Chinese Drywall: Defending Class Actions in the United States and the Need for Arbitration

Stephen Gieger*

> Chinese drywall installed in more than 20,000 homes has been identified as a cause of nosebleeds, headaches, and asthma attacks for thousands of Americans exposed to the product.[1]

 J.D. candidate 2016, Tulane University Law School; B.A. 2013, University of Virginia. I would like to thank the members of the *Tulane Journal of International and Comparative Law* for their effort in editing my Comment. I would also like to thank my family and friends for their continued guidance and support.

1. Elizabeth Weise, *Report Backs Chinese Drywall Health Complaints*, USA TODAY (May 2, 2014, 12:20 PM), http://www.usatoday.com/story/news/nation/2014/05/02/chinese-drywall-adverse-health-effects-wallboard/8574707/ (quoting Vikas Kapil, Chief Medical Officer with the U.S. Agency for Toxic Substances and Disease Registry at the Centers for Disease Control and Prevention).

I. INTRODUCTION

Globalization has fostered international trade by increasing access to foreign markets, but consumerism is not without costs. International trade agreements have sought to encourage foreign investment and facilitate the free flow of products across national borders largely through tariff reductions. Despite this transnational cooperation, concerns over national sovereignty and judicial independence often overshadow civil actions involving foreign litigants, particularly in the realm of products liability law. Modern commercial dealings increasingly require several parties from various countries to execute large-scale projects. Similarly, the structure of multinational corporations often necessitates the involvement of several affiliate or subsidiary companies in performing contractual obligations. Manufacturers are served across the world with complaints filed in foreign courts over alleged damages caused by their products. Heated disputes over threshold issues of jurisdiction and venue have delayed proceedings for years and denied victims relief. A federal class action arising from defective Chinese drywall, which currently involves thousands of homeowners from across the United States and foreign manufacturers domiciled in multiple continents, epitomizes this conflict. Injured homeowners demand a resolution.

This Comment explores the enforcement of U.S. judgments rendered against foreign litigants and delves into Chinese culture in order to suggest an alternative method for American consumers seeking relief. Part II examines the recognition and enforcement of judicial decisions at home and abroad in conjunction with international treaties. Part III scrutinizes China's legal system and illustrates how disruptive factors have harmed U.S. businesses and consumers alike. Part IV navigates the Chinese drywall class action through federal court and addresses the unresolved issues. Part V analyzes recent Congressional efforts to stem the tide of dangerous imports by simplifying judicial service. Lastly, Part VI proposes arbitration as an equitable alternative for adjudicating international products liability claims and concludes that it is the most reliable means of holding foreign manufacturers accountable.

II. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

A. Foreign Judgments as a State Prerogative

In the United States, recognition and enforcement of foreign judgments is a matter of state law, regardless of whether plaintiffs file in state or federal court. The Full Faith and Credit Clause of the United States Constitution requires states to recognize and enforce judgments

rendered in other state courts; however, it makes no mention of foreign courts.[2] Although Congress could structure a framework for enforcing foreign judgments under the Commerce Clause,[3] no federal statute or treaty currently governs the issue. Thus, the recognition and enforcement of foreign judgments remains a state prerogative.

The common law approach for recognizing and enforcing foreign judgments is grounded in Justice Gray's 1895 United States Supreme Court opinion, which underscored the "comity of nations" in the realm of private international law.[4] In *Hilton v. Guyot*, the Court proclaimed, "The general doctrine maintained in the American courts in relation to foreign judgments certainly is that they are prima facie evidence, but that they are impeachable."[5] For instance, a foreign judgment may be denied its full force and effect in the United States due to fraud or lack of due process.[6] The Court ultimately declined to enforce the French judgment at issue in *Hilton* because evidence indicated it was procured through fraudulent testimony.[7]

Although federal law does not govern how U.S. courts review foreign judgments, thirty-one states have supported the comity principle by enacting legislation similar to the Uniform Foreign Monetary Judgment Recognition Act (Uniform Recognition Act).[8] Under the Uniform Recognition Act, foreign judgments are granted full faith and credit in the United States when "final, conclusive, and enforceable where rendered."[9] While plaintiffs must demonstrate the court properly retained personal jurisdiction over the defendant before rendering judgment, reciprocity is not a prerequisite to enforcement.[10] Some states adopting similar legislation anticipate that such comity will encourage

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2. *See* U.S. CONST. art. IV, § 1; *see also* 28 U.S.C. § 1738 (2012).

3. U.S. CONST. art. I, § 8, cl. 3.

4. Hilton v. Guyot, 159 U.S. 113, 164 (1895). In *Hilton*, Justice Gray articulated:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

5. *Id.* at 190.

