement to a similar close examination.

In the end, then, we are left with no cases in which a Chinese money judgment was enforced against a party who (a) contested it and (b) had not effectively crippled itself by having previously argued that the Chinese legal system provided an adequate alternative forum, or having implicitly admitted, as in *Yancheng*, that the Chinese courts were fair by contractually agreeing to their jurisdiction.

5.2.3 Cases unfavorable to those seeking recognition

1. *ECJ-008: Beijing Zhongyi Zhongbiao Electronic Information Technology Co. v. Microsoft*²⁹¹

In this case, the plaintiff, a Chinese company (“Zhongyi”), had licensed certain Chinese fonts to Microsoft in 1995. A dispute arose as to whether the license covered any products other than Windows 95. Zhongyi claimed it did not, whereas Microsoft, naturally, claimed it did.²⁹² The licensing contract contained a choice of law and forum selection clause making the agreement subject to the “laws of the State of Washington and the parties hereby consent to the jurisdiction of the state and federal courts sitting in the State of Washington.”²⁹³

²⁹¹ <ECJ-008 Beijing Zhongyi>.

²⁹² I read the contract, as did the U.S. courts, as stating unambiguously that the license applies to all products in which Microsoft might wish to use it, but the merits of the contract dispute are beyond the scope of this particular discussion.

²⁹³ <ECJ-008 Beijing Zhongyi 131031>, at 2.

In 2007, Zhongyi sued Microsoft in the Beijing No. 1 Intermediate People’s Court, seeking an injunction but no money damages. In November 2009, the court found largely in Zhongyi’s favor. Both parties appealed. (That Zhongyi also appealed turned out to be important, as will be explained later.) In December 2012, the Beijing High People’s Court affirmed the lower court’s ruling, making the decision final (the Chinese term is “legally effective”) under Chinese law. Microsoft then petitioned the Supreme People’s Court (SPC) for a retrial, a procedure that is allowed under Chinese law as a way of revisiting judgments that have already gone into effect. It is not considered an appeal, and courts do not have to hear it.

In June 2013 the SPC issued a notice indicating it had received Microsoft’s request and would consider whether or not to grant a retrial,²⁹⁴ and in August 2014 it issued another notice stating that the retrial request had been granted and that enforcement of the judgment would be suspended while the case was being re-tried.²⁹⁵ As of November 2017, the re-trial had still not been completed.²⁹⁶

In July 2012, Zhongyi sued Microsoft in federal district court in Arkansas²⁹⁷ (the case was later transferred to a federal district court in Washington State), arguing that the Chinese court’s finding that the license was limited to Windows 95 should be binding on Microsoft, preventing it from re-litigating that issue in the U.S. proceedings. It was arguing that the Chinese court’s finding on that particular issue should be preclusive.

This case is different from most other proceedings to recognize Chinese judgments because it did not involve a money judgment. Therefore, the 2005 Uniform Act, in effect in Washington at that time, did not apply. Instead, Zhongyi had to rely on common-law principles, citing Section 98 of the Restatement of Conflict of Laws (Second) (RCL2), an unofficial summary of common-law doctrines. That section provides simply that “[a] valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.” Notably, RCL2 does not require finality, although other statements of the law on recognition do have this requirement.²⁹⁸

The District Court rejected Zhongyi’s arguments. First, it found that the Chinese judgment was not yet final: “The case is on appeal and Chinese courts could yet rule in Microsoft’s favor. . . . It is a fundamental tenet of collateral estoppel that a decision must be final for there to be any

²⁹⁴ <ECJ-008 Beijing Zhongyi 130616>.

²⁹⁵ <ECJ-008 Beijing Zhongyi 140804>.

²⁹⁶ <ECJ-008 Beijing Zhongyi 171120>.

²⁹⁷ <ECJ-008 Beijing Zhongyi 120710>.

²⁹⁸ For example, Section 491 of the Restatement of the Foreign Relations Law of the United States (Fourth) states that to be recognized, a foreign judgment must be “final, conclusive, and enforceable”.

preclusive effect.”²⁹⁹ Second, the court held that aside from the finality issue, a U.S. court “is not required to accept, at face value, the factual and legal conclusions of a foreign court.”³⁰⁰ Third, it found the precedents cited by Zhongyi in which U.S. courts had recognized and enforced Chinese judgments—for example, the *Robinson Helicopter* case—to be inapplicable because those cases had involved money judgments.

While the result of this case is good for those resisting enforcement, its reasoning is questionable. In particular, while it is true that U.S. courts are not obliged to recognize the factual and legal conclusions of a foreign court, that truism does not resolve any case. Of course U.S. courts are not *required* to accept the factual and legal conclusions of a foreign court. But the issue in this case was, as in all cases, whether the court *should* have done so. Merely stating that it is not required to do so is not an argument. The court simply failed to address the relevant factors. Consequently, the decision fails as a reasoned analysis of the question of whether Chinese judgments should be recognized and enforced. No evidence or even unsupported claims about the nature of the Chinese legal system were offered by either party.

2. *ECJ-009: Armadillo Distribution Enterprises, Inc. v. Hai Yun Musical Instruments Manufacture Co. Ltd.*³⁰¹

I put this case in the “unfavorable” pool because in the end the court denied recognition and enforcement of a Chinese judgment, and so it cannot be cited in support of plaintiffs in other cases. Nevertheless, the path that ultimately led to denial shows a court by and large favorable to the arguments in favor of enforcement and unsympathetic to the arguments against. Unlike many other cases, in this case the parties did make arguments about the quality of the Chinese legal system.

In August 2012, Armadillo Distribution Enterprises (Armadillo), a musical instrument distributor based in Florida, sued Hai Yun Musical Instruments (Hai Yun), a Chinese manufacturer,

²⁹⁹ <ECJ-008 Beijing Zhongyi 131031>, at 4. There is a good argument to be made that the Chinese judgment was final within the meaning of American doctrine on recognition of foreign judgments. Chinese civil procedure provides for one and only one appeal, after which a judgment is enforceable. The Chinese judgment in question had been affirmed on appeal and was enforceable: in Chinese terms, “legally effective.” Chinese civil procedure does allow a type of post-effective appeal called petition for retrial, and that was what the court referred to as a further appeal to China’s Supreme People’s Court. But American doctrine holds that a judgment may be recognized provided that it is “final, conclusive, and enforceable where rendered” even though an appeal is pending or allowed. *See* DICKERSON ET AL., *supra* note 223, § 6:5 (footnotes omitted).

To be sure, the point is not beyond reasonable dispute. The availability of retrial, even though it is rarely granted, has indeed led Hong Kong courts under Hong Kong’s common law to deny finality, and therefore recognition, to Chinese judgments. *See* Weixia Gu, *A Conflict of Laws Study in Hong Kong-China Judgment Regionalism: Legal Challenges and Renewed Momentum*, 52 CORNELL INT’L L.J. 591, 598 (2020). The leading case is *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun* [1996] 2 H.K.L.R. 395 (H.C.).

³⁰⁰ <ECJ-008 Beijing Zhongyi 131031>, at 4.

³⁰¹ <ECJ-009 Armadillo>.

in federal district court in Florida, alleging that Hai Yun, a longtime and previously reliable supplier, had delivered a shipment of drum kits so defective that not only were they unsellable, but they had ruined the reputation of the brand under which Armadillo had sold them, forcing Armadillo to discontinue that brand entirely.³⁰² Armadillo, which had not yet paid for the drum kits, sought damages for the harm to its brand.

Eventually Armadillo secured a default judgment in October 2013, but Hai Yun persuaded the court to set it aside. Hai Yun then filed an answer to the complaint, asserting among other things that it had a Chinese court judgment against Armadillo for the amount it claimed Armadillo owed it for the drum kits. Hai Yun had filed suit in China in May 2012. Armadillo apparently received notice and appeared to make a defense, represented by counsel. The court, rejecting the report of Armadillo's expert, found for Hai Yun in a judgment dated August 6, 2013.³⁰³ Although in its answer Hai Yun counterclaimed for the amount it said Armadillo owed it, it did not specifically request enforcement of the Chinese judgment. In effect, it asked the court to decide the issue on the merits instead.

Hai Yun's failure to request enforcement of the Chinese judgment appears to have been simply a product of careless lawyering. In February 2014, it filed an amended counterclaim specifically requesting recognition and enforcement of the Chinese judgment under the Florida Uniform Out-of-Country Foreign Money-Judgment Recognition Act and alleging that the factors under the Act were present.³⁰⁴

Now the issue of the quality of the Chinese judicial system was joined. In its response, Armadillo sought dismissal of Hai Yun's attempt to enforce the Chinese judgment. Armadillo argued among other things that (1) the Chinese judicial system was not impartial and lacked due process protections; and (2) China did not reciprocally enforce U.S. judgments.³⁰⁵ On the issue of impartiality, Armadillo cited the 2013 Country Report for China issued by the State Department, as well as State Department Travel Advisories, for numerous statements about the lack of due process in the Chinese judicial system, and cited *Osorio v. Dole Food Co.*,³⁰⁶ a case in which a court had, on the basis of similar Country Reports from the State Department, found the Nicaraguan court system to lack due process. It concluded that "because the judicial branch in China is dominated by political forces, and in general, does not dispense impartial justice, in an almost identical fashion as the Nicaraguan judicial system cited in *Osorio*, . . . the alleged Chinese Judgment should not be recognized by this Court."

³⁰² <ECJ-009 Armadillo 120814>, ¶¶ 18-20.

³⁰³ <ECJ-009 Armadillo 131204b>.

³⁰⁴ <ECJ-009 Armadillo 140218>.

³⁰⁵ <ECJ-009 Armadillo 140326>.

³⁰⁶ 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

On the issue of reciprocity, Armadillo’s factual observation regarding the lack of reciprocity was correct, but lack of reciprocity was a discretionary, not mandatory, ground for non-recognition under Florida law.³⁰⁷

Hai Yun responded, predictably enough, by citing a slew of precedents in which U.S. courts had either recognized Chinese judgments or found China to be an adequate forum for FNC purposes.³⁰⁸ It cited extensively from *Robinson Helicopter*. Its strongest argument may have been that in order to establish the existence of factors calling for non-recognition of the judgment, a proper hearing with evidence was required, and therefore Armadillo’s efforts to have the court decide the issue on the paper filings alone, during pre-trial proceedings, was premature. On the reciprocity issue, Hai Yun argued that Armadillo had not adequately shown lack of reciprocity, even though it could not cite any examples of Chinese courts enforcing U.S. judgments. But it argued correctly that lack of reciprocity need not be fatal under Florida law.

In its response, Armadillo noted that all but one of the cases cited by Hai Yun involved FNC, not recognition of a foreign judgment. It distinguished those cases, and also noted the special circumstances of *Robinson Helicopter*.³⁰⁹ Armadillo also submitted a student-authored law review article on the general non-enforceability of foreign judgments in China.

