CANADA'S POSITION ON A MULTILATERAL JUDGMENTS CONVENTION

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I. INTRODUCTION

It was a singular honour to be asked to participate as the Canadian member of a panel on the Hague Judgments Convention that was convened in Canada and that included such distinguished members and commentators representing Japan and the United States as Professors Kono, Brand, and Perez, and Mr. Trooboff. To be sure, I was not the sole apologist for Canada present at the panel discussion.[1] The Chair was Mr. Scott Fairley, a notable Canadian international law scholar and practitioner who had direct involvement with the negotiations at The Hague as a member of the Canadian delegation, and the "home audience" contained many who could speak eloquently on Canada's behalf. Still, as the Canadian member of the panel, I felt charged with the substantive responsibility of representing Canada's interests, and I sought to do so by outlining what I regard to be Canada's position on a multilateral judgments convention.

It occurred to me that such a proposal might startle the other members of the panel and the members of the audience who were not from Canada.

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[1] Nor was I the first to offer a "Canadian perspective" on the negotiations. For a detailed account of the issues regarded significant by a member of the Canadian delegation *see* Louise Lussier, *A Canadian Perspective*, 24 BROOK. J. INT'L L. 31 (1998).

It might be hard for them to recollect whether Canada had ever taken a fixed *position* during the negotiations at the Hague.[2] Still, I suggest in this paper that Canada does have a discernible position on the form and substance of a multilateral agreement and that it can be articulated with some precision. It also occurred to me that in making such a proposal, I should reassure the Chair and the Canadian members of the audience that the position I set out in this paper is not intended to represent any official position, or to pre-empt any of the views that the Canadian delegation might proffer on particular aspects or articles of the Hague Convention. While I hope that the view expressed here, in some sense, captures the sentiment of Canadian aspirations for a multilateral agreement on jurisdiction and judgments, I alone am responsible for it.

Although it might have surprised some that I proposed to articulate Canada's position at all, it probably would not have surprised them that I did so at that time. Given the then current state of the negotiations on the Hague Judgments Convention, the prognosis for the achievement of a successful and comprehensive multilateral agreement was somewhat guarded. Following the publication of the draft of the Convention by the Special Commission in October 1999[3] there was doubt about whether the delegations were prepared to move forward with the draft or whether further negotiations on specific articles and issues were in order. Then in the spring of 2000, the American delegation, voicing concerns felt by many, indicated that a series of issues raised by the draft presented insurmountable obstacles to the successful conclusion of a Convention. It was suggested that it would not be suitable to proceed to the diplomatic conference[4] until further consultations demonstrated the promise of negotiating a text representing a broadly based consensus.[5]

In the ensuing period of reflection, delegations would naturally be asking themselves and interested persons at home just how anxious they were

[2] *Id.*

[3] Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission, Oct. 30, 1999, *available at* <http://www.hcch.net/e/conventions/ draft36e.html>. Information on the current status of the negotiations may also be found at this site.

[4] As indicated in the press release reproduced at <http://www.hcc.net>, the Hague Conference on Private International Law met from June 6–22, 2001 in Diplomatic Session (Nineteenth Session, first part). The delegations unanimously confirmed the great importance they attach to the Judgments Project. They felt, however, that the second part of the Diplomatic Session could not be held before the end of 2002.

[5] Letter from Jeffrey D. Kovar, Assistant Legal Advisor for Private International Law, United States Department of State to Mr. J.H.A. van Loon, Secretary General, Hague Conference on Private International Law (Feb. 22, 2000) (on file with author).

to conclude a convention and just what sort of convention they were prepared to support. Fortunately, this did not result in a resumption of multilateral negotiations in which the delegations presented one another with entrenched positions. Nevertheless, it would have been inappropriate to allow the opportunity afforded by the invitation to consider Canada's position to pass, only to press forward, still beleaguered by unarticulated frustrations and misgivings about the process and the direction of the negotiations, and, possibly, to encounter unanticipated difficulties in implementation. Accordingly, in the spirit of continuing dialogue and consultation, I offered the following explanation of the "Canadian position". It is an explanation that reflects my understanding of three kinds of "bottom lines": first, constraints on the *kind of convention* that Canada can support; second, constraints on the *kind of negotiation and implementation process* that Canada can support (both of these constraints being derived from the Canadian constitutional tradition); and, third, the obligation Canada has to support the process of harmonizing or reconciling jurisdictional rules and establishing a multilateral judgments regime (this derived from Canada's approach to international law).

II. Bottom Line Number One: Constitutional Constraints on the Kind of Convention that Canada Can Support—A Response to Professor Brand

It is probably fair to say that the negotiations at the Hague have been preoccupied with (if not dominated by) debate on the points of divergence between the European and the American views of the form and substance of a convention to which they could subscribe. This is not to suggest that some of the views of the European and American delegations are not also shared by others or that there has not been any input of ideas from others.[6] Rather, it is only to say that we have heard a great deal about the views of the Americans and the Europeans. Accordingly, in identifying the key elements of Canada's position it is convenient to begin by contrasting it with a position with which the Hague negotiations have already acquainted us. While I suspect that the American delegation and others have admirably articulated what is likely to be the substance of the divergence between the North American and the European approaches, I am

[6] Nor is to suggest that the primary divergence should be cast in civil law/common law terms. Still, the capacity of some delegations representing countries containing both kinds of legal systems has likely assisted in addressing the issues arising from the distinctions between the civil law and the common law. *See* Paul R. Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgments Convention*, 24 Brook. J. Int'l L. 75 (1998).

not entirely confident that the potential divergence between the Canadian and the American approach has been canvassed in detail. Moreover, since the American approach was represented in the Trilateral panel discussion, there was some sense in beginning with it as a point of departure.[7]

As Professor Brand explained in his article "Due Process, Jurisdiction and a Hague Judgments Convention,"[8] the American position on the various provisions of any multilateral treaty on adjudicatory jurisdiction is, in part, dictated by the United States Constitution. This is because adjudicatory jurisdiction is governed by the Constitution, which requires that jurisdiction be determined in a way that affords due process to defendants, the particularities of which have been developed in the jurisprudence of the United States Supreme Court.[9] Accordingly, the United States is constrained by its Constitution to limit its support for a judgments convention to one that provides the kind of fairness to defendants that has been enunciated in that jurisprudence.

Canada's situation is somewhat analogous. In a series of decisions beginning with *Morguard Investments Ltd v De Savoye,*[10] the Supreme Court of Canada determined that the principles of adjudicatory jurisdiction in Canada are likewise based on the Canadian Constitution. Accordingly, it would seem likely that Canada would be constrained, in much the same way as the United States, to limit its support for a multilateral judgments convention to one that accords with the Canadian Constitution.

However, the nature of the constraints established by the Canadian Constitution are different from those established by the American Constitution, both in form and in substance. In *form,* the constraints established by the Canadian Constitution differ from their American counterparts because adjudicatory jurisdiction is not explicitly provided for in Canada's Constitution. There is, for instance, no equivalent to Article III of the United

[7] Unfortunately, insufficient familiarity with the Japanese approach prevented me from doing so with it also.

[8] Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention,* 60 U. PITT. L. REV. 661 (1999). And *see* Stanley E. Cox, *Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions,* 61 ALB. L. REV. 1177 (1998); Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility,* 61 ALB. L. REV. 1207 (1998).

[9] *See Pennoyer v. Neff,* 95 U.S. 714 (1877) and *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945) which established the requirement of "sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional notions of fair play and substantial justice to permit the state" to assume jurisdiction over the defendant: *International Shoe, id.* 320 The "minimum contacts" test is derived from the requirements of the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

[10] [1990] 3 S.C.R. 1077.