6. *Id.*

7. *Id.* at 228-29.

8. *Enactment Status Map of Foreign Money Judgement Recognition Act*, UNIFORM L. COMMISSION, http:/uniformlaws.org/Act.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act (last visited Nov. 11, 2015).

9. *Foreign Money Judgments Recognition Act Summary*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/ActSummary.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act (last visited Nov. 11, 2015).

10. *Id.*

reciprocal treatment abroad.[11] For instance, the New York legislature commented that its intent was to "promote the efficient enforcement of New York judgments abroad" by assuring nations through statute, rather than mere case law, that their judgments would be enforced here.[12]

Notwithstanding this statewide judicial goodwill, six states that address foreign judgments under the Uniform Recognition Act's approach require reciprocity as a condition precedent to enforcement.[13] Consequently, plaintiffs with foreign awards may commence civil action in U.S. state courts to seek enforcement, but must do so on a case-by-case basis depending on the venue. Thus, while foreign judgments are given full force and effect in a majority of the United States, enforcement nonetheless depends on inconsistent case law.

B. U.S. Judgments Abroad

Just as foreign judgment creditors adhere to federal civil procedure to enforce an award in the United States, American plaintiffs must also enforce a U.S. award under foreign laws when defendants only maintain assets abroad. Substantial, albeit common, problems arise when liable foreign defendants maintain few assets in the United States that can be sequestered to satisfy an award. In these cases, American creditors must rely on the civil procedure and judgment debtor examinations available in that country.[14] Unfortunately, many foreign legal systems do not provide expedited procedures, such as summary judgment or directed verdict, which allow courts to grant relief as a matter of law when there is no genuine issue of material fact.[15] Consequently, American plaintiffs face the risk of incurring substantial legal expenses when seeking enforcement in foreign jurisdictions, in addition to the costs of litigating the matter in U.S. court.

Civil as well as common law jurisdictions raise similar procedural objections when confronted with enforcing a U.S. judgment. Lack of personal jurisdiction and insufficient service of process are most commonly cited as grounds for refusal.[16] For example, China joins a host

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11. Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757 (2004).

12. *See* N.Y. C.P.L.R. § 5301 cmt. 1 (McKinney 2015).

13. Russell J. Weintraub, *How Substantial Is Our Need for a Judgment-Recognition Convention and What We Bargain Away To Get In?*, 24 BROOK J. INT'L L. 167, 175 n.50 (1998) ("This list includes: Colorado, Georgia, Idaho, Massachusetts, Ohio, and Texas.").

14. Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 163 (2013).

15. *Id.*

16. *Id.*

of countries that refute the U.S. Supreme Court's "long-arm" basis for conferring personal jurisdiction over non-residents in U.S. court.[17] Similarly, some foreign courts find that judicial service is insufficient when defendants are not timely served in that country before litigation has commenced in the United States.[18] Others have invalidated awards on the grounds that the petition and other pertinent discovery documents were improperly translated.[19] The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Convention), which codified a universal standard for the international service of judicial process, reduced some of these complications through a streamlined procedure.[20] Notwithstanding the Hague Convention's contribution to international service, American plaintiffs face substantial burden and expense when enforcing judgments abroad.

Beyond procedural formalities, foreign courts also reserve the right to invalidate U.S. awards on reciprocity and public policy grounds.[21] American creditors may be compelled to prove reciprocity by demonstrating that U.S. courts have affirmed foreign judgments in analogous cases.[22] Foreign courts may likewise refuse enforcement on the public policy grounds that a U.S. award is "repugnant to its laws, morality, or sense of justice."[23] Excessive punitive damage awards are commonly cited as inconsistent with public policy.[24] Indeed, U.S. courts awarded punitive damages in 30% of all civil trials litigated in 2005 when such relief was sought.[25] Even more practically, foreign courts often apply different prescriptive periods than U.S. courts and analyze the merits of a case under various standards of review.[26] Consequentially, even after proving liability in state or federal court, American plaintiffs face a range of judicial hurdles before actually recovering compensation.[27]

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17. *Id.* at 165.
18. *Id.*
19. *Id.* at 166.
20. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.
21. Zeynalova, *supra* note 14, at 166.
22. *Id.*
23. *Id.*; *see also* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 98 cmt. g (AM. LAW INST. 1969).
24. Zeynalova, *supra* note 14, at 168.
25. *Punitive Damages in Civil Trials*, BUREAU JUST. STAT., http://www.bjs.gov/index.cfm?ty=tp&tid=45111 (last visited Mar. 18, 2015).
26. Zeynalova, *supra* note 14, at 167.
27. *Id.*

