Issue Preclusion and Foreign Country Judgments: Whose Law?

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It is surprising that one who wrote so much about so many aspects of res judicata as Allan Vestal should have devoted relatively little attention to the preclusive effects of foreign country judgments.¹ Nevertheless, he suggested that subject as one to be included in this symposium issue, planned before his death. Although a number of excellent articles during the past twenty-five years have dealt with that theme,² a reexamination of the subject seems appropriate at this time. Currently under discussion by the American Law Institute is a draft of a revised Restatement of Foreign Relations Law of the United States, which deals at some length with the recognition of foreign judgments.³ The judgment recognition provisions of this proposed Restatement provide a convenient starting point for this discussion.⁴ The subject of this Article is limited to the issue preclusion effects of foreign country in personam judgments and, more specifically, to the source of the rules to be applied in determining those effects.

I. THE REVISED RESTATEMENT

The Revised Restatement contains an entire chapter on recognition and enforcement of foreign country judgments and arbitral awards.⁵ There

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4. The idea of using the Revised Restatement as a point of departure for this study was suggested by Professor Ronan Degnan. I gratefully acknowledge his helpful insight.

5. The sections dealing with judgments are sections 491 through 496.
are basic rules of recognition\(^6\) and enforcement;\(^7\) a rule specifying grounds for nonrecognition;\(^8\) and special rules dealing with tax and penal judgments,\(^9\) divorce decrees,\(^10\) child custody orders,\(^11\) and support orders.\(^12\) We will look first at the basic rule of recognition, focusing on its significance to the question of issue preclusion. The exceptions to the rule of recognition will be considered at a later stage.

The basic rule is found in section 491(1):

Except as provided in § 492, a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.\(^13\)

Recognition is defined by comment b to this section, in distinguishing "recognition" and "enforcement," as follows:

[R]ecognition of a foreign judgment may . . . arise in a context other than enforcement, for example if the defendant seeks to rely on a prior adjudication of a controversy (res judicata), or if either side seeks to rely on prior determination of an issue of fact or law relevant to an action pending in the forum.\(^14\)

The significance of recognition is declared in comment c in the following terms:

The authority and effectiveness of a foreign judgment entitled to recognition by courts in the United States is, generally, the same as that of a judgment of the courts of one State of the United States in the courts of another State. Normally the foreign judgment has no greater effectiveness in the state of recognition than it has in the state where the judgment was rendered. . . . However, no rule prevents a court in the recognizing state from giving greater preclusive effect to a judgment than would be given in the courts of the rendering state.\(^15\)

This statement of the effect of a foreign judgment leaves ambiguous the important question of what law determines the scope of the preclusive

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6. Revised Restatement, supra note 3, § 491(1).
7. Id. § 491(2).
8. Id. § 492.
9. Id. § 493.
10. Id. § 494.
11. Id. § 495.
12. Id. § 496.
13. Id. § 491(1).
14. Id. § 491 comment b.
15. Id. § 491 comment c (citation omitted). The Revised Restatement follows the Restatement (Second) of Conflict of Laws on this point. "Judgments rendered in a foreign nation . . . in most respects . . . will be accorded the same degree of recognition to which sister State judgments are entitled." Restatement (Second) of Conflict of Laws § 98 comment b (1969).
effects. It seems to say that a foreign country judgment will be given the same conclusive effects, including issue preclusion/collateral estoppel effect, that a judgment of another state of the United States would be entitled to under the full faith and credit clause.\textsuperscript{16} Full faith and credit means that each state must accord at least as much conclusive effect to a judgment as that judgment would have in the state of rendition.\textsuperscript{17} All states of the United States follow the basic common-law doctrine of collateral estoppel and will not permit the same parties to relitigate issues of ultimate fact that were actually litigated and decided and which were necessary to the judgment rendered.\textsuperscript{18} The full faith and credit clause requires every other state to give that judgment the same, or at least as great, collateral estoppel effect. The Revised Restatement, then, seems to say that, subject to the exceptions of section 492,\textsuperscript{19} a foreign country judgment must also be given that same collateral estoppel effect—that is, the effect that an American judgment would be accorded in another American state. The extent of the preclusive effects in America of a foreign country judgment thus would seem to be determined by an American standard. This interpretation is reinforced by the reporters' notes, which declare that "[o]ne aspect of recognition of a foreign [country] judgment is that as to matters actually litigated and determined between parties, the judgment precludes relitigation."\textsuperscript{20}

The second sentence in comment c, however, raises some doubt whether the interpretation described in the preceding paragraph is correct. That sentence says that the recognizing state normally will not attribute greater preclusive effects to a foreign country judgment than that judgment would have in the state of rendition.\textsuperscript{21} Most countries, outside of the Anglo-American legal tradition, do not treat judgments as precluding the relitigation of just any issue that happens to have been litigated and decided in an earlier action, as do American courts.\textsuperscript{22} If the foreign coun-

\textsuperscript{16} U.S. Const. art. IV, § 1.

\textsuperscript{17} See Casad, Intersystem Issue Preclusion and the Restatement (Second) of Judgments, 66 Cornell L. Rev. 510, 513-14 (1981).

\textsuperscript{18} Some states ascribe even broader issue preclusion effects, extending preclusion to some matters that were not litigated, e.g., Schwartz v. Public Adm'r, 24 N.Y.2d 65, 69, 264 N.E.2d 725, 727-28, 298 N.Y.S.2d 955, 958 (1969), and permitting nonparties to the first action to invoke the rule of issue preclusion, e.g., Bernhard v. Bank of Am., 19 Cal. 2d 807, 813, 122 P.2d 892, 894-95 (1942) (abandoning mutuality requirement). All states, however, apparently would apply issue preclusion in the circumstances described in the text.

\textsuperscript{19} See infra text accompanying notes 103-06.

\textsuperscript{20} Revised Restatement, supra note 3, § 491 reporters' note 3.

\textsuperscript{21} Id. § 491 comment c.

\textsuperscript{22} See von Mehren & Trautman, supra note 2, at 1676: From the two characteristics of German law already discussed, it follows that direct estoppel effects are never accorded conclusions of fact or of law except to the extent that such are part of the judgment's dispositive holding and, in addition, the cause of action has not been split. It follows a fortiori that
try judgment is to be given as great effect as would be given to the judgment of a sister state, as the first sentence of comment c prescribes, that will often entail greater effect than the judgment would have in the state of rendition, contrary to what the second sentence declares to be the norm. The comment goes on to say that no rule prevents the recognizing state from giving greater preclusive effect to a judgment than would a court in the rendering state, but the norm is "no greater effectiveness." This, then, would indicate that the extent of the preclusive effect in America of a foreign country judgment is to be determined, basically, by the standards of the rendering country.

When comment c refers to the "same" effectiveness that a judgment of one state of the United States would be accorded in another, perhaps it means not that a foreign judgment would have the same conclusive effect as a sister state's judgment, but that the same principle applies: one state should accord at least as great effect to the judgment of another as the judgment has in the state of rendition. This interpretation, however, also makes the law of the rendering state the basic standard for determining the preclusive effects of foreign country judgments.