In June 2014, the court decided on the issue of whether to dismiss Hai Yun’s attempt to enforce the Chinese judgment. It found in favor of Hai Yun. This does not mean that it decided to enforce the judgment; instead, the court found that there were too many issues of disputed fact—was the Chinese system impartial? was the judgment indeed final? did China in fact provide reciprocity?— for the motion to be decided solely on the paper filings. Evidence would have to be heard.³¹⁰

So far, then, this case presented a reasonably vigorous and competent argument between both sides that addressed the question of the overall quality of the Chinese judicial system. Notably, however, this argument took place in the absence of expert witness statements. Moreover, while the side resisting enforcement buttressed its arguments with an official U.S. government report, the side seeking enforcement cited only U.S. court cases as precedents—and as we have seen, those precedents are much weaker than they might appear at first glance to be.

The case then took an unexpected turn when the court, in September 2014, granted a motion filed by Hai Yun’s American attorneys requesting permission to withdraw from representing Hai Yun, citing “irreconcilable differences.”³¹¹ A week later, it granted another motion to withdraw

³⁰⁷ FLA. STAT. § 55.605(2)(g).

³⁰⁸ <ECJ-009 Armadillo 140414>.

³⁰⁹ <ECJ-009 Armadillo 140429>.

³¹⁰ <ECJ-009 Armadillo 140623>. In the interests of brevity, I have not discussed the finality issue here.

³¹¹ <ECJ-009 Armadillo 140903>.

filed by Hai Yun's first attorney on the grounds that he had left the firm representing Hai Yun and was no longer involved in the case. This left Hai Yun without legal representation.

In subsequent proceedings, in December 2014 Armadillo renewed its claim that Hai Yun's attempt to enforce the Chinese judgment should be rejected on summary judgment.³¹² A summary judgment motion, if granted, requires the court to find that there is no genuine dispute about material facts. Armadillo's arguments this time were the same ones presented earlier.

Although Hai Yun neither obtained new counsel nor responded in any way to Armadillo's motion to the court to dispose of the case on summary judgment, the court denied Armadillo's motion.³¹³ On the issue of impartiality, the court criticized Armadillo for continuing to rely solely on its two sources: the State Department's 2013 Country Report for China and its travel advisory. By contrast, noted the court, the defendants in the *Osorio* case had supplemented the Country Report for Nicaragua with expert testimony.

Following the withdrawal of its counsel, Hai Yun and its Chinese attorneys failed to respond to all attempts to contact them and get them to continue their participation in the case. Finally fed up, the court issued a default judgment against Hai Yun on all of Armadillo's claims on June 23, 2015,³¹⁴ and issued another judgment on November 5, 2015 dismissing without prejudice Hai Yun's counterclaims,³¹⁵ including its effort to enforce the Chinese judgment.

In summary, this case stands rather strongly for the proposition that it is fairly easy for plaintiffs to establish that prima facie grounds for recognizing a judgment exist, and difficult for defendants to establish on the pleadings, without more presentation of evidence, that grounds for non-recognition exist. It also shows the court rejecting findings in a report issued by the Department of State, a body that clearly has a greater institutional capacity than any one court, or even the court system as a whole, for determining such factual questions about the Chinese legal system as its general level of impartiality and corruption.

Although the judgment was not in the end enforced, this could have been due simply to Hai Yun's failure to continue its participation in the proceedings.

3. ECJ-011: *Anyang Xinyi Electric Glass Co. v. B&F International (USA), Inc.*³¹⁶

This was a straightforward case of a request for a U.S. court to enforce a Chinese money judgment. The result, while favorable to defendants generally (the court denied the motion) is not a slam-dunk for them. The court did not find that the China fails to provide impartial tribunals; it

³¹² <ECJ-009 Armadillo 141205>.

³¹³ <ECJ-009 Armadillo 150428>.

³¹⁴ <ECJ-009 Armadillo 150623>.

³¹⁵ <ECJ-009 Armadillo 151105>.

³¹⁶ <ECJ-011 Xinyi>.

simply did not address the question, finding that it was a question of fact that could not be answered on the pleadings alone. It expressed itself as open to the possibility of finding, upon presentation of adequate evidence, that particular Chinese proceedings were tainted.

The complaint was filed in February 2015.³¹⁷ The plaintiff, Anyang Xinyi Electric Glass Co. (Xinyi), a Chinese company, sought recognition and enforcement of a Chinese judgment against B&F International (USA) Inc. (B&F), a California corporation. Xinyi alleged that it was established in 2000 with two investors: Xinyi Technology, a Chinese company, and B&F. (Later filings in the case revealed that it was a Sino-foreign joint venture.³¹⁸) The investors' interests were 75 percent and 25 percent respectively. The two parties to Xinyi subsequently made further capital contributions and brought in an additional shareholder, Golden Shell, each transferring a 5 percent interest to it. In June 2005, according to the complaint, all parties agreed to an additional capital increase, with B&F responsible for approximately \$8.8 million. B&F ended up contributing only \$5.539 million, however, leaving it short approximately \$3.27 million.

In December 2007, Xinyi entered bankruptcy proceedings. Its bankruptcy administrator, representing the interests of creditors, filed suit in China against B&F on November 21, 2008, seeking to force it to make its agreed contribution. (Note here that it seems the main and perhaps only creditor was Xinyi Technology, which claimed that it had made various loans to Xinyi. In short, the substance of the proceedings seems to have been an attempt by Xinyi Technology to get B&F to pay money to it.)

B&F challenged the court's jurisdiction and lost. It then contested the suit and lost. The Chinese judgment was issued on February 18, 2013. B&F did not appeal the judgment within the period provided under China's Civil Procedure Law, and so the judgment became legally effective and enforceable under Chinese law.

Xinyi sought recognition and enforcement of the Chinese judgment under the Uniform Foreign-Country Money Judgments Recognition Act (the 2005 Uniform Act), adopted by California.³¹⁹ The complaint alleged that the various elements of the Act were satisfied, including that China has "a judicial system which provides for impartial tribunals and procedures consistent with the requirements of due process of law" (the general argument) and that the particular proceedings in question "were conducted by an impartial tribunal, and comported with the requirements of due process."

Xinyi eventually got an order granting its application for a default judgment on November 24, 2015.³²⁰ B&F then finally sprang into action, moving to set aside the default judgment on the

³¹⁷ <ECJ-011 Xinyi 150206>.

³¹⁸ <ECJ-011 Xinyi 160711>.

³¹⁹ CAL. CIV. PROC. CODE §§ 1713 *et seq.*

³²⁰ <ECJ-011 Xinyi 151124>.

grounds that it had not received actual notice.³²¹ In its brief, it argued strenuously both that the Chinese legal system did not provide impartial tribunals and procedures compatible with due process (grounds for mandatory non-recognition) and that the particular proceedings had been tainted by unfairness (grounds for discretionary non-recognition).

Regarding the particular proceedings, the brief alleged some disturbing facts. First, some or all of Xinyi's debt was owed to its Chinese investor, Xinyi Technologies, on the basis of funds transfers characterized as loans that B&F knew nothing about. Xinyi Technologies had sued Xinyi for these amounts in Chinese proceedings in which both plaintiff and defendant *were represented by the same lawyer*, an egregious conflict of interest.

Second, B&F alleged that the Chinese court had improperly ignored an arbitration agreement when it took jurisdiction over the case. Third, B&F alleged that Xinyi had submitted forged documents in support of its claim (Xinyi board resolutions with forged signatures of B&F's appointees) and that the Chinese court had ignored uncontroverted evidence of the forgery.

Regarding the Chinese legal system in general, the brief cited a number of official and academic sources in support of its assertion that the Chinese legal system did not meet standards of impartiality and due process. As in other cases, the brief cited the State Department's Country Report for China (in this case, from 2015). That report states emphatically that the Chinese courts lack independence and regularly receive instructions on how to decide cases. It states that corruption is widespread and that local governments exert influence over rulings of local judges.

The brief also cited the State Department's travel warning regarding China, which stated, "Many U.S. citizens have reported difficulty getting their contracts enforced by Chinese courts or being forced out of profitable joint-ventures without opportunity to secure legal recourse in China." Other sources cited to the same general effect included the Congressional-Executive Committee on China and scholarly sources. The brief even cited a statement from China's Supreme People's Court that China's judicial system would "resolutely resist the influence of Western principles such as 'judicial independence' and 'the separation of powers' [.]" It also argued that the lack of reciprocity—China had not at that point enforced any U.S. judgments—undermined any comity justification for recognition and enforcement.

Finally, it argued (correctly, as the discussion of the cases here shows) that in the two cases it had discovered in which U.S. courts had recognized Chinese judgments—*Robinson Helicopter*³²² and *Global Material Technologies*³²³—the party resisting recognition had not presented any arguments that the Chinese legal system lacked impartiality and due process.

³²¹ <ECJ-011 Xinyi 160711>.

³²² <ECJ-007 Robinson>.

³²³ <ECJ-010 Global>.

In its response,³²⁴ the plaintiff addressed the question of the Chinese legal system’s ability to deliver impartial judgment by stigmatizing the State Department publications as “very general” and citing extensively from expert witness testimony in another case provided by Professor Jacques deLisle, a Chinese law expert at the University of Pennsylvania Law School. Professor deLisle testified as to the fundamental fairness of the Chinese legal system both in the *Robinson Helicopter* case at the FNC stage and in a number of FNC cases.

It must be said that plaintiff’s arguments in favor of the Chinese legal system were as “very general” as those it criticized. For example, it argued that since China had seen rapid economic development recently, and had attracted a large amount of foreign investment, it must therefore have a “reasonably well-functioning legal system”.

With regard to the fairness of the specific proceedings—that is, Sections 4(c)(7) and (8) of the 2005 Uniform Act in effect in California at the time—the plaintiff simply urged that defendant’s arguments amounted to improper attempts to relitigate the proceedings. This is an odd argument, since the 2005 Uniform Act specifically *allows* defendants to make such arguments. It is proceedings that are *not* tainted by such problems that the Uniform Act seeks to protect from relitigation. The plaintiff argued—correctly, I think—that the joint venture itself (and its legal successor, the trustee in bankruptcy) was not a party to the joint venture agreement and its arbitration clause, and argued as well that the allegedly forged documents were irrelevant to the Chinese court’s decision.

In its response,³²⁵ defendant noted that in none of the U.S. FNC cases cited by the plaintiff had there been adversarial debate on the fundamental fairness of the Chinese legal system. The defendant further noted the weakness of *Robinson Helicopter* as a precedent for enforcement of Chinese judgments: that the defendant in that case also did not challenge the fairness of the Chinese legal system.