States Constitution. In fact, if the text of the Canadian *Constitution Act*[11] is read with sufficient care, it can be seen from the preamble that it provides only for the authority of the legislative and the executive branches of government.[12] There is no mention in the preamble of an intention to provide for the judiciary. In the body of the Constitution, the courts are merely "continued" as if Confederation had not occurred, subject to subsequent applicable legislation.[13] There are no specific provisions directly regulating court jurisdiction. There is no full faith and credit clause. There is no due process clause. Rather, there is simply an affirmation in the various provincial *Courts of Justice Acts* that, for example, "The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario."[14]

This structure is subtly but profoundly different from the structure of the United States Constitution. Where the United States Constitution provides for all three branches of government, and is, therefore, their ultimate source of authority, the Canadian Constitution provides for two and merely continues the third. But what is the significance of this distinction for adjudicatory jurisdiction? One point of significance that would appear to flow logically from this distinction is that, as comprehensive as any legislative scheme regulating court jurisdiction could be, it would seem unlikely that it could ever exhaustively define the scope of court jurisdiction. In other words, although it may be of purely academic interest, I suggest that the structure of the Canadian Constitution makes it difficult, if not impossible, to eliminate the inherent authority of the courts to regulate their own jurisdiction in accordance with their adjudicative traditions. This might well distinguish the situation of Canadian courts from most, if not all, of their foreign counterparts, and this distinction would seem to be likely to be subject only to the kind of fundamental constitutional

[11] CONSTITUTION ACT, 1867 (U.K.), 30 & 31 Vict., c. 3; *see* CONSTITUTION ACT, 1982, being Schedule B of the *Canada Act, 1982* (U.K.), c. 11.

[12] The third paragraph of what serves as the preamble to the Constitution provides "And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared. . . ".

[13] Section 129 of the Constitution provides in part that "all Courts of Civil . . . Jurisdiction . . . existing therein at the Union, shall continue . . . as if the Union had not been made; subject nevertheless" to applicable legislation."

[14] Section 11, *Courts of Justice Act,* R.S.O. 1990, c. C.43.

transformation that is occurring, for example, in Britain in the course of its progressive integration into Europe.[15]

As mentioned above, however, the fact that the roots of Canadian court jurisdiction are to be found in our adjudicative traditions rather than in the text of the Canadian Constitution is a distinction that might be purely of academic significance. As Professor Brand explained in his article,[16] the provisions of the text of the United States Constitution that have been applied to adjudicatory jurisdiction—particularly the due process clauses—were fashioned from traditional notions familiar to the drafters of the Constitution and the interpretation of those provisions has been conditioned by the evolving traditions of adjudicatory jurisdiction. Accordingly, while adjudicatory jurisdiction is governed by the text of the United States Constitution, the text is arguably no more than a reflection of the evolving corpus of rules that forms the American tradition of such jurisdiction.

Since the Canadian law of adjudicatory jurisdiction is fundamentally tradition-based, this would appear to render the distinction *in form* (*i.e.* whether or not it is provided for explicitly in the text of the Constitution) a distinction without a difference. Still, the American adjudicative tradition and the rules for adjudicatory jurisdiction that tradition has generated are different from the Canadian adjudicative tradition and the jurisdictional rules it has generated. And an understanding of the differences between these traditions can give insight into the differences in the *substance* of the respective constitutional constraints.

I suggest that the courts were not left out of the matters explicitly provided for in Canada's Constitution by accident. It was not simply an oversight. This distinctive feature of the Canadian Constitution reflects a different adjudicative tradition. The courts were, if you will, "exempted" from direct regulation by the Constitution because Canadians regarded the role played by the courts in the governance of the country as quite different from the role played by the other branches of government. If I may offer an historical analogy: just as when the Canadian settlers arrived in the Canadian West, they found it a good deal less wild than their American counterparts because they were preceded in their arrival by the railway and the Royal Canadian Mounted Police, so too is there a sense in the Canadian tradition that the law and the courts pre-exist other more prospective forms of government and provide the foundation for them.

[15] The most recent development in this regard being the *Human Rights Act, 1998*, c. 42 (Eng.), making the rights in the European Human Rights Convention directly enforceable in U.K. courts.

[16] Brand, *supra* note 8, 664–67.

This requires further explanation. As Professor Brand observes, the Fifth and Fourteenth Amendments of the United States Constitution "exist to protect individuals from excessive exercises of governmental authority. In a discussion of judicial jurisdiction, this means the Due Process Clauses restrict the extent to which courts may exercise jurisdiction over a defendant".[17] Professor Brand says this because, to Americans, civil dispute resolution is a form of governance. I suggest that, to Canadians, civil dispute resolution is not a *form* of governance—it is a *pre-requisite* to governance.

To the extent that it is not seen as an exercise of governmental power like that exercised by the other branches of government, the exercise of civil jurisdiction by the courts is not regarded with the same degree of caution by Canadians as other governmental interventions might be regarded, or as the exercise of civil jurisdiction is regarded in the American legal tradition. The concern for fairness to the defendant and the consequent limitations on court authority clearly influence the scope of adjudicatory jurisdiction. However, they are not the primary determinants of adjudicatory jurisdiction described by Professor Brand. Canadian jurists instinctively pursue a broadly based analysis that is more concerned with convenient forum than with jurisdiction *simpliciter*. The underlying question in determining jurisdiction tends to be not whether any given court can assume jurisdiction *at all* (and thereby engage in state intervention in private affairs). It tends to be whether it is appropriate for a particular court to be the one whose jurisdiction is invoked in light of the availability of other fora.[18]

This distinction—between the adjudicative traditions of Canada and the United States—can have a surprising effect. One might think from Professor Brand's discussion of the obligation of the United States to support minimum safeguards for defendants, that the disagreements between the American delegation and other delegations would come about because other delegations had proposed broad bases for adjudicatory jurisdiction that were exorbitant or excessive by American standards. (To be sure, Professor Brand identified some bases of jurisdiction that are permitted in the national laws of various European countries that could run afoul of American due process requirements.[19]) And one might think, in light of the

[17] *Id.* 663.

[18] *See*, for example, *Oakley v. Barry*, 158 D.L.R. (4th) 679 (N.S.C.A. 1998), in which the Nova Scotia Court of Appeal held that fairness to the plaintiff, who would not have been able to sue in the defendant's forum (which, on the facts of the case, might otherwise have been regarded a more appropriate forum), should be considered in determining jurisdiction *simpliciter*.

[19] Many of these are among the prohibited bases in the Brussels Convention, now listed in Annex I of Council Regulation 44/01 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

discussion above of the Canadian Constitution, that Canada would be among those countries insisting on the adoption of these excessive bases of jurisdiction. However, by and large, the serious differences of opinion on particular provisions of the draft Hague Convention have tended to be the other way around. The American delegation has insisted on the availability of bases of jurisdiction that have been resisted by other delegations as excessive. Why is this so?

This is because, as I suggested above, in the American tradition, civil dispute resolution is a form of governance. It is a means by which standards of conduct are set proactively and by which the market is regulated by requiring those who do not meet those standards to internalize the costs of failing to do so. I readily acknowledge that only a small portion of civil litigation in American courts involves litigants acting as private attorneys general. However, I suggest that from the perspective of a non-American adjudicative tradition, this seems to be part of the fundamental character of civil litigation in the United States. Civil dispute resolution, in this special role, then, is a public service performed by the courts, at the behest of private persons, in the interests of the community—interests that are best served by maximizing the scope of the situations to which these standards are applied. On the interjurisdictional plane, such an approach fosters an inherently expansive tendency to court jurisdiction, which is then regulated by constitutional restrictions on court jurisdiction.

In the Canadian tradition (and, generally, in the common law tradition outside the United States) civil dispute resolution is a form of governance only in the sense that it is a means to maintain a cohesive community that is conducive to the kind of proactive governance provided by the other branches of government. To be sure, it is important that the assumption of jurisdiction over a dispute is fair to defendants lest the administration of justice fall into disrepute and undermine public confidence that is integral to community cohesiveness. But it is equally important to secure the availability of an accessible forum for authoritative dispute resolution in order to ensure that aggrieved persons when they are not deprived of access to a state-sponsored forum cannot obtain agreement from potential defendants on a form or a forum for the resolution of their dispute.