Although this ambiguity about the source of the standards to be used in determining the issue preclusion effect of a foreign country judgment is frustrating, it cannot be said that the reporters of the Revised Restatement have failed to give an accurate account of the current state of American law on this point. Cases dealing with the issue are in complete conflict. Some courts have declared that the law of the rendering country should determine the issue preclusion effect given a foreign judgment in America. It also has been suggested that the rule should apply even if those "efforts would be broader than the recognizing jurisdiction would accord to its judgments." Other courts, however, have taken the position that foreign country judgments should be accorded the same res judicata effects as

the German system does not recognize any collateral estoppel effects whatsoever.


23. Revised Restatement, supra note 3, § 491 comment c.

24. See Bata v. Bata, 39 Del. Ch. 258, 277-82, 163 A.2d 493, 504-07 (1960), cert. denied, 366 U.S. 964 (1961). "[A] foreign judgment is to be given only such binding effect as would be accorded it by courts of the jurisdiction rendering the judgment. . . . Switzerland does not recognize the rule of collateral estoppel, and therefore its judgment is not entitled to binding effect." *Id.* at 504, 506. The court then examined at length the Dutch law of collateral estoppel, which was also involved. *Id.* at 507-11; see also Schoenbrod v. Sieglar, 20 N.Y.2d 403, 409, 230 N.E.2d 638, 641, 283 N.Y.S.2d 881, 885 (1967) ("Generally, there is no reason to give more preclusive effect to a foreign judgment than it would be accorded by the courts of the jurisdiction which rendered it."); Estate of Cleland, 119 Cal. App. 2d 18, 20-21, 258 P.2d 1097, 1098-99 (1953).

domestic judgments,26 sister state judgments,27 or "American" judgments.28 The failure of the rendering country to give its own judgments so extensive preclusive effect has been said to be of no consequence.29 Other courts have applied American standards of preclusive effect without discussion of the choice of law question.30 Still others have applied domestic law standards, despite recognizing that normally the rendering country's standards should apply, when the absence of proof of foreign law causes the court to presume that foreign law is like that of the forum.31 In one case the court, after noting that the question of which state's rules should be applied was unclear, declared that English and New York law were not in conflict on the point, but held that a nonparty to the English action could assert collateral estoppel because "[t]he doctrine of 'mutuality of estoppel' is a 'dead letter' in New York."32

In the face of such diversity in the cases, it is not surprising that the Revised Restatement's treatment of the problem is somewhat uncertain. Nevertheless, it might be hoped that the Restatement would make it reasonably clear whether American courts should look to the rendering nation's law, their own law, some special law, or to some combination of the above to determine what preclusive effect should be attributed to a foreign country judgment. In this respect the Revised Restatement appears to suffer from the same weakness that marked the treatment of this subject in the Restatement (Second) of Conflict of Laws.33

One reason why this point was not resolved may be the absence of any discussion in the Revised Restatement of the theoretical foundations of

foreign judgment recognition. Once it is clear why American courts should give any conclusive effects to foreign country judgments, the proper source of the rules governing their preclusive effects may become clearer.

II. POLICY BASES FOR RECOGNITION OF FOREIGN COUNTRY JUDGMENTS

A civil judgment has a "double aspect."34 In one aspect it is a formal act of government. In the other, it is a transaction between private parties. As an act of government its effects are limited to the territory of the sovereign whose court rendered the judgment, unless some other state is bound by treaty to give the judgment effect in its territory, or unless some other state is willing, for reasons of its own, to give the judgment effect. When a state that is not bound to do so gives effect within its territory to a foreign country judgment, the reason traditionally given is that the "comity of nations" necessitates that result.35 To say that, however, is to say nothing unless comity can be defined and the reasons why it requires judgment recognition can be identified. The courts that speak of comity rarely look behind the term. Commentators who have examined the concept have concluded that it is merely a "general mode of expression that at most expresses an attitude or disposition and on analysis is simply circular,"36 a term that "state[s] but do[es] not explain the arrived-at result."37

Another rationale occasionally used to explain foreign judgment recognition is the "legal obligation" or "vested rights" theory. Rights, obligations, and other jural relations become fixed, or vested, in the parties to a civil action by virtue of the judgment of a competent court. In the case of in personam judgments, these fixed relations are transitory: they adhere to the parties and are entitled to recognition and protection everywhere in the civilized world. Again, however, as with the comity theory, this rationale is more a statement of the result than an explanation.

The weaknesses of the comity and vested rights explanations have led commentators to search further for the real policy or policies that should inform the rules governing recognition of foreign judgments. Professor Reese concluded that the real basis for recognizing foreign judgments was "none other than the doctrine of res judicata that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."38 A state's

35. The concept of comity is discussed at length, with reference to numerous American and English authorities, in the famous case, Hilton v. Guyot, 159 U.S. 113, 163-228 (1895). See also Barry, Comity, 12 Va. L. Rev. 353 (1926).
36. von Mehren & Trautman, supra note 2, at 1603.
37. Reese, supra note 2, at 784.
38. Id. (quoting Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931)).
interest in not expending its judicial resources to relitigate matters that have already been fairly adjudicated elsewhere is certainly a good reason for giving conclusive effect to foreign judgments. So also is the interest in preserving for a party who has successfully litigated a claim or defense in a foreign court the fruits of that successful litigation. The policy of ending litigation thus has both a public and a private aspect. Professor Reese’s view that the real policy basis was “none other” than res judicata was reflected in the Restatement (Second) of Conflict of Laws, in which the rationale for recognition of foreign nation judgments was declared to rest on the fact that “the public interest requires that there be an end of litigation.”

Professor Smit also declared that the view “that the principles underlying the doctrine of res judicata provide the only logical and satisfactory explanation for recognition of foreign judgments . . . seems the only correct one.” Smit, however, was careful to point out that the policy underlying the doctrine of res judicata was significantly weaker in application to foreign judgments than to domestic judgments.

Inasmuch as the foreign judgment will have been rendered under a system that may show a difference in the substantive law, and—especially in civil law countries—will almost invariably show a marked difference in the laws of procedure and evidence, in the schooling and selection of judges, and in the general political, social, and economic outlook (always to some extent reflected in the judicial machinery), a second local lawsuit would definitely not be a mere duplication of the prior foreign proceeding.

Further examination of the res judicata rationale was offered in a perceptive article by Professor Peterson. He questioned the notion that putting an end to litigation was “the” policy basis of res judicata. It might be appropriate, according to Peterson, to view res judicata as having that as its basis when speaking of the effect within a state of its own domestic judgments, but other policies come into play when the effects of non-domestic judgments are considered. When the judgment of one state of the United States is presented for recognition in another, the policy of ending litigation may have different implications than it would in the case of a domestic judgment. Moreover, in that case an additional policy comes into play: the policy of ordering relations among the states of the union embodied in the full faith and credit clause of the Constitution. Whether this composite concept is called res judicata or full faith and credit, Peterson said, is unimportant. Peterson’s point was that the rationale for recognition in such a case is a combination of complementary policies.