In August 2016, the court issued its decision,³²⁶ agreeing with defendants to set aside the default judgment. This had the effect of at least temporarily not enforcing the Chinese judgment. A necessary condition for setting aside the default judgment was that the defendant allege facts that, if true, would constitute a meritorious defense to the complaint. The court ruled that the defendant’s allegations of a tainted judicial process in China fulfilled that condition, and that therefore the defendant deserved a chance to prove its allegations.

This procedural move is important because the unfairness of a foreign legal system or particular foreign proceedings is an affirmative defense that must be raised and proved by the party resisting enforcement. Plaintiffs in these cases generally want to settle the issue on the pleadings, without moving to a full trial. Defendants, by contrast, want the opposite—to be able to contest the plaintiff’s claims not only in the pleadings, but also, if that fails, to have the chance to contest them

³²⁴ <ECJ-011 Xinyi 160718>.

³²⁵ <ECJ-011 Xinyi 160725>.

³²⁶ <ECJ-011 Xinyi 160804>.

in a trial setting. Here, the court held that issues about the fairness of particular foreign proceedings were questions of fact that could not be settled on the pleadings alone.

Having found grounds to deny the motion for the above reason, the court specifically declined to address the sensitive issue of whether the Chinese judicial system, in the language of the 2005 Uniform Act, “does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”

4. *ECJ-012: Chen v. Sun*³²⁷

Enforcement was denied in this case on procedural grounds unrelated to the fairness of the Chinese legal system. Nevertheless, I count it as a pro-defendant case on the grounds that the judge felt the pleadings showed that the Chinese proceedings needed to be examined in detail.

On January 11, 2013, plaintiff Hsin-Cheng Chen brought a complaint in federal district court for the Southern District of New York against Kelvin Sun seeking enforcement of a Chinese judgment in favor of Chen and against Sun in the amount of 4,555,900 yuan plus interest and costs.³²⁸ The complaint alleged that Sun owed Chen money and that the debt had been confirmed by a final court judgment issued by the Shanghai No. 1 Intermediate People’s Court. A later filing alleged that in or around June 2012, Sun was subject to an exit ban and forbidden to leave China on account of the outstanding judgment.³²⁹

Five days later, the plaintiff filed an identical claim in federal district court in California.³³⁰ But the plaintiff never followed up and the case was dismissed for lack of prosecution on September 4, 2013.³³¹

The governing law was the Uniform Foreign Money-Judgments Recognition Act (the “1962 Uniform Act”), which New York State had adopted.³³² In his answer to the New York complaint,³³³ Sun alleged that the conditions of the 1962 Uniform Act were not met. Specifically, he argued among other things that “the foreign judgment was not obtained in a proceeding before a fair tribunal in which the Defendant was duly served with process,” that “the foreign judgment was not obtained in a proceeding before a fair tribunal in which the Defendant was afforded the due process of law, and “the foreign judgment was obtained by fraud.” (Notably, he failed in this answer to argue lack of diversity, the grounds on which he ultimately won.)

³²⁷ <ECJ-012 Chen>.

³²⁸ <ECJ-012 Chen 130111>.

³²⁹ <ECJ-012 Chen 130509>.

³³⁰ <ECJ-012 Chen 130116>.

³³¹ <ECJ-012 Chen 130905>.

³³² N.Y. C.P.L.R. §§ 5301 et seq.

³³³ <ECJ-012 Chen 130306>.

In a later filing opposing plaintiff's motion to attach his assets pending trial,³³⁴ he expanded on those arguments—*i.e.*, that the system in general was fundamentally flawed. He cited cases where U.S. courts had, on those grounds, refused to enforce judgments from Liberia, Iran, and Nicaragua. The defendant also attached four documents³³⁵ in support of its arguments about the Chinese judicial system: an academic article on judicial corruption in China, a report from Radio Free Asia, a report from the *Wall Street Journal*, and a paper written by a college sophomore that had been posted online. Citing those sources, the defendant argued that the Chinese judicial system lacked independence, was politically controlled, and was corrupt. He also argued (correctly) that China had never to that point enforced a U.S. judgment, although reciprocity is not required under the 1962 Uniform Act.

The plaintiff countered these arguments³³⁶ with a citation to the *Robinson Helicopter* case as well as a set of exhibits of his own purporting to show the strength of the Chinese legal system. His exhibits³³⁷ were, if anything, even weaker than the defendant's. In addition to an excerpt from *Robinson Helicopter*, which as discussed elsewhere is actually a weak source because of its unique circumstances, the plaintiff cited text from China's Civil Procedure Law (which does not tell us anything about what actually happens in Chinese courts) and a self-congratulatory White Paper on the Chinese court system published by the Chinese government itself.

In December 2013, the court issued an order denying the plaintiff's request to attach the defendant's assets pending resolution of the case.³³⁸ The order is important because attachment depends on the likelihood of the plaintiff's success on the merits, and the judge took into account the defendant's arguments about the nature of the Chinese legal system in finding that the U.S. court "must closely examine the Chinese court's proceedings before it may decide whether to recognize [the judgment]."³³⁹

There was little further argumentation on the question of the Chinese legal system. The parties had extensive conflict over discovery, and in the end the court dismissed the case for lack of subject matter jurisdiction: it found that the necessary diversity of citizenship did not exist between the parties.³⁴⁰ This is an argument that the defendant should have made much sooner; it would have saved everyone a lot of time and money.

Summary of the cases

³³⁴ <ECJ-012 Chen 130619>.

³³⁵ <ECJ-012 Chen 130619a>.

³³⁶ <ECJ-012 Chen 130703>.

³³⁷ <ECJ-012 Chen 130703a>.

³³⁸ <ECJ-012 Chen 131205>.

³³⁹ <ECJ-012 Chen 131205a>, at 4.

³⁴⁰ <ECJ-012 Chen 160121>.

In all of these cases recognition was denied, whether for purposes of enforcement or for purposes of issue preclusion. In no case, however, was the issue of the quality of the Chinese legal system properly joined. In three cases, the denial of recognition was merely an intermediate step in the proceedings; had they continued, the party seeking recognition could still have raised arguments and evidence. In only one case, *Beijing Zhongyi*, was recognition denied in the form of a dismissal of the complaint with prejudice. And in *Beijing Zhongyi*, neither party offered any arguments or evidence about the Chinese legal system in general.

5.2.4 Neutral cases

1. *ECJ-005: Ningbo FTZ Sanbang Industry Co. v. Frost National Bank*³⁴¹

In this case, the plaintiff lost on purely technical, procedural grounds and for unknown reasons did not apparently seek to cure the easily curable problem.

The dispute involved a shipment from Ningbo FTZ Sanbang Industry Company, Ltd. (Sanbang), a Chinese manufacturer, to an American customer who did not pay. Sanbang believed that Frost National Bank (Frost), one of the banks involved in the transaction, improperly turned over documents to the customer allowing it to take the goods without first paying for them. Sanbang then sued Frost in China. Whether Frost received effective notice of the lawsuit is not clear; in any case, Frost did not appear and lost the case by default. Sanbang then brought suit in July 2008 in federal court in Texas against Frost, seeking enforcement of the Chinese judgment against Frost for about \$166,000.³⁴²

Frost resisted recognition of the judgment on several grounds. Although the case was heard in federal court, Texas law regarding the recognition and enforcement of foreign judgments, known as the Texas Recognition Act, applied.³⁴³ Frost argued that Sanbang did not meet the requirements of the Texas Recognition Act in that (a) it did not file a properly authenticated³⁴⁴ copy of the Chinese judgment, (b) the Chinese judgment was rendered without due process, (c) the Chinese court did not have jurisdiction over Frost, (d) Frost was not given sufficient notice of the Chinese lawsuit, and (e) China did not extend reciprocity to judgments from Texas. Any of those grounds alone would have been sufficient to make the judgment unenforceable.

³⁴¹ <ECJ-005 Sanbang>.

³⁴² <ECJ-005 Sanbang 080718>.

³⁴³ The relevant statutory language, known as the Texas Recognition Act, can be found in Chapter 36A of the Civil Practice and Remedies Code of Texas. The statutory language in effect at the time of the case, Chapter 36, was repealed and replaced in 2017, but the relevant language is not importantly different. The 2017 amendment removed the reciprocity requirement and added conditions regarding the fairness of the specific proceedings.

³⁴⁴ Authentication requires a specific process set forth in the law; there appears to be no dispute that Sanbang did not follow it.

Sanbang disputed all of these points, offering among other things the bootstrap argument that even if reciprocity did not exist at present, it *would* exist once the court enforced the judgment, because Chinese courts would then start enforcing Texas judgments. The court was not impressed, noting the lack of any authority offered for the claim, but in the end dismissed the plaintiff's action on the straightforward technical grounds that the Chinese judgment had not been properly authenticated as required under the statute. Having been alerted to this problem in Frost's first response to the complaint, the plaintiff inexplicably failed to correct it, and simply argued that it didn't matter. It did. In a brief opinion on appeal, the Fifth Circuit agreed.

The issue of the quality of the Chinese judicial system or the particular proceedings was never joined, and neither party offered evidence or arguments about it.

2. ECJ-003: *Qingdao Youli Century Guarantee Co. v. Chen*³⁴⁵

The plaintiff, Qingdao Youli Century Guarantee Co. (Youli), filed a complaint in federal court on diversity grounds in April 2018, seeking enforcement of several Chinese judgments from 2016 and 2017. The court, without even waiting for a response from the defendants, dismissed the complaint *sua sponte* the next month, noting that it had failed to allege that the defendants were all *citizens* of the United States, a requirement of diversity in this case. The plaintiff then amended its complaint to fix the problem.

The argument at the pleading stage centered around the question of whether the Chinese legal system provided impartial tribunals and afforded due process of law, as required by the relevant statute on the recognition of foreign judgments (*i.e.*, the 2005 Uniform Act). The plaintiff argued that it did, pointing to the internal evidence of the judgments themselves that the defendants had received notice of the Chinese proceedings and appeared in court, represented by counsel. The defendant, moving for dismissal of the complaint, argued that it did not, and cited two documents in support: a report from the Congressional-Executive Commission on China³⁴⁶ and a report in the *New York Times*.³⁴⁷ Both contained statements to the effect that the Chinese courts were subject to political influence and that the Chinese judiciary was not independent.

A key issue was which side bore the burden of proof: was it for the plaintiff to prove that the Chinese legal system as a whole passed muster, or for the defendants to prove it did not? The court's answer was that in California, at least, once the plaintiff has made a minimal showing—in this case satisfied—the burden shifts to the defendant to show that certain disqualifying elements in the 2005 Uniform Act (for example, lack of due process) are present. The court held that the defendant had

³⁴⁵ <ECJ-003 Youli>.