This could seem likely to foster the kind of expansiveness that has just been described as a feature of the American tradition. But it is a different kind of expansiveness—one that seems to generate less controversy. The expansiveness in the American tradition derives from the interest of the community of the forum in benefitting from the opportunity of civil disputes to generate and refine community standards and to enforce those standards on the conduct of persons that have, at least, minimum contacts with the forum. Thus, the expansiveness of the American tradition of

adjudicatory jurisdiction also imports the tendency to an expansive approach to the application of local law. It is, after all, the interest in the development and implementation of local community standards that I have suggested drives civil dispute resolution in the United States.

In contrast, any expansiveness in the Canadian adjudicatory tradition is derived from a desire to facilitate peaceful dispute resolution, and so although there is a public interest in the availability of a suitable forum for dispute resolution, there is no public interest in the assumption of jurisdiction in particular cases,[20] nor does the assumption of jurisdiction imply a public interest in the application of local law. In Canada, a determination of appropriate forum has a great deal to do with the logistics of litigation and the relative capacities of the parties to travel and make witnesses and evidence available, and very little to do with applicable law (except in the rare situation in which it affects litigation convenience).[21] Therefore, when Professor Brand suggests that the descriptions of the bases of jurisdiction in the proposed judgments convention, other than those flowing from the defendant's consent, unduly emphasize connections between the matter and the forum rather than the defendant and the forum, he is, perhaps unwittingly, identifying a subtle but profound difference in focus between the approach to jurisdiction taken in the United States and that taken in Canada. In short, transposed onto the international plane, the obligation to ensure access to justice in the Canadian tradition is the same as it is in local cases except that it represents a collective responsibility between potentially appropriate fora to ensure that there exists *somewhere* a suitable forum for the resolution of civil and commercial disputes.

This fundamental difference in approach to the purpose of civil dispute resolution underlies the substance of the distinction between the adjudicative traditions and between the constitutional constraints on adjudicatory jurisdiction that operate in the United States and those that operate in, among other countries, Canada. Neither approach is objectively verifiable as correct, or even as better. But they are different and the differences inform

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[20] Just as in domestic cases, parties are free, indeed even encouraged, to seek alternative means of resolving their disputes. *See*, for example, Rule 24.1—Mandatory Mediation, Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[21] As the Supreme Court of Canada explained in its leading decision on choice of law in tort *Tolofson v Jensen*, [1994] 4 S.C.R. 1022, citing *Valin v. Langlois*, 3 S.C.R. 1 (1879), where Ritchie C.J. emphasized that these courts 'are not mere local courts for the administration of the local laws'. This is to be contrasted with the tendency to assimilate the analysis of jurisdiction to that of governing law, which is illustrated in Stanley E. Cox, *The Interested Forum*, (1997) 48 MERCER L. REV. 727 (1997) and W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915 (2000).

a dialogue that, in any effort at approximation or assimilation, can sometimes be at cross-purposes.

On the one hand, when, in the spirit of frank bargaining, the American delegation puts forward a series of jurisdictional bases to be included and a series of provisions to be excluded or modified, they might be surprised (possibly, even, put off) to find the Canadian delegation and, perhaps others, responding, not with an equivalent package of proposed terms and conditions, but with a desire to examine the overall effect of the corpus of terms on the ability of the law of adjudicatory jurisdiction to support principles such as access to justice, restrained jurisdiction, and appropriate forum. On the other hand, when those who, like the Canadian delegation, come to the Hague ready to engage in an earnest and careful review of the various participants' laws of adjudicatory jurisdiction in search of common principles and shared aspirations, and are met with blunt declarations from some delegations regarding terms that are acceptable and terms that are not, this could seem to them to be a series of ultimatums that would be misplaced in a process designed to produce consensus on fundamental aspects of the civil justice system.

If the delegations remained locked for long enough in a process in which they were determined to reach agreement, their negotiations could yield "bottom lines" in the form of specific provisions that each delegation either must have or could not accept. But identifying these flashpoints of disagreement would not serve to resolve the kind of fundamental divergence in views about the role and purpose in society of civil dispute resolution that I have been describing. This is largely because, as I have suggested, these different approaches are not simply terms to negotiate as might be done in trade negotiations. Can such fundamental divergences ever be "resolved" or "overcome"? I don't know. In fact, I have not heard of anyone who purports to know. Indeed, trying to "resolve" or "overcome" such differences may make no more sense than seeking to resolve or overcome the differences between the ways of the East and the West.[22]

But this does not mean that it is not worth trying to work out how best to live with those differences and to minimize the friction that might result from them. And so it is enormously encouraging to hear Professor Brand, as a member of the United States delegation, urge the delegations to back off the relentless determination to achieve comprehensive harmonization and, instead, to recall that this is to be a mixed convention. In other words, it might be entirely appropriate to seek agreement on the particular bases

[22] In the end, in fact, the relevant question might be whether such diversity in legal systems is ultimately sustainable. *See* generally PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (2000).

of jurisdiction that will ensure that judgments will be enforced and the particular bases of jurisdiction that our courts will refrain from exercising; and to leave the balance, for now, to the domestic law of member states. It is also encouraging to hear a member of the United States delegation propose such a constructive and frank, if less confrontational, bargaining model as the "getting to yes" model,[23] whether or not this reflects an official position; just as it is encouraging to hear the existing points of consensus recited and the achievement of this level of consensus rightly described as significant in and of itself. If Professor Brand's approach gains sufficient currency, it will again be possible to see the project as a worthwhile challenge rather than as an uncertain exercise. Once again, the glass will begin to look half full.

Still, the Canadian delegation and others might do well to bear in mind the first "bottom line" requirement arising from a constitutional structure such as Canada's. This bottom line is that a regime that purported to replace a fundamentally common law (*i.e.* tradition-based) approach to court jurisdiction, with a comprehensively codified regime that placed absolute limits on discretion (such as might have occurred in the form of a double convention) would have been not only unpalatable in the context of the Canadian legal system, but also arguably unconstitutional. The ultimate source of authority for such a regime would be the text of the Canadian Constitution, which does not appear to authorize the legislatures to replace entirely the pre-Confederation tradition-based common law authority for the courts that is simply "continued" by it the Constitution. The Canadian legislatures are "merely" creatures of the Canadian Constitution whereas the judiciary is not; and the provisions of the Canadian Constitution that do address judicial authority appear to contemplate that the legislative impact on court jurisdiction would be in the nature of incremental statutory incursions on that jurisdiction and not complete occupation of the field.[24] Further, as with the "due process" clauses in the United States Constitution, this is not simply a quirk of the text—it reflects the Canadian tradition of judicial authority.

To be sure, this "bottom line" seems increasingly likely to be of little practical concern, especially in the context of a mixed convention, which would leave room for discretion in areas not addressed by specific provisions. Nevertheless, any implementing legislation could be challenged as

[23] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1991).

[24] In 1994 the Uniform Law Conference of Canada proposed a *Uniform Court Jurisdiction and Proceedings Transfer Act*, available at <http://www.law.ualberta.ca/alri/ulc/acts/ejurisd.htm> which would have established substantive provisions for the regulation of court jurisdiction. The proposed act is not in force in any province.

unconstitutional, whether based on a double or on a mixed model, if it purported to establish a scheme requiring Canadian courts to act in a way that was fundamentally at odds with their traditional jurisdictional mandate (for instance, a scheme containing rules that focused so heavily on fairness to the defendant that they seriously compromised access to justice). It is a firmly established principle of Canadian constitutional jurisprudence that the federal government may not pass legislation that trenches on the legislative authority of the provinces, even in order to implement treaties, which it has sole authority to conclude.[25] This is a product of the division of legislative powers in Canadian federalism. But the limits on both the federal and the provincial governments' authority to pass legislation affecting court authority are, arguably, more fundamental. These limits are a product not of the division of legislative powers but of the asymmetrical nature of the establishment of legislative and judicial authority in the Canadian constitutional tradition.