39. Restatement (Second) of Conflict of Laws § 98 comment b (1969). Professor Reese was the principal reporter for the Second Restatement.
40. Smit, supra note 2, at 56.
41. Id. at 62.
42. Peterson, Res Judicata and Foreign Country Judgments, supra note 2.
43. Id. at 300.
44. Id.
45. Id. at 304.
Projecting his inquiry beyond sister state judgments to foreign country judgments, Peterson found that, despite the inapplicability of the constitutional full faith and credit requirement, the policy of ordering relations between nations nevertheless has significance in determining what effect the foreign country judgment should be given.\(^{46}\) Even though no binding international law may require it, Peterson argued that it is in the interest of each country to adopt policies that serve to promote harmonious interchange and commerce among nations. Giving effect to judgments rendered abroad can serve that interest. Moreover, giving effect in America to foreign country judgments can also promote acceptance abroad of American judgments, because many other countries insist on reciprocity as a condition to recognizing foreign judgments.\(^{47}\) Res judicata projected to the foreign judgment level thus involves a complex policy rationale. At the same time, Peterson pointed out that the policies that would oppose giving res judicata effect to judgments become more complex at the foreign than at the domestic judgment level.\(^{48}\) Whether or not it is proper to speak of all these policy interests as being part of the doctrine of res judicata, as Peterson did, his article makes clear that more is at stake in recognizing foreign judgments than merely the policy of ending litigation in order to conserve judicial effort and protect successful litigants.

In probably the most thorough examination of the policy bases underlying foreign judgment recognition, Professors von Mehren and Trautman noted that “[r]ecognition of foreign judgments and the application of res judicata doctrines to domestic judgments are sufficiently similar that many courts and commentators treat them alike.”\(^{49}\) Nevertheless, there are sufficient differences between the two that “treating recognition problems as an aspect of res judicata tends to lead to a confusion of concepts which should be kept separate.”\(^{50}\) Instead of speaking in terms of res judicata, von Mehren and Trautman analyzed the problem of foreign judgment recognition as involving at least five policy bases:

[1] a desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated;
[2] a related concern to protect the successful litigant, whether plaintiff or defendant, from harassing or evasive tactics on the part of his previously unsuccessful opponent;
[3] a policy against making the availability of local enforcement the decisive element, as a practical matter, in the plaintiff’s choice of forum;
[4] an interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single

\(^{46}\) Id. at 305-06.
\(^{47}\) Id. at 307 & n.83.
\(^{48}\) Id. at 304.
\(^{49}\) von Mehren & Trautman, supra note 2, at 1605.
\(^{50}\) Id. at 1606.
jurisdiction; and, [5] in certain classes of cases, a belief that the
rendering jurisdiction is a more appropriate forum than the
recognizing jurisdiction, either because the former was more con-
venient or because as the predominantly concerned jurisdiction
or for some other reason its views as to the merits should prevail.51

The interests described in the first two categories are those Professors Reese
and Smit described by the term "res judicata." Professor Peterson's res
judicata concept also included the interest identified by von Mehren and
Trautman in category four as well as the interest in promoting accep-
tance abroad of domestic judgments—an interest that could be seen as
subsumed in category four, but which also could be considered distinct.
Categories three and five of the von Mehren-Trautman list seem to in-
volve the same considerations, and probably should be viewed as one.

Combining the insights of these commentators, then, the policy bases
for recognition of foreign country judgments include the following:

1. the policy of economy of judicial resources;
2. the policy of fairness to private litigants;
3. the policy of fostering a desirable international order;
4. the policy of promoting acceptance abroad of domestic
judgments; and
5. the policy of encouraging the initial selection of the most
appropriate forum for litigation of the case.

In each of these instances, of course, the policy referred to is the policy
of the recognizing nation, but it certainly does not follow that the recogniz-
ing nation's rules for determining the scope of the foreign judgment's
preclusive effects must be the same as those applied to its own domestic
judgments. Policies three and four have no application to domestic
judgments, and in connection with the other three, the implications of
a decision to preclude relitigation may be quite different when the prior
case was adjudicated in a foreign forum rather than a domestic one.
Accordingly, in searching for standards to determine the issue preclusion
effect of foreign country judgments, the initial assumption must be that
the standards probably should not be the same as those applied to domestic
judgments. The next step is to inquire whether these several domestic
policies would be adequately served by applying the standards that the
rendering foreign country would use to determine the issue preclusion
effects of its own judgments. Before this question can be answered, however,
we must first get an idea of what those foreign standards might be.

III. ISSUE PRECLUSION UNDER THE LAWS OF
SELECTED FOREIGN COUNTRIES

A complete survey of the law of all foreign countries on this question

51. Id. at 1603-04.
would be a monumental undertaking, and is not really necessary for the purposes of this Article. A sketch of the law prevailing in several countries whose judgments are likely to be presented for recognition in American courts will suffice to make the point. This Article looks first at the law of England, which reflects also the law of some other countries sharing our common-law traditions, and then considers the law of some major civil-law countries.

A. England

English law allows civil judgments extensive issue preclusion effects. George Spencer Bower’s well-known treatise states the general rule as follows:

[A] judicial decision estops or precludes any party to the litigation from disputing, against any other party thereto, in any later litigation, the correctness of the earlier decision in law and fact. The same issue cannot be raised again between them, and this principle extends to all matters of law and fact which the judgment, decree, or order necessarily established as the legal foundation or justification of the conclusion reached by the Court.  

In the English-speaking countries of the Commonwealth, this principle is referred to as the doctrine of “issue estoppel,” as contrasted with “cause of action estoppel.”

The doctrine applies to actions in personam and to actions in rem. In in personam actions, “[a] judicial decision inter partes operates as an estoppel, in favour of, and against, parties and privies only, not third parties or strangers.” Parties can include persons represented by parties, but a person who appears in different capacities in the two proceedings is usually not considered to be the same party for this purpose. In rem actions, “[a] judicial decision . . . which declares, defines, or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person, or thing, to the world generally . . . is conclusive for, or against, everybody.”

The English doctrine, unlike the doctrine followed in most states of the United States and endorsed by the Restatement (Second) of Judgments, extends issue estoppel not only to facts actively litigated and decided, but also to those that are “necessary steps to the decision,” including facts expressly or implicitly admitted. The principle applies to default judgments as well as contested judgments, although some have expressed

53. Id. at 198.
54. Id. at 203.
55. Id. at 213.
56. Restatement (Second) of Judgments § 27 comment e (1980).
57. G. Spencer Bower & A. Turner, supra note 52, at 152-53.
qualms about this use of issue estoppel.\textsuperscript{59} This application of the principle to unlitigated and even undisputed issues reveals the origins of the principle of issue preclusion in the rules of common-law pleading\textsuperscript{60} more clearly than can be seen in the American doctrine, which today tends to view issue preclusion more as a consequence of the public act of judgment than as a consequence of a party’s conduct (estoppel).

The English doctrine of issue estoppel, then, is both broader and narrower in scope than the doctrine generally prevailing today in the United States. It is broader because it may preclude issues that were never actually litigated and decided. It is narrower because it is limited only to later suits between the same parties or privies. Invocation of issue estoppel by a nonparty to the earlier proceeding against one who was a party, which is now permitted in most states of the United States,\textsuperscript{61} generally is not permitted.\textsuperscript{62}

Other English-speaking members of the Commonwealth—Australia,\textsuperscript{63} Canada,\textsuperscript{64} and New Zealand\textsuperscript{65}—generally follow the English doctrine. Israeli law is apparently similar.\textsuperscript{66}

\textbf{B. France}

Common-law pleading emphasizes the necessary “elements” of claims or defenses, but French civil-law pleading emphasizes the \textit{conclusions}—the points on which the parties desire the court to rule.\textsuperscript{67} This different emphasis is reflected in the rules of issue preclusion prevailing in England and France. An early decision of the Court of Cassation declared: “[T]o

\textsuperscript{59} G. Spencer Bower & A. Turner, \textit{supra} note 52, at 158-60; Kelly, \textit{supra} note 58, at 381.