³⁴⁶ Congressional-Executive Commission on China, *Judicial Independence in the PRC*, n.d., <https://www.cecc.gov/judicial-independence-in-the-prc> [<https://perma.cc/Z66Q-SC7Z>].

³⁴⁷ Forsythe, *supra* note 62.

“made no effort” to do so and that in any case such an argument was not properly brought in a motion to dismiss.³⁴⁸

It is perhaps a little unfair to say that Defendant made “no effort” to carry its burden; it did cite a few sources. As important as the decision on burden allocation, however, is the court’s point that such a showing by the defendant is not properly brought at the dismissal stage in any case. The defendant must introduce affidavits and other kinds of evidence either to show that the deficiencies of the Chinese legal system are beyond genuine dispute (in which case it would win a summary judgment motion) or that there is a genuine dispute on this issue, in which case the case would have to go to trial.

I classify this case as neutral because the court held that while it might be willing to listen to arguments and evidence about the Chinese legal system, the defendant had raised them too early in the proceedings. In denying the defendant’s motion to dismiss, the court neither granted nor denied recognition. Further proceedings were interrupted by the defendant’s bankruptcy.

3. *ECJ-004: Beijing Zhong Xian Wei Ye Stainless Decoration Center et al. v. Guo et al.*³⁴⁹

Plaintiffs, all Chinese corporations, sued fugitive Chinese tycoon Guo Wengui³⁵⁰ and associated companies in New York in June 2017.³⁵¹ They alleged that Guo, as the principal owner of two Chinese corporations that owed the plaintiffs money, had improperly converted the assets of the two Chinese corporations to his own use and then transferred the funds to the United States. They requested both a substantive adjudication on the merits as well as enforcement of a number of Chinese judgments against Guo in their favor.

Although the complaint noted the existence of the Chinese judgments against Guo and cited the New York statute concerning the recognition and enforcement of foreign judgments, remarkably it did not include in its requests for relief on various grounds a request for enforcement of the Chinese judgments as such. This defect having been pointed out by the defendants, plaintiffs then specifically asked for enforcement of the Chinese judgments in a cross-motion.³⁵² In support of that cross-motion, they submitted an affidavit from their own lawyer in China setting forth some of the basic rules of Chinese civil procedure and attesting that the Chinese court proceedings had followed

³⁴⁸ <ECJ-003 Youli 180718> (internal citations omitted).

³⁴⁹ <ECJ-004 Guo>.

³⁵⁰ Guo is, to say the least, a colorful character. See, *inter alia*, Lauren Hilgers, *The Mystery of the Exiled Billionaire Whistle-Blower*, NEW YORK TIMES MAGAZINE, Jan. 10, 2018, <https://perma.cc/7Q42-2QXQ>; James Palmer, *Who Is Guo Wengui, the Chinese Emigré With Links to Steve Bannon?*, FOREIGN POLICY, Aug. 26, 2020, <https://perma.cc/VSC6-AXZH>; Jeanne Whelan, Craig Timberg & Eva Dou, *Chinese Businessman with Links to Steve Bannon is Driving Force for a Sprawling Disinformation Network, Researchers Say*, WASH. POST, May 17, <https://perma.cc/527W-5BMQ>.

³⁵¹ <ECJ-004 Guo 170609>.

³⁵² <ECJ-004 Guo 171115a>, <ECJ-004 Guo 171115b>, <ECJ-004 Guo 171115c>.

those rules. The plaintiffs argued that their lawyer’s affidavit proved that the Chinese legal system “guarantees . . . impartial tribunals and procedures compatible with New York’s due process requirements.”³⁵³ They also cited three U.S. cases that they claimed supported their position.

The cases cited demonstrate exactly the problem. Only one case, that of *Global Material Technologies, Inc. v. Dazheng Metal Fibre Co. Ltd.*,³⁵⁴ is a reasonably robust one on the merits, and even that one has significant weaknesses, as discussed above. The other two cases, *Robinson Helicopter* and *Liu v. Zhang*, also suffer from serious infirmities as precedents, also as discussed above.

In response, the defendant cited a number of sources supporting the proposition that the Chinese legal system did not offer impartial tribunals and due process: State Department Country Reports, a report from the Congressional-Executive China Commission, and various other media sources.³⁵⁵

In the end, it turned out that none of these arguments mattered. The court ruled against recognition on narrow procedural grounds: it turns out that under New York law, a cross-motion is not the appropriate way to seek recognition of a foreign judgment. Once again, therefore, the issue of the quality of the Chinese legal system was simply not joined, and the court left it open for both plaintiffs and defendants to make further arguments on the issue.³⁵⁶

Summary of the cases

In all of these cases, courts in effect declined to make a decision about recognition. In two cases, the party seeking recognition failed to get it because of easily curable procedural defects. It was not barred from trying again. In the third case, the party opposing recognition failed to get what it wanted because its arguments were raised at the wrong stage of the proceedings. Again, it was not barred from making those arguments later on.

5.2.5 Pending case

*1. ECJ-014: Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*³⁵⁷

This case is unusual in its clear and strong anti-enforcement stance. In dismissing the plaintiff’s complaint seeking enforcement of a Chinese judgment, the New York Supreme Court did not even bother to attempt to assess the fairness of the specific proceedings that produced the judgment, and the defendant—unusually in this kind of case—made no attempt to argue that the

³⁵³ <ECJ-004 Guo 171115c>, at 10.

³⁵⁴ <ECJ-010 Global>.

³⁵⁵ See <ECJ-004 Guo 180112a>.

³⁵⁶ As of October 2021, the plaintiffs are in the process of appealing the denial, and have sought leave to correct their original oversight by amending their original complaint to include a specific request for recognition and enforcement of the Chinese judgment. See <ECJ-004 Guo 210107> (appellant’s brief).

³⁵⁷ <ECJ-014 Yongrun>.

proceedings had been unfair. Instead, the court, after a peroration on the value of due process, undertook an examination of the Chinese legal system as a whole and found it wanting, ignoring the plaintiff's arguments that the specific proceedings had been fair. This approach is in fact consistent with the language of the relevant legislation, but many courts are reluctant to adopt it.

In August 2020, Shanghai Yongrun Investment Management Company (Yongrun), a Chinese company, brought suit against Kashi Galaxy Venture Capital Company and Maodong Xu in New York state court to enforce a \$9.9 million judgment issued in May 2019 by the Beijing Higher Level People's Court (one level below China's Supreme People's Court) obtained by Yongrun against the defendants.³⁵⁸ The Chinese proceedings were based on a breach of contract claim; the relevant agreements were governed by PRC law and had a forum selection clause providing that any disputes could be resolved by suit in a court of competent jurisdiction in Haidian District in Beijing.³⁵⁹ The suit was brought under New York's statute for the recognition of foreign judgments,³⁶⁰ which tracks the 1962 Uniform Act. The defendants moved to dismiss the complaint on the grounds that the Chinese judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law," as the statute requires.³⁶¹

Defendants moved to dismiss. In support of their motion, they submitted State Department Country Reports for China for 2018³⁶² and 2019³⁶³ as well as certain writings of Professor Jerome Cohen, a well-known expert in Chinese law (although not necessarily well known to the court, of course). This material made the point that the Chinese courts were not independent of political authorities.

In response,³⁶⁴ the plaintiff made a number of arguments. First, it noted the point that the agreements in question provided for resolution of disputes in a court in China. (It is odd that the plaintiff did not put more weight on this argument; it means that the parties in effect chose the

³⁵⁸ See <ECJ-014 Yongrun 200811> (complaint).

³⁵⁹ See <ECJ-014 Yongrun 210420> (judgment)>.

³⁶⁰ N.Y. C.P.L.R. Art. 53.

³⁶¹ See N.Y. C.P.L.R. 5304(a)(1).

³⁶² UNITED STATES DEPARTMENT OF STATE, 2018 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU)—CHINA, <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/china-includes-tibet-hong-kong-and-macau-china/> [<https://perma.cc/5PVG-UNZQ>].

³⁶³ UNITED STATES DEPARTMENT OF STATE, 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU)—CHINA, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/china/> [<https://perma.cc/TP2S-6J3J>].

³⁶⁴ <ECJ-014 Yongrun 201023>.

courts of China as they might choose an arbitration institution, and arbitration awards made pursuant to arbitration agreements are generally enforceable and difficult to overturn.)

Second, it argued—relying on the letter of Chinese law and its unchallenged account of the proceedings—that the proceedings had been fair. Third, it argued that China scored well on the World Justice Project Rule of Law index.³⁶⁵ Fourth, it cited by way of precedent some federal and state cases in which Chinese judgments had been enforced, including *Liu v. Guan*³⁶⁶ and *Robinson Helicopter*.³⁶⁷ Fifth, it argued that the State Department reports were not relevant, since they dealt (so the plaintiff argued) with political problems and not with the functioning of the courts in ordinary civil cases.

In their response,³⁶⁸ the defendants, in addition to reiterating their earlier attacks on the system as a whole, supported by citations to similarly reasoned cases, noted the problems with citing the *Liu* case and the *Robinson Helicopter* case as precedents. In both those cases, the defendants had, in earlier U.S. FNC proceedings, argued strenuously—and successfully—that the case should be dismissed to China, necessarily arguing that the Chinese legal system was reasonably fair. Moreover, as they pointed out, the defense in *Robinson Helicopter*, as the court there specifically noted, “had not presented any evidence, nor did it contend, that the PRC court system does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”³⁶⁹ Thus, the court could hardly have found otherwise.

Finally, they argued that *Robinson Helicopter* is as much an effort to defend the integrity of the California court system as it is a case about foreign judgments: the defendant had explicitly promised, in the FNC proceedings, to abide by the decision of a Chinese court in the matter, and was now refusing to do so.

The defense also argued that *Liu v. Guan* was simply mistakenly decided; the judge, for example, wrote that “[p]laintiff’s submissions demonstrate that the Chinese legal system comports with due process requirements and the public policy of New York,”³⁷⁰ even though the plaintiff submitted no evidence to that effect, and indeed made virtually no arguments to that effect in her attorney’s briefs.

³⁶⁵ The index is available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf [<https://perma.cc/5FQE-GVP8>]; on the index generally, see Juan Carlos Botero, *The Rule of Law Index: A Tool to Assess Adherence to the Rule of Law Worldwide*, N.Y. STATE BAR J., January 2018, at 30, 31.

³⁶⁶ Discussed above at text accompanying note 271.

³⁶⁷ Discussed above at text accompanying note 237.

³⁶⁸ <ECJ-014 Yongrun 201028>.

³⁶⁹ <ECJ-007 Robinson 090722>, at *6.

³⁷⁰ <ECJ-002 Liu 200106>, at *2.