It seems highly unlikely that, as the negotiations move towards a more consensus-based format, there would emerge a corpus of provisions in a text that would cumulatively produce a regime that was fundamentally incompatible with Canadian adjudicative traditions. Still, owing to the constitutional structure in which Canadian courts operate, the members of the Canadian legal community have little experience with externally imposed limits on court jurisdiction in civil matters in the common law provinces, whether of a constitutional, or a treaty-based nature. It is possible, therefore, that Canadians would not readily anticipate that the Canadian constitutional traditions could, in fact, impose some limits on the nature and extent of permissible regulation of court jurisdiction. These limits create parameters for negotiations that are generous and likely to be unproblematic for any convention emerging from the negotiations at The Hague that gains widespread acceptance but they, nevertheless, constitute a "bottom line".

III. Bottom Line Number Two: Constitutional Constraints on the Kind of Negotiating Process that Canada Can Support—A Response to Professor Perez

Professor Perez has argued in a strikingly eloquent and erudite fashion[26] that an effective multilateral judgments regime could improve international trade, and, therefore, that a multilateral judgments convention

[25] *A.-G. Canada v. A.-G. Ontario (Labour Conventions)*, [1937] A.C. 326 (P.C.).

[26] *See* Antonio F. Perez, *The International Recognition and Enforcement of Judgments: The Debate between Public and Private Law Solutions*, elsewhere in this volume.

should be negotiated as a trade agreement. Indeed much of the discussion and debate surrounding the initiative taken by the United States in promoting the negotiations at the Hague and in the subsequent evolution of the United States' position on the developing draft has related to the potential benefit of wider enforcement of American judgments abroad to the United States or to American individuals and businesses.[27]

In taking issue with this approach, I must first acknowledge that a multilateral judgments convention would likely benefit Canadian individuals and businesses, and the Canadian economy. In the course of the last decade, Canadian rules on the recognition and enforcement of foreign judgments have become easily as generous, if not more generous, than the rules of any other country, including the United States.[28] This has occurred quite independently of any reciprocal relaxation of the standards for giving effect to Canadian judgments by the courts of the countries whose judgments are enforced in Canada. It has been pointed out, and I think rightly, that a differential in standards for the enforcement of judgments does not necessarily amount to a barrier to trade that could create the equivalent of a trade imbalance.[29] In this way, it is difficult, if not impossible, to calculate with any precision the implications for trade of particular judgments regimes.

However, the economic impact of a particular judgments regime can easily be broader than that felt by the parties to litigation. For example, businesses considering investing or establishing a branch in a country, such as Canada, whose rules are more generous to foreign judgments than the prevailing rules elsewhere, might suddenly need to concern themselves with the enforceability of default judgments from third countries because

[27] *See*, for example, Friedrich K. Jeunger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111 (1998).

[28] Primarily as a result of the jurisprudence following the 1990 decision of the Supreme Court of Canada in *Morguard Investments Ltd, supra* note 10, pursuant to which a foreign court is regarded as having the authority to issue a binding judgment against a defendant not present in the territory of the foreign court even in default of appearance by the defendant and in the absence of an agreement to submit the dispute to the issuing court, provided there was a real and substantial connection between the matter and the forum of the issuing court. The *Morguard* decision established this test for judgments issued in other provinces, but its application has readily been extended to foreign judgments. For a list of the decisions that convinced an Ontario court in 1995 that there was a general consensus on the application of this test to foreign judgments, *see U.S.A. v. Ivey*, 26 O.R. (3d) 533 (Gen. Div. 1995), *aff'd* 30 O.R. (3d) 370 (C.A. 1996).

[29] *See* Vaughan Black, *Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention*, 38 OSGOODE HALL L. J. 237 (2000). For a different view *see* Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167 (1998).

the rules prevailing in the countries where they previously kept their assets or done business would not have permitted the enforcement of such judgments. Having decided not to defend certain actions, they might have to reconsider the risks to assets in Canada posed by default judgments that might have been issued. Accordingly, the effect of particular standards for foreign judgments on international trade and on foreign investment and the domestic economy can be subtle but pervasive. In this regard, given the current state of the law in Canada relating to foreign judgments, Canada would very likely benefit from the establishment of a multilateral judgments convention. This is so for two reasons. First, a multilateral judgments convention could supply an authoritative formulation of the appropriate bases for caution with respect to certain foreign judgments—a basis for caution that Canadian courts have been struggling to articulate in recent years.[30] Second, a multilateral judgments convention could permit plaintiffs to commence actions in Canadian courts in prescribed circumstances with greater confidence that the judgments would be enforceable abroad.

Despite the potentially salutary effects on trade for Canada of a coherent judgments regime, I think that there would be a uniformly negative reaction to treating the matter as one of trade.[31] In part, this is a product of Canadian adjudicative traditions that form the substratum for constitutional norms in this area. Pursuant to these traditions, the courts and the jurists who develop and refine the ground rules on which the courts operate are not thought of by Canadians as alternative or "private" legislatures.[32] In

[30] In *Beals v. Saldanha*, 42 O.R. (3d) 127 (Gen. Div. 1998), *rev'd* 54 O.R. (3d) 641 (C.A. 2001) leave to appeal to S.C.C. granted S.C.C. Bulletin 2002 at 781, one of several recent Ontario judgments resurrecting the impeachment defences as a basis for refusing to enforce certain American judgments, the Court said of the challenge to articulate clear standards for refusing to enforce judgments: "It may be that a corollary of the public policy which was set out in *Morguard* and the broadening of the recognition rules for foreign judgments, is that Canadian Courts will, of necessity, have to develop some sort of judicial sniff test in considering foreign judgments." *See id.* 144. In a not too dissimilar plea for external intervention to rationalize the law, some American commentators have indicated that a multilateral judgments convention would help in rationalizing the law of jurisdiction. *See*, for example, Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89 (1999).

[31] Such as those expressed by Black, *supra* note 29.

[32] *See* Perez, *supra* note 26. Even if this term is intended to be reserved for those who make the rules governing domestic court jurisdiction and procedure, and not for those who do so on the international front (such as participants in the negotiations at The Hague), it would not cause any greater concern among Canadians. For example, there does not seem to be any anxiety expressed over the lack of democratic accountability in the work of the committee in Ontario responsible for the rules of court even though their legislative mandate permits them to make rules that alter the substantive law in their areas of competence. Thus, s. 66 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, provides in part "Subject to the approval

Canada, the courts serve a different, and logically prior, function. To cast them in the light of private legislatures is to suggest, in the fine tradition of critical scholarship, that they are really engaged in the same kind of lawmaking enterprise as legislators but in a rather more suspect fashion because they are not accountable to the democratic process. As intriguing as this notion is, and as brilliantly and effectively as it has been advanced by Prof. Perez, I think it would be unlikely to find support in Canada beyond academia. It is a notion that relies not only on an adjudicative tradition in which Prof. Perez's fundamental propositions are more likely to ring true, the American tradition of civil litigation, but also on a democratic culture that is the political equivalent of what is described in securities law as an "efficient market", one that may be unique to the United States.

I do not propose to respond in a point-by-point fashion to the arguments made in support of the recommendation to treat the multilateral judgments convention as a matter of trade law. Instead, I will describe just two kinds of objections that are likely to form the basis for resistance on the part of Canadians (and perhaps others) to a reformulation as matters of trade of the issues that have been addressed in the negotiations under the auspices of the Hague Conference. The first kind of objection goes to the implications of the proposed approach for local determinations relating to the enforcement of judgments. The second kind of objection goes to the implications of the proposed approach for the nature and extent of the contemplated regime and its potential for success.