\textsuperscript{60} See Kelly, \textit{supra} note 58, at 364-66; Millar, \textit{supra} note 22, pt. III at 238.

\textsuperscript{61} See \textit{Restatement (Second) of Judgments} § 29 reporters’ note (1980) (declaring that the rejection of the mutuality requirement had “now gained general acceptance,” although a few states continued to adhere to the mutuality rule).

\textsuperscript{62} See G. Spencer Bower & A. Turner, \textit{supra} note 52, at 211 (citing an Australian case, Ramsay v. Pigram, 42 Austl. L.J.R. 89 (1968) (employer of driver of car not allowed to use defensively in later suit the finding from earlier action that employee had been free of contributory negligence in connection with accident in suit; insistence on mutuality an alternative basis for decision; court also found issues were not the same in two cases)).

\textsuperscript{63} See, e.g., Kelly, \textit{Issue Estoppel and Negligence on the Highway} (pts. 1 & 2), 41 \textit{Austl. L.J.} 12, 46 (1967).

\textsuperscript{64} See, e.g., Hill v. Hill, 57 D.L.R.2d 760, 763-64 (1966). The question is one of provincial law.

\textsuperscript{65} Sir Alexander Turner, author of the second edition of Mr. Spencer Bower's treatise, \textit{supra} note 52, was a judge on the Court of Appeals of New Zealand, and cited Australian and New Zealand cases freely. He said, “In the discussion of issue estoppel, especially, the Australian cases should be found helpful, if indeed they do not prove to be positively the best authorities.” G. Spencer Bower & A. Turner, \textit{supra} note 52, at vi.


constitute res judicata on a given matter, there must have been conclusions advanced by the parties on the point and a dispositive provision of the judgment pronouncing their admission or rejection." This is what is meant by the statement, frequently seen but seldom explained in American legal writings, that the res judicata effect of a French judgment attaches only to its "dispositive" part, not to the "motives." The plaintiff's demand will assert certain conclusions, such as the existence of a right or a title, to support the judgment sought. The court will determine whether the asserted conclusion is warranted, and will declare whether it is or is not warranted in ordering judgment. This declaration is the dispositive part (dispositif) of the judgment. Determinations of those conclusions cannot be relitigated under the French doctrine of res judicata.

The French law of res judicata, however, has application only when the second action is identical to the first in three respects. The second suit must be between the same persons, concern the same object, and have the same cause. Identity of persons includes those represented by parties and those whom we would call privies. The difficulty of specifying the identity of object prompted one commentator to state: "The authors have tried to formulate a general rule to determine when the second case has the same object as the first. They have not succeeded." Apparently it means only that there must be identity of questions in the same juridical context. The identity of cause too has been troublesome. To the extent identity of cause corresponds to our concept of the "same cause of action," this requirement would limit the issue preclusion effects of French judgments to situations we would describe as involving "direct" as opposed to "collateral" estoppel. However, the limitation does not seem to be quite that restrictive. Issues propounded as conclusions which were determined and declared in the judgment thus apparently will be precluded from relitigation by the same parties or their privies in a later suit in which the same question is again presented in the same judicial context even if the cause of action is not strictly the same.

The power to seek a decision on conclusions is not limited to the plaintiff. The defendant, by a counterclaim, can seek an express decision on any "prejudicial questions," that is, questions of ultimate fact necessarily

68. Millar, supra note 22, pt. 1 at 11 (quoting 26 Merlin, Repertoire de Jurisprudence 260 (5th ed. 1827)).
69. See, e.g., P. Herzog, Civil Procedure in France 533 (1967).
70. Code Civil § 1351.
71. 2 M. Planiol, Treatise on the Civil Law No. 54A(5) (Louisiana State Law Institute ed. 1959).
72. Millar, supra note 22, pt. 1 at 15-16.
73. Planiol declared that it was wrong to apply this condition to personal actions, and that in fact "one could do well without this condition," leaving only the identity of person and object as conditions of res judicata. 2 M. Planiol, supra note 71, No. 54A(6).
75. See Millar, supra note 22, pt. 1 at 16 ("If a given question has been bindingly
involved in the resolution of the plaintiff’s claim or of a defense. 76 Those facts would not have any conclusive effect, even though necessarily decided, if they were not made the subject of specific conclusions. If a defendant wants to make sure that issues other than those posed as conclusions by the plaintiff will have such conclusive effect as French law provides, the defendant must demand their determination as conclusions in a declaratory counterclaim.

C. Federal Republic of Germany

The rules relating to the conclusive effects of German judgments are similar to those prevailing in France, but the instances in which relitigation of issues will be precluded are somewhat more limited. Res judicata effects apply only to the dispositive part of the judgment (Urteilsformel or Tenor), rather than to the fact determinations on which the judgment is based. 77 However, by special pleading the parties can seek a determination of specified “prejudicial questions,” that is, questions whose decision is a condition precedent to the decision in chief. 78 Issues decided and incorporated in the Tenor cannot be relitigated by the parties or their privies in a later suit. This form of issue preclusion, however, may not apply when the second suit is on a different cause of action and it may not apply even to a later suit on the same cause of action if the plaintiff in the first suit formally “split” the cause of action, as is permitted. 79 Thus, the scope of issue preclusion under German law is somewhat narrower than under the French.

D. Argentina

Like the French, Argentine law requires the concurrence of the three identities (subjects, object, and cause), although the Argentine civil code, unlike the French, does not expressly refer to the identities. 80 Within the limits of these identities, which may be construed rather loosely, the range for operation of issue preclusion is apparently somewhat broader than under the French practice.

As in France and Germany, the parties can secure a binding determination of incidental prejudicial questions by advancing them as formal

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76. Id. at 2-4, 17-18. The definition offered in the text of the present Article is a rough and imprecise generalization, but it will suffice for the limited purposes of this Article.
77. See F. Baur, Juristische Lehnbucher: Zivilprozessrecht 197 (1978); E. Cohn, Manual of German Law 213-16 (2d ed. 1971); von Mehren & Trautman, supra note 2, at 1674-76.
79. von Mehren & Trautman, supra note 2, at 1676.
conclusions. 81 Preclusive effect can also extend to questions implicitly decided even though they are not expressly declared in the judgment.82 And even matters not included in the “dispositive” part of the judgment may have preclusive effect, although this is a question of some debate.83

E. Japan

The Japanese Code of Civil Procedure was patterned after the German, and so it is not surprising that the rules relating to issue preclusion are similar. However, American influence in the postwar period has led to some cases recognizing more extensive issue preclusion effects. Hattori and Henderson’s recent book describes the Japanese situation in the following terms:

The Code of Civil Procedure declares that “only the matters contained in the formal adjudication (shubun)” are res judicata. This means that the findings contained in the part called “reasons” are not res judicata. This provision is generally construed to mean that the court’s holding on the claim (seikyū) or cause of action (soshōbutsu) becomes res judicata, but that the findings appearing in the reasoning in support of the holding (i.e., the premises of the judgment on the claim) do not constitute res judicata.