The court found for the defendants. It accepted the defense argument that the State Department reports qualified as conclusive documentary evidence, and therefore gave weight to their description of the Chinese legal system: “Judges regularly received political guidance on pending cases, including instructions on how to rule”; “[t]he [Chinese Communist Party] Central Political and Legal Affairs Commission has the authority to review and direct court operations at all levels of the judiciary”; “[c]orruption often influenced court decisions, since safeguards against judicial corruption were vague and poorly enforced”; a “[Chinese Communist Party]-controlled committee decided most major cases, and the duty of trial and appellate court judges was to craft a legal justification for the committee's decision”; and “[c]ourts deciding civil matters faced the same limitations on judicial independence as criminal courts.”³⁷¹

The court also noted the defense argument that in the Liu case, the defendant had previously argued in favor of FNC dismissal to China.

Finally, the court noted an inexplicable procedural failing on the plaintiff's part: it had failed to attach a translator's affidavit to its translated Chinese judgments, as required by New York law.

The *Shanghai Yongrun* case is highly unfavorable to judgment recognition for two reasons beyond simply its result. First, as noted above, the court uniquely among all the cases examined here examined the Chinese legal system as a whole and found it wanting.³⁷²

Second, the court treated State Department reports on China as conclusive documentary evidence of what those reports stated. This meant that the reports were not simply ordinary evidence to be considered along with other evidence offered by both sides during a trial, but rather conclusive evidence that could be considered at the dismissal stage before trial had even occurred.

In March 2022, the case was revived when the Appellate Division unanimously reversed the lower court's dismissal.³⁷³ In a brief opinion, the court held that the plaintiffs had “sufficiently pleaded that the basic requisites of due process were met” and that the State Department reports relied on by the defendant did not “utterly refute plaintiff's allegation that the civil law system governing this breach of contract business dispute was fair.” This does not mean the judgment was to be enforced; it means merely that the issue of the fairness of the Chinese legal system was held to be something that could not be settled at the dismissal stage. At the time of this writing, the case remains unresolved.

³⁷¹ <ECJ-014 Yongrun 210420> (quoting State Department Country Reports for China from 2018 and 2019).

³⁷² Doubtless for this reason, the case attracted an amicus brief in appeal proceedings from a group of professors specializing in transnational litigation, arguing that the decision if allowed to stand would have dire consequences. See *Yongrun Amicus Brief*, *supra* note 23.

³⁷³ <ECJ-014 Yongrun 220310>.

5.2.6 Summary

Although the results in the cases were different, and in many cases turned on procedural issues unrelated to the question of the quality of the Chinese legal system, nevertheless some common features stand out.

The overwhelming feature of the cases is the inability of the courts to undertake an inquiry into the Chinese legal system, even though such an inquiry is specifically contemplated in the common-law doctrine of foreign judgment-recognition and the relevant statutes. *Hilton v. Guyot*, the *locus classicus* of common-law doctrine, requires the existence of “a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries.”³⁷⁴ And both the 1962 Uniform Act and the 2005 Uniform Act provide as grounds for non-recognition that “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process.”³⁷⁵ Yet in six of the fifteen cases, no evidence or even arguments were presented asserting the existence of an impartial system, and in seven cases, no evidence or arguments were presented that denied it. In the remaining cases, the evidence and arguments for and against varied in depth and sophistication, but were mostly brief and sketchy. The pro side talked a lot about *Robinson Helicopter*; the anti side talked a lot about State Department Country Reports for China. *In no case did either side offer its own expert testimony on the issue.*³⁷⁶ And in only three cases³⁷⁷ was the issue of the availability of impartial tribunals properly joined.³⁷⁸

³⁷⁴ *Hilton*, 159 US at 158.

³⁷⁵ 1962 Uniform Act, *supra* note 220, § 4.

³⁷⁶ In one case, the side seeking recognition offered expert testimony about China’s legal system from another case; I consider that equivalent to offering other kinds of documentary evidence, such as academic writings or press reports, since the author is not even theoretically available as a witness to be sworn in and cross-examined. Some cases did have expert testimony, but on narrower issues.

³⁷⁷ The cases are <ECJ-003 Qingdao Youli>, <ECJ-014 Yongrun>, and <ECJ-016 Yancheng>.

³⁷⁸ Thus, however much Professor Carodine’s concern, quoted below, about what courts are doing may be justified with respect to other countries, it has no foundation in how courts are treating China:

Courts reviewing foreign judgments to determine whether they are worthy of recognition have created an “international due process” analysis. The analysis requires courts to pass judgment on the overall judicial and political systems of the countries from which the judgments originated and to determine whether the systems as a whole are fundamentally fair. Remarkably, courts ignore the individual proceedings that resulted in the judgment and refuse to determine whether the foreign courts afforded the individual litigants due process, relying instead on political “evidence” and judges’ own personal perceptions of the foreign countries. Courts have gone so far as to label countries “civilized” and “uncivilized.” Under this analysis, courts will enforce judgments from “civilized”

In a sense, this is not a surprising result. Judges may, with some justification, not feel up to the task of assessing the quality of a foreign—in this case, very foreign—legal system. This seems generally to lead to one of two responses. First, judges may simply avoid the question by deciding on other grounds. Instead of judging the entire legal system of China, they may instead find fault with the particular proceedings, something they feel more competent as specialists in process to do. Second, they may declare the entire undertaking essentially off-limits, declaring—in language cited in some of the plaintiff’s briefs in these cases—that “[i]t is not the business of our courts to assume responsibility for supervising the integrity of another sovereign nation.”³⁷⁹

6 Lessons and Proposals

This Article has shown that U.S. courts, both federal and state, have difficulty figuring out the Chinese legal system. This is not surprising.³⁸⁰ That system operates on principles quite different from those that judges are accustomed to, and the very depth of that difference, which would require extensive research and expert testimony to explain, makes it hard to overcome the presumption that it doesn’t even exist. One of the differences is a different approach to what counts as law, in which the formal hierarchy of norms can be sidestepped and oral instructions from officials count as binding norms.³⁸¹ Another important difference is the extensive and deliberate opacity, which compounds the difficulty of understanding the other differences; the operation of the legal system is

nations that violate U.S. constitutional norms and refuse to enforce judgments from “uncivilized” countries even if the foreign countries afforded the litigants due process.

Carodine, *supra* note 59, at 1160.

³⁷⁹ <ECJ-010 Global 121015>, at 9 (citing *Pavlov v. Bank of New York Co.*, 135 F. Supp. 2d 426 (S.D.N.Y. 2001)). See above at text accompanying notes 35-38 for a discussion of this quotation and how it has taken on a life of its own divorced from its original context and meaning.

³⁸⁰ As one commentator recently wrote regarding FNC, the inquiry into the existence of an adequate alternative forum in a foreign state “has proven too complex to be practical, with the result that foreign fora are almost never found to be either inadequate or unavailable. This is not particularly surprising.” Gardner, *supra* note 125, at 988. If it is too complex for foreign jurisdictions in general, it can hardly be less so for China in particular.

³⁸¹ This is not just my own opinion. See, e.g., Report of Professor Shen Sibao, In re Vitamin C Antitrust Litigation, 2009 WL 5133512 (E.D.N.Y. Feb. 19, 2009), ¶ 17 (testifying in support of a Chinese government position in litigation). Shen is a senior and well connected lawyer and academic in China who has, among other positions, served as the dean of the law faculties of the University of International Business and Economics, Shanghai University, and Macau University of Science and Technology. A biography is available at <https://perma.cc/3LP6-J25F>.

in principle a state secret, with transparency the exception to the default rule of secrecy.³⁸² These features are not unique to China, and many are shared by other illiberal legal systems.

Various commentators have been sanguine about courts' capacity to manage this challenge. For example, in a recent amicus brief urging reversal of a decision denying enforcement to a Chinese judgment, a group of law professors specializing in transnational litigation wrote, "[C]ase-specific grounds give courts sufficient tools to police against unfairness[.]"³⁸³ But courts have sufficient tools to police against unfairness only when they have adequate information. The research behind this Article suggests that at least in China-related cases, it is a fantasy to think that courts will, in more than a very few cases, have anything close to adequate information. Making case-by-case judgments is unexceptionable in theory, but it is just not going to work in practice with opaque and very different legal systems. It assumes a richness of information that is not present.

In a similar vein, Professor Paul Stephan, another expert in the field, writes, "What courts actually do . . . [in FNC cases] is look at the foreign court's capacity to handle the case at hand."³⁸⁴ This is an accurate description of what courts always purport to do, and sometimes actually try to do, but it is not—at least in the case of China and likely many other countries—an accurate description of what they actually *do* do. A close reading of the briefs and other party submissions shows that the evidentiary basis for judgments in FNC and REFJ cases is extremely thin and sometimes literally non-existent. As noted above, in FNC cases involving China, in 43 percent of the cases in which the issue of China's adequacy as a forum was disputed, the parties did nothing more than assert their position in their briefs (or in affidavits provided by their own lawyers), without offering any actual evidence. And then there is the remarkable *Quanta Computer* case,³⁸⁵ an FNC case where the court found China, as well as Singapore and Taiwan, to be adequate alternative fora despite literally not having heard a *single word* of argument, to say nothing of evidence, about them.

Perhaps most perplexing is the courts' inability or unwillingness to apply information that is readily available to them. As mainstream press reports³⁸⁶ and a mountain of scholarship³⁸⁷ show, there is no serious question that China's political system is a one-party dictatorship that rejects the

³⁸² See Luo Jiajun & Thomas Kellogg, *Verdicts from China's Courts Used to Be Accessible Online. Now They're Disappearing*, CHINAFILE, Feb. 1, 2022, <https://perma.cc/9J5Q-E8GT>; Glenn Tiffert, *Peering Down the Memory Hole: Censorship, Digitization, and the Fragility of Our Knowledge Base*, 124 AM. HIST. REV. 550 (2019) (noting disappearance of academic literature on sensitive aspects of PRC legal history from Chinese online database).

³⁸³ Yongrun Amicus Brief, *supra* note 23, at 5.

³⁸⁴ Stephan, *supra* note 23, at 95.

³⁸⁵ *Quanta Computer Inc. v. Japan Communications Inc.*, 2016 WL 11620515 (Cal. Super. 2016), *aff'd*, 21 Cal. App. 5th 438, 230 Cal. Rptr. 3d 334 (Cal. App. Ct. 2018).

³⁸⁶ See note 8, *supra*, and accompanying text.

³⁸⁷ See the discussion and sources cited in Part 3, *supra*.

separation of powers and demands Party leadership in literally everything.³⁸⁸ Its judges have no security of tenure or other kind of meaningful independence. While one could disagree with the proposition that courts in such a system should be automatically disqualified as adequate alternative fora,³⁸⁹ it is hard to see how one could, like the court in *Group Danone*,³⁹⁰ agree with that proposition and yet still dismiss to China.