The first kind of objection is illustrated by the concern over the continued availability of the "impeachment" defences against foreign judgments. The common law impeachment defences are similar to those provided for in Art. 28 of the current Preliminary Draft Convention.[33] Until recently,

of the Lieutenant Governor in Council, the Civil Rules Committee may make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings, including family law proceedings. (2) The Civil Rules Committee may make rules for the courts described in subsection (1), *even though they alter . . . to the substantive law . . .* ". (emphasis added) Moreover, there seems to be considerably less discomfort over leaving the matter of court jurisdiction on the international front to persons of professional expertise, than there does to leaving it to civil servants without such expertise, even though civil servants are more democratically—albeit indirectly—accountable. *See* Black, *supra* note 29.

[33] Article 28 of the Draft Convention provides, in part, that:

> Recognition or enforcement of a judgment may be refused if— . . . c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court; . . . e) the judgment was obtained by fraud in connection with a matter of procedure; f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

these defences were very rarely invoked and even less often effective in preventing the enforcement of judgments in Canada. In part, this was because under the old rules for judgment enforcement a default judgment against a defendant served abroad precluded enforcement if the defendant had not previously agreed to litigation in the issuing court. Accordingly, a plaintiff could chose to pursue a matter in a court other than that of the defendant's home jurisdiction or that agreed to by the defendant. However, if the plaintiff did so, the defendant could avoid an enforceable judgment simply by not appearing and defending on the merits.

The 1990 Supreme Court of Canada decision in *Morguard Investments Ltd v. De Savoye* removed this "defence of non-appearance" or "non-attornment". Once this defence had been removed, the jurisdictional battleground shifted for defendants. Defendants who felt they would be treated unfairly in a foreign court, or who felt that the judgment would be fundamentally objectionable for one reason or another, were required to challenge jurisdiction before trial, not in an enforcement proceeding. For those defendants who did not do so, or who were unsuccessful in the attempt to do so, and who felt their fears regarding the foreign proceeding were borne out in the judgment that was eventually issued, the battleground in the enforcement proceeding shifted from the jurisdictional defences to the impeachment defences and these impeachment defences were revived.

It might be anticipated that in Canada, the cases in which defendants were concerned about being treated unfairly in a foreign court or about being the subject of an award that was in some way objectionable would be confined to those involving markedly different legal systems in distant countries. Indeed, under a trade law model, one would expect that the countries that felt most comfortable in mutual trade might also tend to be the countries in which there was the least friction in mutual judgments enforcement. However, despite the generally good trade relations between Canada and the United States and the high degree of integration between their economies, it has been almost exclusively the judgments of the United States that have given rise to concern in enforcement proceedings in Canada.

For example, in *Beals v. Saldanha,*[34] two Ontario couples who frequently wintered in Florida bought a vacant lot in Florida that they never developed. Some time later, a developer bought the lot from them for about (U.S.) $8,000. There was some confusion over which lot was conveyed and, in time, the developer threatened to sue them for losses he said this had caused him. After some correspondence and exchanges of court documents, the Canadian defendants hoped the matter would be resolved by

[34] *See supra* note 30.

unwinding the transaction; and, at some point, they ceased to be involved in the proceedings in Florida. In time, the problem did not go away—instead, a judgment against them came to be presented for enforcement in the Ontario courts for an amount that, with interest, at the time of enforcement was in the order of (Cdn.) $800,000. The Ontario court seemed somewhat unsure about which of the impeachment defences should apply to prevent the enforcement of this judgment. Was the judgment obtained by fraud on the part of the plaintiff? Was it the product of procedures that violated the principles of natural justice? Was it contrary to public policy in Ontario to enforce such a judgment? It did not seem immediately obvious to the court which ground should apply.[35] But it did seem beyond controversy that there was nothing on the record of the judgment that warranted enforcing a judgment of that size in this case.[36]

Under the existing approach to judgments, and under that presupposed by the negotiation of a multilateral convention as a convention relating to civil dispute resolution, the general explanation for refusing to enforce such a judgment would be clear: it would be unjust to do so. It would not be necessary to go into the merits of the claim or the procedures used to determine the result. It would be clear to the average Canadian that it was inconceivable that a judgment of such proportions should ever be issued under the circumstances of the case and that the quantum of the award so exceeded the range of conceivable awards in such a case as to render it inappropriate under any circumstances to enforce it.[37]

However, under a trade law approach, the public policy exception to the enforcement of judgments, and presumably any other basis for refusing to enforce judgments, could be seen as a kind of parochial indulgence. The public policy defence would be regarded as operating as a deliberate decision to give effect to the interests of the local community even where this would violate international obligations and it could warrant WTO-authorized retaliation for deviation from the trade-law mandated standards. I am

[35] In *Beals, supra* note 30, at 144 Jennings J. suggested that the courts would "have to develop some sort of judicial sniff test in considering foreign judgments".

[36] A majority in the Court of Appeal reversed the trial judge and held that there was no reason not to enforce the judgment. The plaintiffs brought an action in the proper court and complied with the procedures dictated by the Florida rules. There was no evidence that they misled the Florida court on any matter. Rather, they apparently won a weak case because the defendants chose not to defend the action.

[37] Indeed, Art 33 of the Preliminary Draft Convention, *supra* note 3, would sever the issue of the quantum of non-compensatory damages, including exemplary and punitive damages, from other issues arising on enforcement and would permit enforcing courts to limit enforcements order to the amounts for comparable local awards.

not suggesting that a trade law-based regime could not accommodate the non-enforcement of such a judgment such as that described above. It would be hoped that a sufficient margin of appreciation would permit courts to refuse to enforce judgments obtained by what seemed necessarily abusive or opportunistic means. Moreover, it would be hoped that this exercise of discretion would not be seen as an expression of peculiar local custom, but as an expression of the most commonplace sense of fairness that would be readily supported by persons from a wide range of legal systems. However, the notion that a judge refusing to enforce such a judgment might need to be concerned that her decision could provoke retaliatory trade sanctions, or indeed, simply the notion that the implications for cross-border trade were relevant considerations at all, would be likely to be seen as troubling to Canadians. A judgments convention that had this effect would be seen by Canadians as "commodifying justice."[38] Since civil dispute resolution operates in Canada to establish a societal foundation on which particular legislative initiatives can be mounted, the reliability of a just result tends to be seen as an end in itself and not merely as facilitative of the market incentives and deterrents produced by particular outcomes (incentives and deterrents that, in Canada, are the business of the other branches of government). Thus, although it is clear that the quality of any judgments regime has significant implications for trade, pressing the formulation of a judgments regime into the service of trade is fundamentally contrary to Canadian adjudicative traditions. To the extent that the constitutional authority for these traditions arguably precedes the authority of the branches of government responsible for the lawmaking that is facilitative of trade, the bottom line is that a trade law-based judgments regime that is inconsistent with key principles of the Canadian adjudicative tradition is likely to be beyond the implementing authority of any Canadian legislature.

This brings me to the second kind of objection. It surely is not commonplace for judgments such as that in *Beals* to be issued in the United States, and it is probably not even a serious concern in many of the jurisdictions of the United States. However, it would be naive to fail to acknowledge the fact that the hazards posed by the potential for such outcomes in litigation in the United States remain unnerving to many from outside the United States. They remain sufficiently unnerving to those who might otherwise do business with the United States that they could constitute in themselves a substantial, if unintended, barrier to trade.

[38] As discussed in Black, *supra* note 29.