There is a tendency in doctrinal writings to recognize an effect similar to the collateral estoppel effect of American law. Such decisions as there are supporting this effect are found only at the district and high court levels, and it appears very unlikely,

81. Id. at 158 ("That which has been adjudicated incidentally by virtue of formal conclusions of the parties has the effect of res judicata just as if it had been the principal matter.") (author’s translation).
82. Id. at 159.
83. Id. at 168 n.122.
at least at the present, that the Supreme Court would uphold such judgments on appeal. 84 The strongest argument against recognition of collateral estoppel effect in Japan is the existence of a better alternative in the statutory institution of “interlocutory confirmation action” (ちくけん かくにん の うたつ), through which either party may request the court to give a conclusive adjudication, declaratory in nature, on any matter constituting a premise of any final judgment. Although this action is not often utilized in practice, it may be argued that it could be used and is better suited to the purpose of preventing re-litigations than the recognition of collateral estoppel, the content and scope of which are inherently vague. 85

This statement of Japanese law indicates that the issue preclusion effect of determinations made through the “interlocutory confirmation action” can extend to later suits on a different cause of action, that is, collateral estoppel as well as direct estoppel. If this is true, the scope of issue preclusion under the Japanese practice is broader than that of its German model, as described by von Mehren and Trautman. 86

F. Sweden

The Swedish Code of Civil Procedure also follows the German model. The scope of a Swedish judgment’s preclusive effect has been described by Ginsburg and Bruzelius.

Binding force (rättskraft) attaches only to the judgment order (domslut); it does not extend to the grounds of decision (domskal) enunciated by the court as the basis of its ultimate pronouncement. Correspondingly, the scope of the judgment order is limited to matters advanced by the parties as the immediate objects of their claim; the dispositive portion of the judgment may not encompass matters asserted merely as premises for the parties’ ultimate demands.

However, by presenting a separate demand for a declaratory judgment on a threshold issue, a litigant in a Swedish court may obtain a conclusive ruling on the existence vel non of a legal relationship. For example, in conjunction with a creditor’s suit for an accrued installment of interest on an unmatured debt obligation, either party may formally demand a declaratory judgment concerning the validity of the obligation. If such a demand

84. Two Supreme Court cases have refused to give collateral estoppel effect to findings or reasoning, as opposed to the actual holding, of lower court judgments: Kaneko v. Takahashi, 110 Ōsakushū (Minji) 159, Hanrei jihō (no. 724) 33 (Sup. Ct. 1st P.B., Oct. 4, 1973); Matsumoto v. Tamadana, 95 Ōsakushū (Minji) 613, Hanrei jihō (no. 569) 48 (Sup. Ct. 3d P.B., June 24, 1969) (footnote in original).
86. See supra text accompanying note 79
is presented, the court disposes of the validity issue in the judgment order and the matter becomes res judicata. If a declaratory judgment is not requested, although the validity of the obligation is controverted between the parties, the issue is resolved by the court only as a ground of decision and remains subject to re-examination in the subsequent action.  

The Swedish concept of res judicata, however, differs from the German concept in that issue preclusion can apply in a later suit on a different cause of action.

G. Mexico

Generalizing about the Mexican law of issue preclusion is difficult because Mexico is a federal republic and each state has its own code of civil procedure. Most writings on Mexican procedure focus on the Code of Civil Procedure for the Federal District and Territories, which is probably the most important code.

Like its European counterparts, the District Code’s provision for the “presumption” of res judicata requires three identities between the first and second actions: identity of “things, cause and persons” (cosas, causa, and personas). These are essentially the same as the object, cause, and persons requirements of the French and Argentine codes, referred to above. The Mexican doctrine also limits the preclusive effect of judgments to the dispositive part of the judgment (resolutivo). The supporting reasons, which the judges always supply in another part of the judgment (considerando), are taken into account for some purposes, but are not conclusive.

Although usually not mentioned in Mexican writings concerning res
judicata, it is probably possible to obtain an express determination of particular prejudicial questions that will have preclusive effect in later actions, within the limits of the "three identities." Mexican procedure recognizes a "declarative action":

The end sought through declarative actions is to obtain, with the force of res judicata, the declaration of the existence of a certain juridical relation, or of a right arising out of some juridical transaction, and also, exceptionally, concerning the existence or non-existence of some relevant juridical fact which can give rise to a juridical relation or right.

It has reached general acceptance in our time in the new codes.

By means of the declarative action one can obtain a judicial decision concerning the nature of a right, the validity of a title, the proof of a certain fact, the existence and validity of contracts and the interpretation of their provisions, the civil status of persons, etc.\textsuperscript{96} Mexican procedure also permits the assertion of incidental claims by a plaintiff\textsuperscript{97} and counterclaims by a defendant.\textsuperscript{98} It seems probable, then, that the parties to an action can obtain a conclusive determination of important prejudicial questions through a special demand or counterclaim (reconvención), just as in France and Germany. However, that possibility is not widely discussed by the commentators.

Although the absence of source material has prevented me from including any discussion of the rules of Moslem and Marxist countries, this brief survey of the domestic rules of issue preclusion in in personam actions in these representative countries suggests two different patterns. The English pattern is similar to that prevailing in the United States, but it accords issue preclusion effect to some issues that were not actually litigated, and it does not accord such effect even to issues that were actually litigated, except when the parties are the same in the two suits. On the other hand, the French-German pattern attributes issue preclusion effect only to matters expressly declared (or perhaps necessarily implied) in the dispositive provisions of the judgment, that is, the court's definitive answers to the questions posed by the parties' conclusions. Even that limited preclusive effect may apply only when the second suit is on the same cause, although

\textsuperscript{96} R. De Pina & J. Castillo, supra note 93, at 175-77 (author's translation). It should be noted that one commentator takes the view that the declarative action generally can only be used to obtain a declaration of the existence of a right; it cannot be used to establish just a juridical relation of particular facts. See E. Pallares, Tratado de las Acciones Civiles 69-73 (1943).

\textsuperscript{97} See I. H. Biseño, El Juicio Ordinario Civil 338 (1980).

\textsuperscript{98} Id. at 392.
in the countries examined other than Germany and perhaps Mexico the identity of "cause" requirement seems to be either ignored or eliminated when the issue has been presented and decided in a formal declarative claim or counterclaim.

IV. USE OF THE RENDERING COUNTRY'S STANDARDS TO DETERMINE THE ISSUE PRECLUSION EFFECT OF FOREIGN JUDGMENTS IN THE UNITED STATES

The next step in this analysis is to consider whether any reason exists to resort to standards other than those of the country of rendition in determining the issue preclusion effect to be accorded in the United States to foreign country judgments under the regime of the Revised Restatement. Do the policies identified above require consideration of any different standards? If so, in what respects?

The Revised Restatement refers to three different kinds of judgments as being entitled to recognition: those granting or denying a sum of money, those establishing or confirming the status of a person, and those determining interests in property. These three types of judgments pose somewhat different problems. The present study focuses on judgments granting or denying a money award.

The principle of merger, which applies to judgments for the plaintiff in our domestic res judicata law, generally does not apply to a foreign country money judgment for the plaintiff. This means that a successful plaintiff in the foreign action who wants to collect the obligation in America has a choice of either suing on the judgment debt or on the original cause of action. This is true according to the general rule even if the cause of action is deemed to merge in the judgment under the law of the foreign country, as it might, for example, in England. If the plaintiff chooses to sue on the original cause of action instead of on the judgment, the question whether the issues litigated in the foreign action will be precluded from relitigation will arise.