C. International Conventions

The lack of a multinational convention governing the recognition and enforcement of foreign judgments fosters uncertainty in private international law. Although the Hague Convention has effectively streamlined service, it has not facilitated enforcement with the same degree of success.[28] The additional expense required for executing judgments abroad has functioned as a barrier to entry for American consumers seeking to recover from foreign manufacturers.[29] For instance, translating documents alone can cost thousands of dollars and take weeks to complete under the Hague Convention.[30] Thus, as a threshold matter, it is easy to understand how both time and money discourage consumers from suing foreign manufacturers or prevent plaintiffs from ultimately collecting their award.

Although the Hague Convention has simplified service of process, it has failed to marshal extensive multilateral support for an international agreement that resembles the Uniform Recognition Act.[31] Despite the Hague Convention's coalition of seventy-eight nations, which span every continent and includes the European Union, only three members have ratified the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[32] Delegations from nine countries, including the United States and China, began a dialogue in 1992 to establish a framework for the mutual enforcement of civil judgments.[33] However, after nearly a decade of negotiations, this vision

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28. Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 837 (1988).

> The Hague Convention was drafted to accomplish three objectives. First, the drafters wanted to simplify the methods of serving in the territory of one state documents issued by the courts of another. Second, they desired to establish a system for service that best would ensure that the person served received actual notice in time to respond to pending litigation. Third, they created a means by which proof of service abroad could be easily made.

Id.

29. Jessica Shelton, *Defective Products in a Defective System: Legislation Designed To Level the Playing Field in International Trade*, 16 ROGER WILLIAMS U. L. REV. 171, 186 (2011).

30. Mark P. Chalos, *Successfully Suing Foreign Manufacturers*, 44 TRIAL 32, 34 (2008).

31. *Overview*, HCCH, http://www.hcch.net/index_en.php?act=text.display&tid=26 (last visited Nov. 6, 2015).

32. *Status Table 16: Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, HCCH, http://www.hcch.net/index_en.php?act=conventions.status&cid=78 (last visited Nov. 11, 2015) (listing among other countries, Cyprus, the Netherlands, and Portugal). *Id.*

33. Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 272 n.2 (1994).

never materialized into a treaty.[34] Nevertheless, the Hague Convention took substantial steps towards international reciprocity in 2005 when it passed the Choice of Court Convention, which permits contractual parties to designate an exclusive forum to arbitrate commercial disputes.[35] Although China never signed the Choice of Court Convention, it recently hosted judges, civic officers, and academics from thirteen Asian Pacific nations to discuss the choice of forum in arbitration.[36] The United States has signed the treaty; however, another Hague nation must join Mexico in its ratification so it will have full force and effect on all its members.[37]

In contrast to the Hague Convention, the United Nation's Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[38] is universally recognized as the best mechanism for enforcing foreign awards abroad.[39] Under the New York Convention, courts of member-nations must enforce awards rendered in foreign arbitration venues with limited exceptions.[40] As the foundation for international arbitration, the New York Convention's membership of 154 nations includes the United State as well as China.[41] When ratifying the treaty, nations stipulated that the dispute underlying a valid arbitral award must be of a commercial nature.[42] Judge Stephen Schwebel of the International Court of Justice demonstrated that the New York Convention has controlled more than 600 arbitrations held in over thirty countries.[43] Upon review, foreign courts refused to enforce less than 2% of these awards within their own jurisdiction.[44]

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34. Samuel P. Baumgartner, *The Proposed Hague Convention on Jurisdiction and Foreign Judgments: Where We Are and the Road Ahead*, 4 EUR. J. L. REFORM 219, 222 (2002).

35. Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

36. Press Release, HCCH, Conference on Int'l Litig. in the Asia Pac. Region Highlights Hague Conference Instruments & Initiatives Which Facilitate the Resolution of Cross-Border Legal Disputes (Sept. 27, 2013), http://www.hcch.net/upload/wuhan2013press_en.pdf. The nations in attendance include Australia, Cambodia, China, India, Indonesia, Republic of Korea, Lao People's Democratic Republic, Myanmar, New Zealand, Singapore, Sri Lanka, Thailand, and Vietnam. *Id.*

37. *Status Table 37: Convention of 30 June 2005 on Choice of Court Agreement*, HCCH, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited Nov. 6, 2015).

38. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter Arbitral Awards Convention].

39. Zeynalova, *supra* note 14, at 169.

40. Arbitral Awards Convention, *supra* note 38, art. 3.

41. *Status Table 1: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. TREATY COLLECTION (Oct. 19, 2015, 5:03 PM), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en.