Accordingly, when Prof. Perez argues that, logically, under a transactional approach to reciprocal enforcement of judgments, increased enforcement of American judgments in Europe should follow from increased enforceability of American judgments against European assets in the United States, he misses a key point: regardless of the nature and quality of the judgments regime operating between the United States and Europe, Europeans might consider the prospect of dispute resolution in American courts itself to be a disincentive to doing business with the United States or to maintaining assets there. Accordingly, some of the delegations might legitimately regard the negotiation of a multilateral regime that includes the United States not as an opportunity to foster greater economic integration at all. To them it might be regarded primarily as a means for clarifying and rationalizing the bases for the assumption of jurisdiction of American courts. This would enable businesses based outside the United States to operate in such a way as to prevent enforcement proceedings for American judgments in their home courts by avoiding practices that would form accepted bases for the assumption of jurisdiction by American courts over disputes involving them.

Perhaps more importantly though, if a trade law approach is to be applied to the *jurisdiction and judgments* aspects of civil dispute resolution on the rationale that these things affect international trade, it is difficult to understand why one would stop there. Why would choice of law escape scrutiny for its effect on trade? Why would the application of local remedial statutes prescribing multiple damages awards escape review for the way in which they distort trade? Indeed, there does not appear to be any reason in principle, following this approach, why matters of procedure should not also be rendered more "transparent". The fear of suits involving civil juries in certain counties of certain American states is notorious. It would seem likely that this fear could constitute a disincentive to taking up opportunities for trade with the United States, where not doing business with the United States would seem to be the best way to avoid the risk of dispute resolution there.[39] Nevertheless, it does not seem that matters of substantive law or of procedure have been put on the negotiating agenda at The Hague.

[39] A recent example involving a Canadian company is *The Loewen Group Inc and Raymond L. Loewen v. The United States of America*, ICSID Additional Facility Case No. ARB(AF)/98/3, an investor-state proceeding under Chapter 11 of the North American Free Trade Agreement, 32 ILM 289 (1993). Loewen, a British Columbia-based funeral services company, has claimed that it was prevented from appealing a $500-million jury verdict against it in a Mississippi court over a transaction originally worth $4 million by the requirement under Mississippi state law to post bond of $625-million.

Nor is it expected that such matters would be on the agenda if the negotiations shifted to Geneva (*i.e.* to be conducted under the auspices of the World Trade Organization). Admittedly, it is provocative to suggest that local standards for substantive law and for procedure would inevitably become subject to scrutiny under a trade law approach to a judgments convention—particularly provocative where the scrutiny was not confined to the *enforceability* of a treble damages award, but extended to the very entitlement of an American court to make such an award, even if was enforceable only in the United States.[40] As provocative as this suggestion is, though, it is still relatively uncontroversial in comparison with the ambitious project of pressing a multilateral judgments convention in a trade law setting into the service of public law litigation in support of what Prof. Perez describes as "non-trade interests". It seems likely that the mere suggestion that a multilateral judgments regime would be designed explicitly to foster coercive reform of labour, environmental and other "non-trade" standards would be sufficient to deter many countries from participating.[41]

Further, as European regulators have demonstrated, international trade and economic integration can be affected by governmental regulation of most aspects of daily life. Accordingly, there is no principled basis for distinguishing the areas of governmental regulation that would be subject to scrutiny from those that would free from it. For example, in some countries it has been determined that it is a violation of fundamental human rights to discriminate against same sex couples. The fiscal benefits accorded by government policies to couples clearly have an economic impact, and one that could well affect labour markets and trade. Under a trade law approach to a judgments regime, it would seem that the distortion of labour markets and trade caused by discriminating against same sex couples could well become the basis of a *prima facie* enforceable judgment. As noted above, resistance on grounds of public policy would remain an option should a country that maintains a discriminatory approach wish not to satisfy a judgment against it. But, presumably this could serve as the basis for retaliatory sanctions or discipline through WTO mechanisms.

[40] For a discussion of the impact of multiple and simply large damages awards on the negotiations of judgments conventions between the United States and other countries *see* Patrick J. Borchers, *A Few Little Issues for the Hague Judgments Negotiations*, 24 BROOK. J. INT'L L. 157 (1998).

[41] I do not mean to suggest by this that the use of civil litigation to advance international human rights claims is wrong simply because it presents significant challenges. The matter is beyond the scope of this paper. For a thoughtful analysis *see* Thomas E. Vanderbloemen, *Assessing the Potential Impact of the Proposed Hague Jurisdiction and Judgments Convention on Human Rights Litigation in the United States*, 50 DUKE L. J. 917 (2000).

Finally, indulging briefly in a transactional approach, or "game theory" analysis, the fact that some of the more powerful economies could sometimes be in the minority on some social policies is unlikely to provide much reassurance to the rest of the world that it is appropriate for a judgments regime to operate through trade law mechanisms and to seek to achieve non-trade ends. After all, if the terms of engagement are based on trade and trade sanctions, it will be clear to all that it is a game in which it hardly matters who is offside. Only those in a position to effect and withstand substantial trade sanctions would be able to operate within such a system to advantage.

All of this is to say that, notwithstanding Prof. Perez's engaging analysis, a trade law approach is, to borrow Prof. Brand's theme, a sure means only to get to "no" in the negotiation of a multilateral judgments convention. Thus, the bottom line for Canada must be that a trade law approach is a means of negotiating and implementing a multilateral judgments convention that, I suggest, Canada's constitutional and adjudicatory traditions prevent Canada from supporting.

IV. BOTTOM LINE NUMBER THREE: CANADA'S INTERNATIONAL OBLIGATION TO SUPPORT NEGOTIATIONS TOWARD A MULTILATERAL CONVENTION

Although the third "bottom line" in Canada's position on a multilateral judgments convention is closely related to the first two, it differs from them in the following way. Rather than creating a "negative" obligation to confine support to particular approaches to the substance of a multilateral convention and to the form of the negotiations, this bottom line entails a "positive obligation" to support the rapprochement of international standards in the field of adjudicatory jurisdiction.

I suggest that Canada's obligation to support the negotiations, or more precisely, Canada's view of the shared duty of all participants to support the negotiations, is first and foremost regarded as an obligation under international law. Thus, the support due a multilateral judgments convention is based on more than the anticipated benefit of wider enforcement of local judgments abroad to the participating countries or to local individuals or businesses.[42] Such a convention should be supported on more than merely pragmatic grounds. Further, the Canadian perspective on the principled support rather than the pragmatic support due a convention

[42] This applies equally to the corollary: that support should not be conditioned upon being able to avoid adopting rules for giving effect to foreign judgments that would subject locally held assets to execution.

is founded on the recognition of an international obligation to foster consensus in this area. What is the basis for this international obligation to support a convention?

This international obligation is an obligation to provide persons with access to justice. It is an obligation owed both to plaintiffs and defendants. It requires states to ensure that plaintiffs are not denied reasonable access to the courts to determine their claims and that defendants are not denied reasonable access to the courts to defend against claims or to appeal unfavourable results.

One example of a recognition of the international obligation to provide access to justice to plaintiffs can be found in decisions relying on Art. 6 of the European Convention of Human Rights[43] to prevent the grant of a stay in favour of another forum, such as that of the House of Lords in the *Lubbe* case.[44] Some 3000 persons exposed to asbestos in the mines of South Africa sued the U.K. parent corporation in England and defeated a motion for a stay in favour of the South African courts on the basis that they would not be able to pursue their claims in South Africa without the benefit of the legal aid and multi-party procedures that they enjoyed in the English proceedings. The Court acknowledged that the grant of a stay in that case would be a denial of justice. One example of a claim based on the international obligation to ensure access to justice for defendants can be found in the Loewen challenge under Chapter 11 of the North American Free Trade Agreement to the requirement of a Mississippi statute that it post a bond of $625 million in order to be permitted to appeal a jury award against it of $500 million.[45]

To date, the obligation to provide access to justice as it applies to jurisdictional rules has arisen primarily in challenges to the granting of stays and the requirement to post security for costs, in other words, in situations in which persons might be prevented from gaining access to the courts for the purposes of adjudicating their claims. However, the standards as they

[43] Article 6 of the European Convention on Human Rights, Nov. 4 1950, 213 U.N.T.S. 221, provides in part that "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[44] *See Lubbe v. Cape Plc*, [2000] 2 LLOYD'S REP. 383 (H.L.). Other cases have considered the potential for a denial of justice arising from the inadequacies of a foreign civil justice system: *Recherches Internationales Québec v. Cambior*, [1998] Q.J. No. 2554 (Sup. Ct); *Pei v. Bank Bumiputra Malaysia Berhad*, 41 O.R. (3d) 39 (Gen. Div. 1998). However, these have not explicitly been linked to an international obligation.