The Revised Restatement, following the pattern set in section 4 of the Uniform Money-Judgments Recognition Act, declares some mandatory

99. See supra text accompanying notes 34-51.
100. Revised Restatement, supra note 3, § 491(1).
101. See Yatema, supra note 34, at 1139-40.
103. Revised Restatement, supra note 3, § 492(1).

(1) A judgment of the court of a foreign state may not be granted recognition by a court in the United States if:
(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
(b) the court that rendered the judgment did not have jurisdiction over
and some discretionary grounds for nonrecognition. Before a foreign country judgment is entitled to any recognition under the regime of the Revised Restatement, the procedural system of the foreign court must have been compatible with our notions of due process, and the rendering court must have had jurisdiction over the defendant under the laws of the rendering state and also in accordance with the standards declared in section 441. The section 441 standards generally incorporate bases of personal jurisdiction that are compatible with the due process limitations of International Shoe and its progeny. The Revised Restatement also recognizes the following discretionary grounds for denying recognition to a foreign judgment: when the defendant in fact failed to receive adequate notice (even though the foreign procedure was reasonably calculated to provide it); when the judgment was tainted by fraud; when the judgment or the underlying cause of action is repugnant to our public policy; when the judgment conflicts with another final judgment; or when the foreign court’s jurisdiction was invoked by the plaintiff in violation of a prorogation clause providing for exclusive jurisdiction in a different court. In each of these situations, the American court can refuse recognition altogether.

To be entitled to any recognition, then, the foreign court’s proceedings must have comport with American ideas of fundamental fairness, including our concept of the permissible bases for personal jurisdiction. In light of this, is there any justification for ascribing to a foreign person judgment granting or denying recovery of money less issue preclusion effect than it would have under the law of the rendering country?

the defendant in accordance with the applicable laws of the rendering state and with the rules set forth in § 441.

Id.

104. Section 441(1) provides that a state has jurisdiction to adjudicate "with respect to a person or thing, if the relationship of the person or thing to the state is such as to make the exercise of such jurisdiction reasonable." Restatement of Foreign Relations Law of the United States (Revised) § 441(1) (Tent. Draft No. 2, 1983). Section 441(2) states that jurisdiction is reasonable if the person or thing subject to adjudication has sufficient contacts with the forum, as enumerated within § 441(2). Id. § 441(2)(a)-(k). Special appearances to challenge jurisdiction are allowed, subject to the rules of the forum. Id. § 441(3).

105. International Shoe Co. v. Washington, 326 U.S. 310 (1945) (due process requires minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice). See generally Drobak, The Federalism Theme in Personal Jurisdiction, 68 Iowa L. Rev. 1015, 1037-48 (1983) (discussing progeny of International Shoe). In one respect § 441 may authorize jurisdiction more broadly than International Shoe. Section 441(2)(h) authorizes general jurisdiction (i.e., jurisdiction for claims not related to the forum state contact) over a person or corporation that regularly carries on business in the state. Restatement of Foreign Relations Law of the United States (Revised) § 441(2)(h) (Tent. Draft No. 2, 1983). This could perhaps support general jurisdiction over one whose in-state contact is not so substantial, systematic, and continuous as to satisfy International Shoe. See 326 U.S. at 316-17.

106. Revised Restatement, supra note 3, § 492(2). This section also provides that a "judgment of the court of a foreign state need not be granted recognition in the United States if . . . the court that rendered the judgment did not have jurisdiction of the subject matter of the action." Id. In the Uniform Foreign MoneyJudgments Recognition Act,
If the judgment was rendered in a contested action in a country whose res judicata doctrines follow the French-German pattern, it is difficult to see any reason why the judgment should be given less extensive preclusive effect here than in the rendering country. Our policy of judicial economy would favor such preclusion. The possible argument that it would be difficult for an American court to discover and understand the foreign law concerning the scope of preclusion is not very strong in connection with countries that limit preclusive effect to matters expressly declared in the dispositive part of the judgment. The interest of fairness to the winning party would argue for not requiring relitigation here of matters conclusively established in the foreign judgment. Fairness to the losing party would generally have been served in the foreign proceeding if the judgment was not subject to either the Revised Restatement's mandatory or discretionary grounds for nonrecognition. However, the American conception of fairness in the context of issue preclusion demands that the party to be bound must have had a fair opportunity and incentive to litigate the issue fully in the first proceeding, including the right of appeal. The Restatement (Second) of Judgments provides an exception to the basic rule of issue preclusion when

[t]here is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.107

If this represents the American view of fairness, it might be appropriate to include a similar provision in the Revised Restatement. Such a provision would provide desirable flexibility that could be particularly useful in a case in which the losing party in the foreign action was an American defendant forced to litigate in a foreign and perhaps inconvenient forum. The provision should appear as a special rule relating to the scope of issue preclusion rather than as an additional ground for general nonrecognition, because the judgment may well be appropriately recognized for other purposes. If this American law-based escape device were provided, a basic rule extending preclusive effect to a foreign country judgment to the extent that it would have preclusive effect in the domestic law of that country


107. Restatement (Second) of Judgments § 28(3) (1980).
would not seem to pose any particular unfairness to the losing party. The policies of fostering international order and promoting acceptance abroad of American judgments would also argue for according the judgment such preclusive effect. The policy of encouraging initial selection of the most appropriate forum at least would not be impaired in such a case because the forum must have been a fundamentally fair one and the underlying law must not have been repugnant to American public policy. Otherwise, one of the grounds of nonrecognition would be applicable.

The arguments for giving default judgments issue preclusion effect are considerably weaker. In such a case the plaintiff’s conclusions, recited in the judgment, may have been accepted without proof. Even in countries requiring a plaintiff to substantiate the claim before a default judgment will be rendered, there is less assurance that the conclusions recited in the judgment were accurate than is true in the case of a contested judgment. The winning party’s claim to automatic acceptance of the foreign court’s determinations is considerably weaker and the losing party’s claim to another chance to litigate the issues is considerably stronger. In those American states (a majority) that reject the idea that issue preclusion applies to matters not actually litigated, the unfairness to the losing party may seem too great to warrant giving issue preclusion effect to a default judgment, even when it would have that effect in the rendering country.

However, if both the parties were residents or domiciliaries of the rendering country, they presumably contemplated that the judgment, even if uncontested, would produce a conclusive determination of the dispositive points. Preclusion on such issues would seem to be appropriate even in states that generally deny issue preclusion in such circumstances to their own domestic judgments. If the losing party was an American, the policy against holding a party bound on uncontested issues would be a significant concern, but it could be accommodated adequately in the Revised Restatement’s scheme by invoking the “public policy” ground for discretionary nonrecognition, or the “lack of notice” ground if that was the reason for the default. And if the additional provision suggested above, patterned after section 28(5) of the Restatement (Second) of Judgments, were incorporated into the Revised Restatement, recognition of issue preclusion effect could be denied if the default was the result of a lack of incentive to litigate. The problem of default judgments, then, could be dealt with by American law-based exceptions to the basic principle that the foreign judgment should be accorded as much preclusive effect as it would have been accorded in the rendering country.