42. *Id.*

43. Stephen M. Schwebel, *A Celebration of the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 12 ARB. INT'L 83, 86 (1996)

Commercial arbitration provides a useful forum for dispute resolution in the modern globalized economy.[45] First, it resolves matters in an expedited fashion based on legal standards predetermined by the litigants.[46] Arbitration mitigates uncertainty by eliminating reciprocity considerations.[47] Most importantly, awards rendered pursuant to the New York Convention are presumptively valid, unless an objecting party proves that one of a few exceptions has been satisfied.[48] Therefore, arbitration has proven to be a valuable model for enforcing foreign judgments abroad.

III. JUDGMENT ENFORCEMENT IN CHINA

A. Disruptive Factors

China's bureaucracy has been a long-cited source of problems when litigants seek to enforce foreign judgments.[49] The Communist regime's protectionist tendencies pose a significant hurdle.[50] When civil actions involve manufacturers, who provide a substantial source of provincial employment, local civic officials pressure the courts against validating damages.[51] Corruption becomes even more problematic when claims implicate state-owned enterprises.[52] Under a public policy rationale,[53]

(quoting Professor Albert Jan van den Berg, Professor of Law and the Arbitration Chair at Erasmus University, Rotterdam, Netherlands).

44. *Id.*

45. Zeynalova, *supra* note 14, at 178.

46. *Id.*

47. *Id.* at 180.

48. Arbitral Awards Convention, *supra* note 38, art. V(1), provides exclusive grounds for refusing enforcement:

(a) invalidity of the arbitration agreement;
(b) insufficient service of process;
(c) award settled a dispute that was beyond the scope of the arbitration agreement;
(d) defect in the composition of the arbitral panel or its procedure;
(e) award has been set aside by an authority in the country in which it was rendered.

49. *See* Jason Hsu, *Judgment Unenforceability in China*, 19 FORDHAM J. CORP. & FIN. L. 201, 218-19 (2013); *see also* Yuan, *supra* note 11, at 758 (explaining that the "enforcement of foreign judgments in China has been notoriously difficult in recent years" and that a "large percentage of judgments, both domestic and foreign, are never enforced").

50. Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L COMP. L. REV. 59, 91 (2002).

51. *Id.*

52. *Id.*

53. Civil Procedure Law of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, *rev'd*, Aug. 31, 2012, effective Jan. 1, 2013) art. 266 (China). Article 266 mandates that the people's court shall reject a legally effective judgment rendered by a foreign court, which contradicts China's national or public interests, irrespective of any treaty obligations.

foreign judgments may be suspended when a Chinese corporation cannot satisfy the debt or if doing so would threaten its long-term survival.[54] Indeed, the state-owned manufacturer sued in the Chinese drywall class action that this Comment analyzes raised a similar sovereign immunity defense when contesting personal jurisdiction in the United States District Court for the Eastern District of Louisiana.[55]

China's lack of an independent judiciary enables ubiquitous corruption. While China's constitution does delineate judicial independence,[56] the reality proves quite different. The Supreme People's Court reports directly to a legislative body, the National People's Congress, despite its status as the highest court in China.[57] Separation of powers is a mere illusion in China. Judge Jianli Song of the Supreme People's Court has lamented, "[S]ome politicians and citizens still assume that the judicial process should bow to current political priorities and these perceptions contribute to [a] popular distrust of the judiciary."[58] Judges in the lower courts are appointed and paid by the lower people's congress, which operates under the direction of local communist party chiefs.[59] Moreover, judges are more likely to acquiesce to political corruption because a judge's appointment lasts only as long as that judge remains in political favor.[60] Aside from arbitration awards, plaintiffs face substantial uncertainty when executing judgments through the Chinese judicial system.

Foreign languages also present challenges to enforcement beyond the immeasurable complications posed during pretrial service and discovery. For instance, a foreign judgment must be translated into Chinese before it is legally valid, meaning that a mistranslation in a party's name or business could, in itself, provide sufficient grounds for denial.[61] Beyond these seemingly endless procedural hurdles, the Chinese legal system does not rely on binding case precedent and written

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54. *Id.*

55. *See* Katherine Sayre, *Maker of Defective Chinese Drywall Taishan Skips Out on Court Hearing, Leaving Homeowners Waiting*, TIMES-PICAYUNE (Aug. 13, 2014), http://www.nola.com/business/index.ssf/2014/08/chinese_drywall_taishan_gypsum.html. The principal manufacturer of Chinese drywall, Taishan Gypsum Company Limited, is controlled by China's State-Owned Assets Supervision and Administration Commission.