The “dictatorship exception”³⁹¹ cited in *Group Danone* does not appear to be controversial.³⁹² The court there sourced it in a previous California case, *Shiley, Inc. v. Moore*, which stated that FNC dismissal shall be denied “where the alternative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process of law.”³⁹³ In *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, the court found Ecuador an inadequate alternative forum, stating:

Plaintiff has represented by affidavit that Ecuador is presently controlled by a military government which has “assumed the power of the executive and legislative branches and rules by fiat,” “has specifically retained the right to veto or intervene in any judicial matter which the Military Government deems to involve matters of national concern,” and “has absolute power over all branches of government.” The status and powers of the judiciary are thus allegedly “uncertain.”³⁹⁴

Yet courts that accept this doctrine seem unable to see the relevant facts where China is concerned. Replace “military government” in the passage above with “Communist Party” and this is a good description of the Chinese political system. Yet what is obvious in small countries of which we know little seems hard for judges to see in large countries of which we know a great deal.

What solutions are there, then? Although REFJ and FNC issues are often heard by state courts or at least governed by state law, it seems clear that the federal government would have the constitutional power, as part of its foreign affairs powers, to dictate a solution.³⁹⁵ Both Congress and the executive have far greater resources and institutional competence than any individual court to

³⁸⁸ See note 63, *supra*, and accompanying text.

³⁸⁹ This is the position I understand the authors of the Yongrun Amicus Brief, *supra* note 23, to be taking—*i.e.*, they reject just such a proposition.

³⁹⁰ <FNC-012a Danone 090227>.

³⁹¹ The term is Diego Zambrano’s; see Zambrano, *supra* note 25, at 204.

³⁹² See generally Zambrano, *supra* note 25, at 203-04 (listing cases where courts have denied FNC motions on the grounds that courts in the foreign forum lacked independence from the government)

³⁹³ 4 Cal. App. 4th 126, 133-34 (1992).

³⁹⁴ 78 F.R.D. 445, 455, 456 (D. Del. 1978).

³⁹⁵ See Bellinger & Anderson, *supra* note 192, at 526.

reach an informed understanding of the legal system of any other country, let alone China.³⁹⁶ Moreover, any federal solution would automatically vitiate any concerns about intruding on the foreign affairs authority of the federal government in general and of the executive in particular, especially in light of the executive's institutional capacity to make assessments about foreign affairs matters. At the same time, of course, a one-size-fits-all solution necessarily means ignoring the details of any particular case, which could result in injustice.

FNC cases are a hard nut to crack. One plausible solution is simply to abolish FNC to foreign jurisdictions entirely. This is not an outlandish proposal; it is backed by serious scholars.³⁹⁷ It has the virtue of simply eliminating the task of evaluating the foreign legal system, as well as the virtue of not singling out China or any other country. It will do no constitutional injustice; the only parties to be disadvantaged will be those over whom a court's exercise of personal jurisdiction passes constitutional muster, but who will no longer be able to argue that the court should nevertheless decline to exercise it.

If that is the policy goal, the question is then how to accomplish it. Both Congress and the state legislatures generally have the power to legislate the abolition of specific doctrines and practices. As FNC is purely a court-made doctrine, higher courts in any jurisdiction could also abolish its use by lower courts. It is not clear, however, that the federal government would have the power to require states to abolish the doctrine.

Solutions short of across-the-board abolition also exist. For example, FNC could be limited to cases where all parties are citizens and residents of the alternative jurisdiction proposed by the movant. Alternatively, similarly to what might be proposed for REFJ cases below, FNC dismissal could be prohibited to countries that show up on a list of jurisdictions prepared by the executive branch. The main point in all cases is to take the decision as to the adequacy of a foreign jurisdiction—at least when that jurisdiction is profoundly different—out of the hands of courts, who appear incapable of making it in an informed and consistent way.

In the absence of a legislated solution, the doctrinal solution is no different from that which has been proposed by FNC critics more generally: a “strong threshold presumption in favor of exercising jurisdiction, regardless of where the plaintiff resides,”³⁹⁸ and the use of stays rather than

³⁹⁶ As Maggie Gardner writes,

Codification is the most obvious choice, and there are many potential authors: nations via the negotiation of treaties, Congress or state legislatures via statutes, uniform law commissions and the American Law Institute via clarification of the common law, or the Advisory Committee via revision of the Federal Rules.

Gardner, *supra* note 116, at 1009.

³⁹⁷ See, e.g., Gardner, *supra* note 91.

³⁹⁸ Maggie Gardner, *Deferring to Foreign Courts*, 169 U. PENN. L. REV. 2291, 2339.

dismissals, recognizing the predictions about what unfamiliar foreign courts will actually do are especially unreliable.³⁹⁹

The REFJ cases are probably the most perplexing. Here the balance of costs and benefits is especially complex. Because not all judgments from China or other illiberal legal systems are tainted, simply ceasing the enforcement of such judgments will mean injustice to deserving plaintiffs. Moreover, there are possible reciprocal effects; Chinese courts will arguably be less likely to enforce U.S. judgments, meaning injustice to another set of deserving plaintiffs. On the other hand, enforcing any judgment tainted by unfairness means injustice to the defendant, and the relevant statutes require U.S. courts to hear and evaluate arguments on this subject. Whether state legislatures are right or wrong in requiring courts to assess, when the issue is raised by a defendant, the fairness of foreign proceedings or of foreign legal system in its entirety, it is a usurpation of the legislative power for courts to simply ignore that requirement because of a concern for the consequences, especially given their relative lack of expertise in assessing those consequences accurately.

There is another consideration that goes beyond unfairness to the parties. If there is a foreign affairs concern about courts of repressive regimes retaliating for offensive U.S. judgments, there is also an opposite concern over having U.S. courts endorse the decrees of the courts of such regimes, thus undermining the foreign policy goal of promoting human rights—a goal to which an entire division of the State Department is dedicated.⁴⁰⁰

One possible solution is to have the executive branch—perhaps the State Department—prepare reports on the legal systems of various countries that specifically have in mind the issues of FNC and REFJ. Another candidate in the case of China would be the Congressional-Executive Commission on China, which as the name suggests is a joint body and could thereby alleviate concerns over excessive power being lodged in the executive. One critique of courts' use of the State Department Human Rights reports is that they are written with a specific purpose in mind, and that purpose is something other than to provide courts with guidance on these issues.⁴⁰¹ A set of reports

³⁹⁹ See *id.* at 2339-40.

⁴⁰⁰ I am grateful to Martin Flaherty for raising this point.

⁴⁰¹ See Yongrun Amicus Brief, *supra* note 23, at 11-12. On the other hand, the Second Circuit, after an extended discussion, concluded that the State Department reports were both relevant and trustworthy. See *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143-44 (2d Cir. 2000) (assessing the Liberian legal system in an action to enforce a Liberian judgment). It is sometimes argued that the State Department reports, dealing as they do largely with human rights and criminal law issues, should be given little weight in the civil context. Yet as Judge Rakoff observed in a FNC case,

[w]hile the evidence set forth in the report in support of this strong statement largely relates to criminal cases, the Court does not believe that, even in the very different context of the instant lawsuits, it can ignore without further inquiry a statement from a department of the U.S.

written with these issues specifically in mind would solve both that problem and the concern courts have with appropriating to themselves decisions that could have foreign policy implications and properly belong to the executive branch. The State Department has, or can call on, the resources to prepare these reports in a thorough and accurate way.

The State Department's findings need not be, or even purport to be, binding on courts, and a non-listing need not forestall a court inquiry into the specific foreign proceedings.⁴⁰² But they would provide guidance to courts that desired it, while still leaving the decision in any individual case in the hands of the institution most familiar with the specific details. Moreover, the absence of a blanket rule would give the executive branch plausible deniability with respect to its responsibility for any specific outcome, given the independence of federal and state courts from the federal executive branch. Other solutions, such as a federal statute that would at least bring consistency to the field,⁴⁰³ are no doubt possible, limited only by the imagination.

7 Conclusion

Current doctrine in FNC and REFJ cases calls for courts, when the issues is raised by a party, to make an assessment of a foreign legal system. In the case of China, at least, they are simply not capable of doing so. Some kind of reform is needed. The coercive power of the state is being mobilized to enforce judgments that do not meet due process standards,⁴⁰⁴ and courts are, on very

Government that so fully casts doubt on the independence and impartiality of the principal courts to which the defendant seeks to remit these cases.

Aguinda v. Texaco, Inc., 2000 WL 122143, at *2 (S.D.N.Y. 2000) (memorandum order).

⁴⁰² This is the solution favored by Professor Carodine:

Under this solution, courts cannot pass judgment on the judicial and political systems of the countries in which the judgments were rendered. If there are countries whose judgments the executive branch deems unworthy of recognition, then it can compile an official list, much like the terrorist country list it maintains. If, however, the executive branch has not officially stated that a particular country's judgments are not to be recognized, then courts must consider whether the foreign country afforded the litigants due process in the individual foreign proceedings. . . . My solution eliminates the separation of powers problems with the international due process analysis. It also recognizes that courts cannot enforce judgments obtained in violation of due process.

Carodine, *supra* note 59, at 1165.

⁴⁰³ For a concrete proposal, see Bellinger & Anderson, *supra* note 192.

⁴⁰⁴ Whether U.S. courts may constitutionally enforce foreign judgments that do not meet domestic due process standards, and whether such enforcement constitutes state action, is debated. See Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171 (2004) (constitutional standards do not apply); Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783 (2004) (same); Carodine, *supra* note 59 (constitutional standards apply); Case Comment, *State-Action Doctrine—Enforcement of Foreign Judgments—Ninth Circuit Holds that Enforcement of Foreign Judgment Is Not State Action for*

thin evidentiary grounds, shutting their doors to plaintiffs even though they may constitutionally exercise jurisdiction over defendants. This is not justice.

Purposes of Constitutional Scrutiny—Naoko Ohno v. Yuko Yasuma, 723 F.3d 984 (9th Cir. 2013), 127 HARV. L. REV. 2575 (2014) (critiquing Ninth Circuit decision). Space constraints forbid further consideration of the debate here.