If the judgment was rendered in a country whose rules follow the

108. This is the German practice. See 2 E. Cohn, supra note 77, at 218-19.
109. French courts may require some proof. See P. Herzog, supra note 69, at 260.
111. Revised Restatement, supra note 3, § 492(2)(d).
112. Id. § 492(2)(b).
113. See supra text accompanying note 107.
English pattern, again, the interests identified above generally would be advanced by according the judgment as extensive issue preclusion effect here as it would have under the law of the rendering country. The only substantial argument for not extending such issue preclusion effect is the questionable fairness in American eyes of holding someone bound on issues that were never actually litigated or for which the person lacked the opportunity and incentive for full litigation. The English rule of issue estoppel applies to default judgments and to facts established by admission or stipulation in contested cases.114 Here again, however, the American policy concern about that problem is not very strong if both parties were domiciliaries of the rendering country. Even if they were not, if giving effect to issues not actually litigated is contrary to the public policy of the recognizing American state, that ground for discretionary nonrecognition can be invoked. The strength of the American states’ public policy concern, however, will generally not be great unless the party sought to be bound by the foreign adjudication was an American domiciliary. Preclusion may be denied when opportunity and incentive to litigate in the foreign court was lacking, if the suggested ground for denial of issue preclusion effect is added to the Revised Restatement.115

It thus appears that the interests implicated in the judgment recognition decision would be best served by recognizing at least as great issue preclusion effect in America as the judgment would have under the law of the rendering state, subject to the American law-based exceptions embodied in the Revised Restatement’s grounds for mandatory and discretionary nonrecognition and subject to an opportunity-to-litigate limitation as suggested. The next question is whether any reason exists to ascribe

114. See supra text accompanying notes 56-59.
115. Professor Smit has argued that collateral estoppel effect should not be given to issues determined in foreign country in personam judgments except when “the whole prior judgment is drawn into question in subsequent proceedings on a different cause of action.” Smit, supra note 2, at 71-72. Unfortunately, no examples are offered to explain the kind of case he had in mind. In other cases, the foreign judgment should be prima facie evidence of the points adjudicated, but not conclusive evidence, under Smit’s view. His argument rests on the belief that it is more likely to be harsh and unfair to the unsuccessful litigant to project the consequences of the foreign judgment into litigation in America, and on the belief that there would not be much net saving of judicial effort to apply preclusion because much effort would be required to determine just what was litigated and determined in the foreign judgment. The latter point does not appear very persuasive, however, in connection with judgments of the French-German pattern, because the only points conclusively decided are specifically declared in the judgment. Determining what was decided in an English or Australian judgment is no more, and no less, difficult than determining what was decided by another American court.

Applying issue preclusion would work harshly and unfairly in some cases, such as when the defendant was forced to litigate in a foreign court and the amount at stake did not warrant full-scale litigation or where the use sought to be made of the precluded issues in the later suit was not foreseeable. Such circumstances could lead to denial of preclusion under American standards as well. Perhaps Professor Smit’s concerns could be better met by adding to the Revised Restatement limits on issue preclusion similar to those contained in the Restatement (Second) of Judgments § 28(5), rather than by a general rule of no preclusive effect.
more extensive preclusive effect to a foreign country judgment than it would have in the rendering country.

In countries that follow the French-German pattern, the scope of the preclusive effect of in personam judgments is much more limited than under American doctrine. The American conception of the policy of judicial economy thus might argue for extending greater issue preclusion effect to a foreign country judgment than it would have in the rendering country. If the parties had a full and fair opportunity and incentive to litigate specific issues and did litigate them in the foreign court, why should the time of an American court and jury be expended in relitigating those same issues, simply because the rendering country is willing to squander its own judicial resources in that fashion?

On the other hand, giving the judgment more extensive issue preclusion effect than it would have in the rendering country could often mean unanticipated prejudice to the losing party and unexpected benefit to the winner. If a subsequent action brought in an American court involves issues and interests of substantive concern to American law, fairness to the parties and the interests of the recognizing state appear to require that the parties be given a day in court here. The policy of judicial economy normally does not go so far as to bar relitigation here of issues of substantive concern to American law, especially when the issues would not be considered conclusively determined in the country where the judgment was rendered. If the second action does not present any issues of substantive concern to American law, the American policy of judicial economy could be served by merely invoking the doctrine of forum non conveniens, leaving the parties to relitigate the issues in the courts of the country that rendered the first judgment, or in some other court. Giving the foreign judgment preclusive effects like those given an American judgment would hardly be justified in the name of judicial economy in view of the hardship potentially cast on the party who lost the first suit.

It is highly speculative whether giving greater preclusive effect here to a foreign judgment than it would have in the country where rendered would tend to promote greater acceptance abroad for American judgments. Some foreign countries that ascribe very limited preclusive effect to domestic judgments may give greater preclusive effects to foreign judgments;116 wider acceptance of that practice among civil-law countries could conceivably be encouraged. However, the connection between such a country’s decision to accord broad preclusive effect to American judgments and an American rule extending greater preclusive effect to a foreign judgment than it would have in the rendering country is tenuous at best.

It appears, then, that there is no good reason for generally giving greater issue preclusion effect to a foreign country judgment than it would

116. von Mehren and Trautman report that the “actual German rule appears to be that the foreign judgment, if recognized, will be accorded the same preclusive effects it enjoys in the rendering jurisdiction,” von Mehren & Trautman, supra note 2, at 1681 n.275, but they seem somewhat skeptical about the point.
be given under the law of the rendering country. As a general rule, giving a foreign judgment issue preclusion effect as extensive as we would give another American judgment would not lead to a net advancement of the several policies we have been considering. There is one situation, however, in which such a rule might be appropriate. If the successful party in the foreign suit was the defendant and was an American resident or domiciliary, the balance of economy and fairness interests seems to favor extending to that party the benefit of as great issue preclusion effect as we would give an American judgment. The policy of preserving for the winning party the fruits of a successful litigation is stronger when the successful party was an American who was forced to litigate in a foreign forum. On the other hand, if the American defendant voluntarily submitted to the foreign forum, as through a contractual proration clause,\(^{117}\) or sought it out by invoking the doctrine of forum non conveniens in a case initially brought in an American court,\(^{118}\) justification for applying American standards of issue preclusion is considerably weaker and would generally be inappropriate. If such a defendant, sued in a country whose issue preclusion rules follow the French-German pattern, wanted issue preclusion effect to apply to important questions litigated in the foreign proceeding, it could have sought a specific declaration on those questions in the foreign proceeding.

This examination of the standards to be applied in determining the issue preclusion effect of a foreign in personam judgment granting or denying an award of money suggests generally that the effect should be the same as—neither less than nor greater than—the effect the judgment would have under the domestic laws of the foreign country. Exceptions to this general rule may be warranted when the issues were not actually litigated, or when it would be inconsistent with American notions of fairness to preclude relitigation. Such exceptions are or should be included among the provisions of the Revised Restatement. In one situation, however, according greater preclusive effect, equivalent to that recognized by American law, may be warranted: where an American defendant, involuntarily subjected to the foreign court’s jurisdiction, was the successful party.