[45] *See supra* note 40.

affect litigants in adjudicating courts will likely evolve to encompass rules for the enforcement of judgments when it comes to be recognized that there is no meaningful access to justice if, despite a favourable determination of a plaintiff's claim, the plaintiff is prevented from recovering by the inappropriate refusal to enforce the judgment obtained. Similarly, it is likely that defendants will come to be regarded as entitled to complain when the rules for jurisdiction and judgments result in the enforcement of awards against them in circumstances in which enforcement should reasonably be denied.

In part, these international obligations are emerging independently of the negotiation of the Hague Judgments Convention. They are a product of the conditions that provide impetus to negotiate such a Convention. The obligation to provide access to justice is so well established that it seems largely axiomatic. For example, Art. 6 of the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens provided in part that "The denial to an alien of the right to initiate, or to participate in, proceedings in a tribunal or an administrative authority to determine his civil rights or obligations is wrongful . . . if it unreasonably departs from those rules of access to tribunals or administrative authorities which are recognized by the principal legal systems of the world. . . ".[46] However, recent efforts to identify and articulate common standards for such an obligation are serving to crystallize the obligation in a way that makes it feasible to identify specific breaches and to contemplate appropriate forms of redress. One example of the recent emergence of the recognition of common standards can be found in the work of the Committee on International Civil and Commercial Litigation of the International Law Association and, in particular, the Leuven/London Principles[47] adopted at the London Conference of the International Law Association, in July 2000. Another example of the recognition of a convergence of standards can be found in the work of the International Bar Association's Committee "O"'s various sub-committees, whose mandate it is to identify common

[46] Louis Sohn & R. R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens* 55 AJIL 545 at 550 (1961). In *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, [1970] I.C.J. 1 at 3, 47 the Court observed that "Human rights . . . include protection against denial of justice." And *see* generally ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1970).

[47] *See* International Law Association Committee on International Civil and Commercial Litigation, "Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters", contained in Third Interim Report: Declining and Referring Jurisdiction in International Litigation (2000) available at <http://www.ila-hq.org>.

principles in areas such as proof of foreign law, *forum non conveniens*, anti-suit injunctions, and international judicial cooperation.[48]

While the emergence of these international obligations is, in part, coincidental to the project of negotiating a multilateral judgments convention, it is also a product of these negotiations. It stands to reason that negotiations such as these must be premised on a general consensus that restrictive rules for the recognition and enforcement of judgments unacceptably reduce the security of cross-border transactions and, thereby, impede ordinary cross-border dealings. Negotiations such as these must also be premised on the belief that there exists the potential for some common ground on the standards that could ultimately prevail (even if this does not result in comprehensive consensus on all issues). To the extent that these negotiations identify particular rules or norms on which there is a broad consensus, even in the absence of a widely-ratified treaty in full force, the convention drafts could, in time, increasingly come to be regarded as articulations of customary norms of international law. Further, in light of the context of emerging norms in which these negotiations occur, it might be suggested that a country that has acted as a driving force in the pursuit of a multilateral judgments convention could be precluded from holding itself out to be a persistent objector to the norms it has endorsed. A least, such a country could be precluded from resiling from a commitment to promote more generous rules for giving effect to foreign judgments and precluded from instituting stricter rules to block the enforcement of foreign judgments against assets in its territory.

To the extent that supporting the negotiations toward a multilateral judgments convention is responsive to international obligations beyond those related to trade, it is not merely reflective of the desire to be a responsible member of the world community generally but also of the desire to meet increasingly clear and binding obligations emerging from the growing consensus on standards for the assumption of jurisdiction and for the recognition and enforcement of judgments in civil and commercial disputes. I suggest that Canada and other participants in the process believe that support for the negotiations is not merely in their interests, but that it is also part of their international obligation to do so.

[48] *See* William Horton, *Common Principles Project for Multi-Jurisdictional Litigation in Commercial Cases*, INTERNATIONAL LITIGATION NEWS, July 1998, 13. These were the four of eight topics selected at the 1999 IBA Conference in Barcelona for further discussion at the 2000 IBA Conference in Amsterdam. The remaining four topics were: jurisdiction over non-resident individuals and business entities; *lis pendens*, consolidation of actions, parallel proceedings; provisional and conservatory measures; and limitation of actions.

If it is an international obligation, then there is no turning back. Even in a period of reflection in the negotiating process, weighing the potential advantages and disadvantages of a multilateral judgments convention is not the same as assessing the cost/benefit ratio of a purchase or of a proposed venture. The evolving international obligations preclude the option of suspending the process or "walking away" as if this was a "no-obligation" offer. There is no way to roll back the clock on the emerging shared obligation of states to establish rules for jurisdiction and judgments that prevent a denial of justice. We must move forward. The real question then is, towards what?

It is trite that every successfully negotiated multilateral agreement is the product of compromise between, among other things, on the one hand, the scope and progressiveness of the substance of the agreement and, on the other hand, the breadth of the support the agreement will attract from states parties. An agreement that satisfies the most enthusiastic of its supporters is likely to be endorsed by only a narrow range of states parties and, therefore, to be of little effect. In this case, a handful of parties to a judgments convention would hardly serve to establish a global judgments net. Equally, an agreement in which even the least enthusiastic are immediately willing to participate is likely to be so conservative in its provisions and so narrow in its scope that it would achieve little more than to replicate the status quo. This is only to say that the real choice is probably not between concluding a convention or not concluding a convention, but between delaying negotiations now for the sake of a more desirable convention at some later point, and pressing on to conclude a convention now based on a less satisfying compromise at the risk of finding it difficult to negotiate improvements in the coming years.

In this regard, North Americans might learn from the strategies devised by the Europeans in their continuing process of progressive integration. Despite the length of the Hague negotiations to date and the considerable ground that has been covered, there seems to be virtue in maintaining an open mind and a willingness to entertain new suggestions, not only with respect to the substance of particular articles, but also to the overall structure of the Convention and the manner in which it is to be implemented. Without making specific observations on moderate applications of bilateralism or on the implications of a mixed convention, a model, for example, that proceeds at *deux vitesses*, so to speak, could be in order. Complexity is not to be courted but neither is it to be feared. For the most part, those who will need to understand and interpret the Convention in order to give advice on cross-border transactions are not faint-hearted when it comes to complexity. While it sometimes seems unlikely that the law in this area could be rendered much more complex than it already is, risking some

complexity in a transitional period could facilitate the conclusion of an effective convention.

All in all, it seems that for those who support wholeheartedly the conclusion of an effective convention, it is becoming important to consider not whether to succumb to pressure to include or exclude or redraft certain provisions, but which matters can form the basis of a consensus and whether (or how) they might form the basis of a convention—a convention that, however imperfect or incomplete, would constitute a firm commitment to establishing and advancing international standards in the area.

Moreover, it would seem that the apparent option of delaying negotiations now for the sake of a more desirable convention at some later point is based on a false premise. This false premise is that it is important to get the terms of a convention right and complete the first time, because there will be little if any opportunity to refine or expand the Convention. To be sure, some of the underlying premises that provide the basic structure for the Convention might be difficult to revise without changing the effect of many particular provisions. However, we have only to consider the continuing efforts to refine and expand the scope of what have been the most sophisticated and comprehensive of such agreements, the Brussels and Lugano Conventions,[49] to appreciate how foolish it would be to think that any multilateral judgments convention, no matter how perfectly conceived and drafted, would be finished, once and for all, upon the conclusion of the negotiations that led to its establishment. In this respect, it is only sensible to support ongoing efforts to improve and enlarge upon the shared standards for the resolution of civil and commercial disputes in national courts.