APPENDIX A: LIST OF FNC VARIABLES

<i>Name</i>	<i>Description</i>	<i>Values</i>
AdUnclear	Court finding on adequacy unclear	1 = Yes
ArbJudgEnf	Plaintiff is requesting enforcement of a foreign judgment or arbitration award; defendant resists by seeking FNC dismissal to China	1 = Yes
ChiAdDisp	Court finds China an adequate forum where adequacy was disputed	1 = Disputed in briefs only 2 = Disputed with affidavits or other evidence
ChiAdUndisp	Court finds China an adequate forum where adequacy was not disputed	1 = Yes
ChiInadDisp	Court finds China an inadequate forum where adequacy was disputed	1 = Disputed in briefs only 2 = Disputed with affidavits or other evidence
Denied	FNC motion denied	1 = Yes
ExpAcad	Testimony offered for at least one side by academic expert	1 = Yes
ExpAntiFNC	Quality of expert testimony offered against FNC dismissal	0 = No expert testimony 1 = Affidavit from party's own attorney reciting text of laws 2 = Affidavit from practicing attorney not affiliated with party reciting text of laws 3 = Qualified academic expert reciting text of laws 4 = Qualified academic expert discussing both formal law and actual practice. NOTE: The descriptions above represent subjective scores of credibility and quality. Testimony not falling precisely into any

		of these categories was coded according to the nearest equivalent.
ExpDiff	Differential in expert testimony offered by parties. Where ExpDiff is positive, pro-FNC expert testimony was of a higher quality than anti-FNC expert testimony.	ExpProFNC - ExpAntiFNC
ExpProFNC	Quality of expert testimony offered against FNC dismissal	<p>0 = No expert testimony</p> <p>1 = Affidavit from party's own attorney reciting text of laws</p> <p>2 = Affidavit from practicing attorney not affiliated with party reciting text of laws</p> <p>3 = Qualified academic expert reciting text of laws</p> <p>4 = Qualified academic expert discussing both formal law and actual practice.</p> <p>NOTE: The descriptions above represent subjective scores of credibility and quality. Testimony not falling precisely into any of these categories was coded according to the nearest equivalent.</p>
FedState	Federal or state court	<p>1 = Federal</p> <p>2 = State</p>
ForSel	Case arose under contract in which there was a forum selection clause that plaintiff or defendant is trying to avoid	<p>1 = Forum selection clause favored winner in FNC dispute</p> <p>2 = Forum selection clause favored loser in FNC dispute</p>
Granted	FNC motion granted	1 = Yes
ResultDet	Detailed result of FNC motion	<p>0 = Denied or otherwise not granted</p> <p>1 = Granted conditionally</p> <p>2 = Granted unconditionally</p>

ResultSim	Simple result of FNC motion	0 = Denied 1 = Granted
Strength	Strength of case as precedent	-3 = Very anti-FNC -2 = Moderately anti-FNC -1 = Weakly anti-FNC 0 = Neutral 1 = Weakly pro-FNC 2 = Moderately pro-FNC 3 = Very pro-FNC
Year	Year of effective decision (appeal court if successfully appealed; otherwise trial court)	

APPENDIX B: CASES

Cases are identified with a letter prefix (FNC or ECJ, depending on whether *forum non conveniens* or enforcement of a Chinese judgment is involved), a hyphen, and a unique three-digit number. Cases discussed in the text but for various reasons excluded from the dataset are in italics.

<i>Code</i>	<i>Case Name & Citation</i>
Enforcement of Chinese Judgments	
ECJ-001	Qinrong Qiu v. Hongying Zhang, 2017 WL 10574227 (C.D. Cal. 2017)
ECJ-002	Liu v. Guan, 2020 WL 1066677 (N.Y. Sup. Ct. 2020)
ECJ-003	Qingdao Youli Century Guarantee Co. v. Shaoqiang Chen, 2018 WL 6164284 (C.D. Cal. 2018)
ECJ-004	Beijing Zhong Xian Wei Ye Stainless Decoration Center v. Guo, 2020 WL 2404938 (N.Y. Sup. Ct. 2020)
ECJ-005b	Ningbo FTZ Sanbang Industry v. Frost Nat'l Bank, 338 Fed. App'x 415 (5 th Cir. 2009)
ECJ-006	KIC Suzhou Auto. Prod. Ltd. v. Xia Xuguo, 2009 WL 10687812 (S.D. Ind. 2009)
ECJ-007	Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., 2009 WL 2190187 (C.D. Cal. 2009), <i>aff'd</i> , 425 F. App'x 580 (9th Cir. 2011)
ECJ-008	Beijing Zhongyi Zhongbiao Elec. Info. Tech. Co. v. Microsoft Corp., 2013 WL 6979555 (W.D. Wash. 2013), <i>aff'd</i> , 655 Fed. App'x 564 (9th Cir. 2016)
ECJ-009	Armadillo Distribution Enterprises, Inc. v. Hai Yun Musical Instruments Manufacture Co., 2014 WL 2815943 (M.D. Fla. 2014)
ECJ-010	Global Material Technologies, Inc. v. Dazheng Metal Fibre Co., 2015 WL 1977527 (N.D. Ill. 2015)
ECJ-011	Anyang Xinyi Elec. Glass Co. v. B & F Int'l (USA), Inc., 2015 WL 12859716 (C.D. Cal. 2015)
ECJ-012	Chen v. Sun, 2016 WL 270869 (S.D.N.Y. 2016)
ECJ-013	Fusion Co. Ltd. v. Jebao Electrical Appliance Co. Ltd., No. 10-cv-01132RSM (D. Wash. 2010)
ECJ-014	Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Capital Co., 2021 BL 184316 (N.Y. Sup. Ct. 2021), <i>rev'd</i> , Shanghai Yongrun Investment Management Co. v. Xu, 203 A.D. 3d 495, 160 N.Y.S. 3d 874 (N.Y. App. Div. 2022)
ECJ-016	Yancheng Shanda Yuanfeng Equity Investment Partnership v. Wan, 2022 WL 411860 (C.D. Ill. 2022)
Forum Non Conveniens	
FNC-002	Lu v. Air China Int'l Corp., 1992 WL 453646 (E.D.N.Y. 1992)
FNC-003	China Gezhouba United Industries Co. v. Robinson Helicopter Co., No. YC022805 (Cal. Super. Ct. 1995)

FNC-004	Marshall Commodities, Ltd. v. People’s Ins. Co. of China (Shanxi Branch), 1996 WL 684219 (S.D.N.Y. 1996)
FNC-005	S. Megga Telecommunications Ltd. v. Lucent Techs., Inc., 1997 WL 86413 (D. Del. 1997)
FNC-006d	Orion Tire Corp. v. Goodyear Tire & Rubber Co., No. SACV 95-0221 DOC (C.D. Cal. 2003)
FNC-007	Lafarge Canada, Inc. v. Bank of China, 2000 WL 1457012 (S.D.N.Y. 2000)
FNC-008a	Amlon Metals, Inc. v. Liu, 2001 WL 36405056 (N.Y. Sup. Ct. 2001)
FNC-009a	Malaysia Int’l Shipping Corp. Berhad v. Sinochem Int’l Co., 2004 WL 503541 (E.D. Pa. 2004), <i>vacated</i> , 436 F.3d 349 (3d Cir. 2006), <i>rev’d</i> , 549 U.S. 422 (2007)
FNC-010a	BP Chemicals Ltd. v. Jiangsu SOPO Corp., No. 4:99-cv-323 (E.D. Mo. 2004)
FNC-011a	Huntati v. General Elec. Co., 2007 WL 7266583 (Cal. Super. Ct. 2007), <i>aff’d sub nom</i> , Guimei v. General Elec. Co., 172 Cal. App. 4th 689 (2009)
FNC-012a	Group Danone v. Kelly Fuli Zong, No. BC372121 (Cal. Super. Ct. 2009)
FNC-013	S & D Trading Acad., LLC v. AAFIS, Inc., 494 F. Supp. 2d 558 (S.D. Tex. 2007)
FNC-015	Mintel Learning Tech., Inc. v. Beijing Kaidi Educ. & Tech. Dev. Co., 2007 WL 2403395 (N.D. Cal. 2007)
FNC-016a	In re Compania Naviera Joanna S.A., 531 F. Supp. 2d 680 (D.S.C. 2007), <i>aff’d</i> , 569 F.3d 189 (4th Cir. 2009)
FNC-017	Vanguard Int’l, Inc. v. Guangdong Fully, Ltd., 142 Wash. App. 1026 (2008)
FNC-018a	Sinotrans Container Lines, Co. v. N. China Cargo Serv., Inc., 2008 WL 3048855 (C.D. Cal. 2008), <i>aff’d</i> , 380 Fed. App’x 588 (9th Cir. 2010)
FNC-019	Zim Integrated Shipping Servs., Ltd. v. Belco Res., Inc., 2008 WL 1959041 (S.D.N.Y. 2008)
FNC-020	2002 Irrevocable Tr. for Richard C. Hvizdak v. Huntington Nat. Bank, 2008 WL 5110778 (M.D. Fla. 2008)
FNC-021	<i>Fairchild Semiconductor Corp. v. Third Dimension (3D) Semiconductor, Inc.</i> , 589 F. Supp. 2d 84 (D. Me. 2008)
FNC-022	Home Decor of Elmwood Oaks, LLC v. Jiyou Arts & Frames Co., 2009 WL 273193 (E.D. La. 2009)
FNC-023	<i>Celanese Acetate, LLC v. Lexcor, Ltd.</i> , 632 F. Supp. 2d 544 (W.D.N.C. 2009)
FNC-024	Bleu Prod., Inc. v. Bureau Veritas Consumer Prod. Servs., Inc., 2009 WL 2412413 (C.D. Cal. 2009)
FNC-026a	Tang v. Synutra Int’l, Inc., 2010 WL 1375373 (D. Md. 2010), <i>aff’d</i> , 656 F.3d 242 (4th Cir. 2011)
FNC-027a	Huang v. Advanced Battery Techs., Inc., 2010 WL 2143669 (S.D.N.Y. 2010)