V. What Effect Should Be Given to Issues Litigated and Decided in a Foreign Judgment, But Not Precluded?

If the basic rule is that a foreign country judgment is entitled only to such issue preclusion effect as it would have under the law of the rendering country, there will be many instances in which matters fully litigated and decided in a court whose rules follow the French-German pattern will not be entitled to preclusive effect in American courts. Questions naturally arise in such cases: Does the fact that the issues are not regarded as having been conclusively resolved mean that the foreign determinations should have

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no effect at all? Should the foreign judgment be admissible in an American action as evidence of the points litigated and determined? Should the foreign judgment, as Professor Smit has suggested,119 be treated as prima facie proof of the points litigated and determined?

These are questions that the Revised Restatement does not address. The underlying assumption is probably that the American practice of regarding factual determinations made in other lawsuits as inadmissible if they are not regarded as conclusive will govern this matter in the context of foreign country judgments as well. This practice rests on our evidentiary rules excluding hearsay evidence.120 Should this practice be followed, however, with respect to issues decided in foreign country proceedings under circumstances in which those issues would have preclusive effect if decided by an American court, but which, because of the narrower rules of the rendering country, do not have preclusive effect? If such determinations have evidentiary though nonconclusive effect in the rendering country, should they have that effect in America?

If the reason that no preclusive effect is given to the foreign judgment is one of the Revised Restatement’s grounds for nonrecognition, or the absence of a full opportunity and incentive to litigate, the matters litigated and decided probably should not be admissible at all. The relitigation of the issues in the American court should be free of the influence of any prejudging in the foreign court. But if the reason that no preclusive effect is given to the issues decided in the foreign action is the rendering country’s narrow rules of preclusion, it may be appropriate for an American court to give that judgment some evidentiary, if not preclusive, effect. This is a matter to which the Revised Restatement should devote some attention.

VI. SHOULDN'T THE SOURCE OF THE STANDARDS BE A MATTER OF STATE OR FEDERAL LAW?

Before concluding this examination of the source of law determining the issue preclusion effects of a foreign country judgment, one other question should be considered. This Article has analyzed the problem and the effects of the various policies from an American point of view, as though that were a unitary conception. Among the policies identified with the problem are the policies of fostering a desirable international order and encouraging acceptance abroad of American judgments. It would seem that the law implementing these policies should be a uniform national law reflecting a national policy. In one of its double aspects, a foreign judgment is an act of a foreign sovereign. Relations between the United States and foreign sovereigns are matters normally committed to the federal, not the state governments. It would seem, then, that the law that prescribes

119. Smit, supra note 2, at 68.
the choice of law rule for determining the effect in America of foreign country judgments should be federal, not state. The leading Supreme Court case, Hilton v. Guyot,121 with its elaborate discussion of the "comity of nations" seems to suggest this.122 However, in a later case, Aetna Life Insurance Co. v. Tremblay,123 the Supreme Court refused to review a Maine decision denying recognition to a Canadian judgment on the ground that the case did not involve a federal question.124 Since Aetna it has been generally assumed that unless and until some federal statute or treaty declares otherwise, it is state, not federal, law that governs the effect to be given foreign country judgments. This is the view accepted by the Revised Restatement, and many cases supporting it can be cited.125 Even federal courts, in diversity cases at least, consider themselves bound by Erie126 to follow the law of the state in which they sit on this question.127

The soundness of leaving to state law all matters relating to the recognition and enforcement of foreign country judgments has been seriously questioned by many commentators.128 Courts, too, sometimes suggest that the subject is more suitable for uniform national treatment.129 Some commentators have argued that the "act of state" doctrine, under which the Supreme Court has held that the respect accorded acts of foreign sovereigns is a matter of federal common law,130 could be extended to recognition

121. 159 U.S. 113 (1895).
122. Id. at 164-67.
123. 223 U.S. 185 (1912).
124. Id. at 189-90.
129. See Tahan v. Hodgson, 662 F.2d 862, 868 (D.C. Cir. 1981) (discussing reciprocity: "The issue of how best to respond to a foreign nation’s scrutinization of an American judgment is, after all, a political one. Moreover, notwithstanding Erie Railroad Co. v. Tompkins, the issue seems to be national rather than state."); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1011 (E.D. Ark. 1973) ("It is observed that suits of this kind necessarily involve to some extent the relations between the United States and foreign governments and for that reason perhaps should be governed by a single uniform [federal common-law] rule."). The latter court nevertheless, following Erie, held Arkansas law to be applicable. Id. at 1012.
of foreign judicial acts.\textsuperscript{131} The argument that federal, not state, law should govern matters of foreign judgment recognition received further support in the Supreme Court's decision in Zschernig v. Miller.\textsuperscript{132} That case held that a state could not impose a reciprocity limitation on the ability of a nonresident alien to inherit personal property because enforcing that rule involved the state in foreign affairs and international relations, matters assigned by the Constitution to federal authority.\textsuperscript{133} Denial of recognition to foreign country judgments could have similar international repercussions.

A civil judgment is an act of a state, of course, but as noted previously it is also a private transaction. Most ordinary civil judgments resolving disputes between private parties raise no sensitive international issues. Viewing a judgment in its private aspect, the need for a uniform federal rule does not seem so important. Professor Peterson has suggested that while federal law should preempt state law in matters posing a "serious potential for disruption or embarrassment of the foreign relations of the United States,"\textsuperscript{134} most issues relating to foreign judgment recognition can be left to state law. He recognized, however, that the principle of Zschernig v. Miller could exert control over such matters as the use of in-temperate language in state judicial opinions, the evaluation of the impartiality of foreign tribunals, the imposition of reciprocity requirements, and some types of state "public policy" defenses to judgment recognition.\textsuperscript{135}

Although the Republic can survive without federalizing the law of foreign judgment recognition, the arguments in favor of that position are strong and the principal argument against it amounts to little more than inertia. It is unlikely that Congress will undertake the task of drafting a federal code to govern the subject, and so far the United States has not ratified any treaties dealing with the matter.\textsuperscript{136} The Supreme Court,

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\item It would be baffling if a foreign act of state intended to affect property in the United States were ignored on one side of the Hudson but respected on the other; any such diversity between states would needlessly complicate the handling of the foreign relations of the United States. The required uniformity can be secured only by recognizing the expansive reach of the [Sabbatino] principle . . . that all questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the Supreme Court of the United States.
\item 353 F.2d at 50-51.
\item 131. See, e.g., Scoles, supra note 128, at 1605-07.
\item 132. 389 U.S. 429 (1968).
\item 133. Id. at 440-41.
\item 134. Peterson, Foreign Country Judgments and the Second Restatement of Conflict of Laws, supra note 2, at 238.
\item 135. Id.
\item 136. The United States has participated in international conferences that led to the promulgation of conventions relating to recognition and enforcement of civil judgments, such as the Hague Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, reprinted in 15 Am. J. Comp. L. 362 (1967), and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, reprinted in R. GASAD, CIVIL JUDGMENT RECOGNITION AND THE INTEGRATION OF MULTIPLE-STATE ASSOCIATIONS 169-72 (1981). So far the United States has
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however, could decide that the subject is appropriate for federal common law. If it does, the provisions of the Revised Restatement, if amplified and clarified, could serve as a foundation.

not ratified any such conventions. The bilateral convention between the United Kingdom and the United States for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters was initialed in 1976, but it never came into force. See Bishop & Burnette, United States Practice Concerning the Recognition of Foreign Judgments, 16 Int'l Law. 425, 427 (1982).