V. Concluding Comments: A Last Bottom Line

The importance of generating a firm commitment among nations to establish and advance international standards in the area is not, moreover, limited to the imperative to produce the best convention possible for our current collective needs. Rather, it extends to the imperative to refine international standards so as to accommodate the changing needs of transnational civil litigation. Here are some examples of existing situations that,

[49] *See* Council Regulation 44/01 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1; Council Regulation 1347/00 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses, 2000 O.J. (L 160) 19; and Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters, 2001 O.J. (C 12) 1.

sooner or later, will give rise to the need to refine international jurisdictional standards.

First, as class actions come to be adopted in more and more jurisdictions,[50] the impetus to pursue common claims on behalf of persons in several jurisdictions will eventually prompt the reconsideration of the application to plaintiff class members of the rules for judgments that currently apply to defendants. For example, should persons who have not taken steps to exclude themselves from a plaintiff class in an action decided in another country be precluded from seeking a different result in their own courts? To date, this reconsideration of the law of judgments has been undertaken or is underway within the federations of the United States,[51] Canada[52] and Australia[53] but reconsideration at the international level seems inevitable and it can probably be pursued effectively only if undertaken multilaterally.

Second, as the global economy develops, not just horizontally through increased penetration of emerging markets by multinational corporations, but also vertically through the increased participation in cross-border trade by small businesses, rules that have been designed mainly for dealings between large multinational corporations will need to be adapted to accommodate the needs of small businesses.[54] For example, rules that accord a high degree of respect to party autonomy in jurisdiction agreements[55] might be appropriate in circumstances in which it can be assumed that the contract represents a negotiated allocation of risk between sophisticated parties.[56]

[50] Class actions procedures, which may involve the presumptive aggregation of the claims of plaintiff class members in a way that will bind the persons described if they do not seek to be excluded, have been instituted in the United States at the federal and state level, in several Canadian provinces, in Australia in the Federal Courts in the State of Victoria, and in Sweden.

[51] *See Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985).

[52] *See Nantais v. Telectronic Proprietary (Canada) Ltd*, 25 O.R. (3d) 331 (Gen. Div. 1995), *leave to appeal to Div. Ct dis'd at* 347 (Gen. Div.); *Harrington v. Dow Corning*, 29 B.C.L.R. (3d) 88 (S.C. 1997); and *Wilson v. Servier*, 50 O.R. (4th) 219 (S.C. 2000).

[53] *See Mobile Oil Australia Pty Ltd v. Victoria*, [2002] HCA 27.

[54] *See* generally Janet Walker, *Beyond Big Business: Contests between Jurisdictions in a Vertically Integrated Global Economy*, *in* Law Society of Upper Canada Civil Litigation Forum (2000).

[55] Apart from those involving specified sectors of the economy such as consumers and workers, which are fairly readily identified and segregated for specialized regimes. *See*, for example, Arts 15–21 of the regulation replacing the Brussels Convention, Regulation 44/01, *supra* note 49.

[56] For example, Art. 3 of the Leuven/London Principles, *supra* note 47, appears not to acknowledge or to make allowance for the particular uncertainties created by the introduction of a kind of contractual provision with which many parties will be fairly unfamiliar. As small businesses enter into regular international trade for

This would seem likely to be the case when most of the businesses engaged in cross-border trade were large multinational firms. However, as the proportion of those engaged in cross-border trade of varying degrees of sophistication and bargaining power increases, it will be necessary to refine the rules for jurisdiction agreements to accommodate the appropriate degree of judicial inquiry into the validity of the agreement. While this need not be any more interventionist than is otherwise the case in contract law generally, it would still represent a refinement on the approach currently taken to jurisdiction agreements.

Another example can be found in the current tendency to discourage anti-suit injunctions on the basis that they might offend a foreign court by pre-empting its jurisdictional deliberations.[57] This approach seems appropriate as long as it can safely be assumed that the defendant can readily travel to challenge the exercise of jurisdiction. However, as small businesses increasingly become involved in cross-border trade and as cross-border disputes increasingly include relatively small claims, there will be a proportionate increase in the likelihood that it will be genuinely impractical for defendants to travel to challenge the plaintiff's choice of forum.[58] Under these circumstances, current rules on anti-suit injunctions could create the potential for abuse. This would make it necessary either to reconsider the availability of anti-suit injunctions or to devise means of judicial cooperation in determining the appropriate forum and, possibly, of transferring cases from one court to another.[59]

Third, particular emerging areas of technology-driven developments in business such as e-commerce, create specialized requirements for jurisdiction and judgments such as those considered at length in the report for the American Bar Association's Jurisdiction in Cyberspace Project entitled Achieving Legal and Business Order in Cyberspace: A Report on Global

the first time, they will need to familiarize themselves with the operation and effect of jurisdiction clauses. During this transition period, there will be a tendency for courts asked to enforce these agreements to take into account the limited sophistication of such parties in bargaining in respect of these clauses. On this subject generally, though, *see* Peter E. Nygh, AUTONOMY IN INTERNATIONAL CONTRACTS (1999).

[57] *See* Art. 7 of the Leuven/London Principles, *supra* note 47, and Draft Common Principles by Committee "O", *supra* note 48.

[58] *See*, for example, *Turner v Grovit*, [2002] 1 W.L.R. 107 (H.L.), upholding an anti-suit injunction in wrongful dismissal case.

[59] As recommended by Art. 4 of the Leuven/London Principles, *supra* note 47, and as currently operates between the Australian states pursuant to the various *Jurisdiction of Court (Cross Vesting) Acts, 1987* and between U.S. federal courts pursuant to §1404(a) of the United States Code Title 28.

Jurisdiction Issues Created by the Internet.[60] This example of the changing needs of transnational litigation illustrates a challenge that delegations to The Hague negotiations have accepted must be addressed sooner rather than later.[61]

Fourth, in time, in the course of the ongoing refinement of international standards, we are bound to recognize that rules for the allocation of jurisdiction are likely to be most fair and effective and least subject to abuse when the structural incentives to engage in manipulative forum selection have been eliminated. This could, in turn, require the harmonization of choice of law rules and of procedural rules. Of course, the project of harmonizing choice of law rules has been underway for many decades as the work of the Hague Conference attests. Liberalized rules for the enforcement of judgments are likely to prompt renewed enthusiasm for this work. The project of developing transnational rules of civil procedure, though more ambitious and more recent, is now underway under the auspices of the American Law Institute and Unidroit.[62] This project is also likely to take on fresh significance as participants in a judgments convention begin to take responsibility for enforcing a wider range of judgments from a wider range of countries.

In sum, despite the currently guarded outlook for the negotiations toward a multilateral judgments convention, the importance of this project cannot be overstated. The final of these "bottom lines", then, is that pursuant to their international obligations these negotiations deserve the wholehearted support of Canada and of the other participants.

[60] Available at <http://www.kentlaw.edu/cyberlaw/docs/drafts/draft.rtf>.

[61] *See* Preliminary Document No. 12—Electronic Commerce and International Jurisdiction, Ottawa, 28 February–1 March 2000, Summary of discussions prepared by Catherine Kessedjian with the co-operation of the private international law team of the Ministry of Justice of Canada, *available at* <http://www.hcch.net/e/workprog/jdgm.html>.

[62] *See* American Law Institute, Principles and Rules of Transnational Civil Procedure Preliminary Draft No. 2 (Mar. 17, 2000), available at <http://www.ali.org>. The rapporteurs for the Transnational Rules Project are Geoffrey Hazard Jr, Michele Taruffo and Antonio Gidi.