FNC-028a	CYBERSitter, LLC v. People’s Republic of China, 2010 WL 4909958 (C.D. Cal. 2010) CYBERSitter, LLC v. People’s Republic of China, 805 F. Supp. 2d 958 (C.D. Cal. 2011)
FNC-029a	Elmaliach v. Bank of China Ltd., 2011 WL 10997479 (N.Y. Sup. Ct. 2011), <i>aff’d</i> , 110 A.D.3d 192, 971 N.Y.S.2d 504 (2013)
FNC-030a	Liu v. Wang, 2012 WL 8895326, (Ga. Super. 2012), <i>aff’d in part, vacated in part</i> , Wang v. Liu, 292 Ga. 568 (2013)
FNC-031	<i>InStep Software, LLC v. InStep (Beijing) Software Co.</i> , 2012 WL 1107798 (N.D. Ill. 2012)
FNC-032a	Innovation First Int’l, Inc. v. Zuru, Inc., 2012 WL 12897157 (N.D. Tex. 2012), <i>aff’d</i> , 513 Fed. App’x 386 (5th Cir. 2013)
FNC-033	Chattery Int’l, Inc. v. JoLida, Inc., 2012 WL 1454158 (D. Md. 2012)
FNC-034	Enterprises Int’l, Inc. v. Pasaban, S.A., 2012 WL 2576359 (W.D. Wash. 2012)
FNC-035	Mercury Cable & Energy, Inc. v. Wang Chen, 2013 WL 1389990 (C.D. Cal. 2013)
FNC-036	Sullivan v. Starwood Hotels & Resorts Worldwide, 949 F. Supp. 2d 324 (D. Mass. 2013)
FNC-037	Nalco Co. v. Chen, 2013 WL 4501425 (N.D. Ill. 2013)
FNC-038	Jacobs Vehicle Sys., Inc. v. Yang, 2013 WL 4833058 (M.D.N.C. 2013)
FNC-039	RF Micro Devices, Inc. v. Xiang, 2013 WL 5462295 (M.D.N.C. 2013)
FNC-041	King.com Ltd. v. 6 Waves LLC, 2014 WL 1340574 (N.D. Cal. 2014)
FNC-042a	Chengwu (Kevin) Zhao v. Guo Qiang Ye (William), 2014 WL 4851666 (D. Or. 2014), <i>aff’d</i> , 748 Fed. App’x 732 (9th Cir. 2018)
FNC-043b	Nibirutech Ltd. v. Jang, 75 F. Supp. 3d 1076 (N.D. Cal. 2014) Nibirutech Ltd. v. Jang, 2015 WL 831465 (N.D. Cal. 2015)
FNC-044	Warner Tech. & Inv. Corp. v. Hou, 2014 WL 7409978 (D.N.J. 2014)
FNC-045	In re Montage Tech. Grp. Ltd. Sec. Litig., 78 F. Supp. 3d 1215 (N.D. Cal. 2015)
FNC-046	Interleda Co. v. Zhongshan Broad-Ocean, Motor Co., 2015 WL 1310724 (N.D. Ind. 2015)
FNC-047a	Xueying Wang v. Yong Wang, No. 17 PDFL 00357 (Cal. Super. Ct. 2018)
FNC-047b	Xueying Wang v. Yong Wang, No. 17 PDFL 00357 (Cal. Super. Ct. 2018)
FNC-048	<i>Masimo v. Mindray DS USA, Inc.</i> , 2013 WL 12129654 (C.D. Cal. 2013)
FNC-049	<i>Jiangsu Hongyuan Pharmaceutical Co., Ltd. v. DI Global Logistics Inc.</i> , 159 F.Supp. 3d 1316 (S.D. Fla. 2016)
FNC-051a	Zheng v. Soufun Holdings, Ltd., 2016 WL 1626951 (N.D. Ohio 2016), <i>aff’d</i> , 2017 WL 3708628 (6th Cir. 2017)

FNC-053	Spencer Stuart Hum. Res. Consultancy (Shanghai) Co. v. Am. Indus. Acquisition Corp., 2017 WL 4570791 (S.D.N.Y. 2017)
FNC-054a	Melaleuca, Inc. v. Kot Nam Shan, 2018 WL 1952523 (D. Idaho 2018)
FNC-054b	Melaleuca, Inc. v. Kot Nam Shan, 2018 WL 1952523 (D. Idaho 2018)
FNC-055	Wang v. Gen. Motors, LLC, 371 F. Supp. 3d 407 (E.D. Mich. 2019)
FNC-056	AttriCure, Inc. v. Jian Meng, 2019 WL 4957915 (S.D. Ohio 2019)
FNC-057	Beijing iQIYI Sci. & Tech. Co. v. iTalk Glob. Commc'ns, Inc., 2019 WL 6876493 (W.D. Tex. 2019)
FNC-058	Sund v. Marriott Int'l, Inc., 2020 WL 2085469 (D. Md. 2020)
FNC-059	<i>IntelliCAD Technology Consortium v. Suzhou Gstarsoft Co. Ltd.</i> , 2020 WL 3047370, 465 F. Supp. 3d 1130 (D. Or. 2020)
FNC-060	Tongfang Glob. Ltd. v. Element Television Co., LLC, 2020 WL 4354173 (C.D. Cal. 2020)
FNC-062	Stross v. NetEase, Inc., 2020 WL 5802419 (C.D. Cal. 2020)
FNC-063	New Classic Home Furnishings, Inc. v. Haining Nice Link Home Furnishings Co., 2012 WL 13015017 (C.D. Cal. 2012)
FNC-068	Applied Materials, Inc. v. Advanced Micro-Fabrication Equip., Inc., 2008 WL 11398913 (N.D. Cal. 2008)
FNC-071	American Pacific Industries Inc. v. Xuzhou Xugong Tyre Co. Ltd., 2015 WL 1309969 (Cal. Super. Ct. 2015)
FNC-074	Liu v. Guan, Index No. 707493/2018 (N.Y. Sup. Ct., Jan. 4, 2019)
FNC-076	Philips Medical Systems v. Buan, 2021 WL 3187709 (N.D. Ill.)
FNC-077	Kinon Surface Design v. Hyatt International Corp., 2020 WL 7123068 (N.D. Ill.)
FNC-078	Inventus Power, Inc. v. Shenzhen Ace Battery Co., 2021 WL 1978342 (N.D. Ill.)
FNC-079	Zhi An Wang et al. v. Shimin Fang et al., 59 Cal.App.5th 907, 273 Cal. Rptr. 3d 753 (2021) (affirming & modifying trial court's FNC grant)
FNC-080	Amimon Inc. v. Shenzhen Hollyland Tech Co., 2021 WL 5605258 (S.D.N.Y. 2021)
FNC-081	Graduation Solutions LLC v. Luya Enterprise Inc., 2020 WL 9936697 (C.D. Cal.)
FNC-082	Ma v. Li, 2022 WL 1165623 (D.N.J.)
FNC-084	<i>Rattler Holdings LLC v. United Parcel Service Inc.</i> , 505 F. Supp. 3d 1076 (D. Mont.2020)
FNC-085	<i>Genzon Investment Group Co. v. Huang</i> , 2021 WL 3053014 (N.D. Cal.)
FNC-086	<i>International Specialty Services, Inc. v. Willis Insurance Services of Georgia, Inc.</i> , 515 F. Supp. 3d 374 (D.S.C. 2021)
FNC-088	<i>JPaulJones, L.P. v. Zurich Insurance Co. (China)</i> , 2022 WL 1135424 (9 th Cir.)
FNC-089	<i>Lu v. SAP America</i> , 2022 WL 627146 (E.D. Mich. 2022)

APPENDIX C: CASE DOCUMENTS

Documents from each case are identified with a letter prefix (FNC or ECJ, depending on whether forum non conveniens or enforcement of a Chinese judgment is involved), a hyphen, and a unique three-digit number; a short name for ease of identification; and a six-digit number representing the the two-digit year, month, and date of the filing respectively. Where more than one document would otherwise have an identical code, a letter is added to the date to distinguish them. Thus, “ECJ-004 Guo 171115b” means one of at least two documents filed on Nov. 15, 2017 in the judgment enforcement case of Beijing Zhong Xian Wei Ye Stainless Decoration Center v. Guo, with the detailed citation in the appendix.

<i>Code</i>	<i>Document name</i>
Enforcement of Chinese Judgments	
ECJ-001 Qiu 170724	Complaint (Jul. 24, 2017), Qinrong Qiu v. Hongying Zhang, 2017 WL 10574227 (C.D. Cal. 2017)
ECJ-001 Qiu 171027	Transcript of Order Granting Pl.’s Application for Default Judgment (Oct. 27, 2017), Qinrong Qiu v. Hongying Zhang, 2017 WL 10574227 (C.D. Cal. 2017)
ECJ-001 Qiu 180330	Defs.’ <i>Ex Parte</i> Application to Vacate Default Judgment (Mar. 30, 2018), Qinrong Qiu v. Hongying Zhang, 2017 WL 10574227 (C.D. Cal. 2017)
ECJ-001 Qiu 180413a	Order Granting Stipulation to Set Aside Entries of Default, Default Judgment, and Writs of Execution and to Quash Service (April 13, 2018), Qinrong Qiu v. Hongying Zhang, 2017 WL 10574227 (C.D. Cal. 2017)
ECJ-002 Liu 180514	Summons (May 14, 2018), Liu v. Guan, 2020 WL 1066677 (N.Y. Sup. Ct. 2020)
ECJ-002 Liu 180814a	Aff. of Guoqing Guan in Support of Defs.’ Motion to Dismiss (Aug. 14, 2018), Liu v. Guan, 2020 WL 1066677 (N.Y. Sup. Ct. 2020)
ECJ-002 Liu 180814b	Defs.’ Mem. in Support of Motion to Dismiss (Aug. 14, 2018), Liu v. Guan, 2020 WL 1066677 (N.Y. Sup. Ct. 2020)
ECJ-002 Liu 180906	Pl.’s Mem. in Opposition of Defs.’ Motion to Dismiss (Sept. 6, 2018), Liu v. Guan, 2020 WL 1066677 (N.Y. Sup. Ct. 2020)
ECJ-002 Liu 190104	Short Form Order (Jan. 4, 2019), Liu v. Guan, 2020 WL 1066677 (N.Y. Sup. Ct. 2020)

ECJ-002 Liu 190809b	Affirmation in Support of Motion for Summary Judgment in lieu of Complaint (Aug. 9, 2019), Liu v. Guan, 2020 WL 1066677 (N.Y. Sup. Ct. 2020)
ECJ-002 Liu 191015a	Defendants' Memorandum of Law in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment (Oct. 15, 2019), Liu v. Guan, 2020 WL 1066677 (N.Y. Sup. Ct. 2020)
ECJ-002 Liu 200106	Liu v. Guan, 2020 WL 1066677 (N.Y. Sup. Ct. 2020)
ECJ-003 Qingdao Youli 180718	Qingdao Youli Century Guarantee Co. v. Shaoqiang Chen, 2018 WL 6164284 (C.D. Cal. 2018)
ECJ-004 Guo 170609	Summons (Jun. 9, 2017), Beijing Zhong Xian Wei Ye Stainless Decoration Center v. Guo, 2020 WL 2404938 (N.Y. Sup. Ct. 2020)
ECJ-004 Guo 171115a	Notice of Cross-Motion to Recognize Foreign Judgments (Nov. 15, 2017), Beijing Zhong Xian Wei Ye Stainless Decoration Center v. Guo, 2020 WL 2404938 (N.Y. Sup. Ct. 2020)
ECJ-004 Guo 171115b	Affirmation in Opposition to Def.'s Motion to Dismiss and in Support of Cross-Motion to Recognize Foreign Judgments (Nov. 15, 2017), Beijing Zhong Xian Wei Ye Stainless Decoration Center v. Guo, 2020 WL 2404938 (N.Y. Sup. Ct. 2020)
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