56. *See* XIANFA art. 126 (1982) (China). Article 126 provides, "The people's courts exercise judicial power independently, in accordance with the provisions of law, and are not subject to interference by any administrative organ, public organization or individual."

57. Zhang, *supra* note 50, at 93.

58. Jianli Song, *China's Judiciary: Current Issues*, 59 ME. L. REV. 141, 147 (2007).

59. Zhang, *supra* note 50, at 94.

60. *Id.*

61. *Id.* at 92.

decisions rarely provide more than a brief legal analysis.[62] As a result, China's disoriented system is more susceptible to the risk of civil corruption.

B. Problem of Available Assets

American consumers face substantial obstacles when litigating against manufacturers who export products to the United States but maintain a majority of their assets in China. Given the delays in trials involving multinational parties, manufacturers abuse this status quo by stalling discovery in order to transfer any remaining assets beyond the jurisdiction of U.S. courts.[63] This "offshore immunity" discourages foreign manufacturers from allocating corporate profits towards quality controls or insurance, as their assets practically remain judgment proof.[64]

China's civil procedure grants judges and court-appointed officers exclusive authority for locating a debtor's assets and sequestering such property to satisfy a judgment.[65] Frequent mergers and acquisitions within China, in addition to undocumented corporate transfers, make it difficult to establish clear title to corporate assets.[66] Although China's Commercial Banking Code limits companies to one corporate bank account for ordinary business activities, enterprises open several concurrent accounts to evade taxes.[67]

Aside from tracking assets within the mainland, China's penal law does not prohibit defendants from transferring assets during litigation to avoid creditors, which, under U.S. bankruptcy law would be an illegal fraudulent conveyance.[68] Consequently, a Chinese manufacturer can reallocate assets between its affiliates to avoid seizure with impunity.[69] Moreover, Chinese courts may not "pierce the veil" by disregarding a company's corporate form to hold shareholders personally liable in

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62. Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 136 (2006).

63. *See* David J. Cook, *Class Actions and the Limits of Recovery*, 5 J. LEGAL TECH. RISK MGMT. 1, 8 (2010) (discussing "strategic exits" whereby defendants sell their assets to a third party and cease operations in the midst of a class action to leave plaintiffs with an "empty judgment").

64. David Cook, *Collecting Your Products-Liability Award from an Offshore Defendant*, PLAINTIFF MAG. (Nov. 2012), http://www.plaintiffmagazine.com/nov12/cook_collecting-your-products-liability-award-from-an-offshore-defendant_plaintiff-article.pdf.

65. Yuan, *supra* note 11, at 773.

66. Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 58 (2005).

67. *Id.*

68. Yuan, *supra* note 11, at 773; *cf.* 11 U.S.C. § 548 (2012).

69. Yuan, *supra* note 11, at 773.

instances of fraud or to achieve an equitable resolution.[70] Thus, the current system incentivizes Chinese manufacturers to hide assets and ignore court orders so that even a default judgment in U.S. court will not result in actual loss.

C. Disadvantaged U.S. Manufacturers

While Chinese manufacturers may transfer assets offshore to avoid payment, American creditors can still seek compensation in U.S. courts. For example, if a liable manufacturer avoids court-ordered payments but continues business operations in the United States, judgment creditors can collect their award from the accruing stream of accounts receivable.[71] Postjudgment discovery under the federal rules affords creditors subpoena power to facilitate the seizure of liquid assets and to uncover potential conveyances, such as bank transfers or other acts in contemplation of insolvency.[72] As a result, American consumers instead pursue legal action against other domestic companies involved in the product's chain of distribution.[73]

Procedural barriers to enforcing U.S. judgments abroad harm domestic suppliers and distributers on multiple fronts. Foreign manufacturers reap a considerable competitive advantage because their counterparts in the United States cannot avoid service or conceal assets without incurring civil and criminal penalties.[74] Additionally, foreign companies avoid ancillary production costs, such as complying with U.S. product safety regulations and labor laws, allowing a greater profit margin relative to U.S. competitors.[75] As a result, plaintiffs fearful of litigating against foreign parties may strategically sue the defective product's U.S. distributor or supplier as an easier target.[76] Domestic companies would likewise struggle to recover from an offshore manufacturer by bringing an incidental demand.[77] Therefore, any domestic business involved in a product's supply chain realistically bears a higher risk of liability than the foreign manufacturer who approved the product's design and assembly.[78]

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70. *Id.*
71. Cook, *supra* note 63, at 1.
72. *Id.*; *see also* FED. R. CIV. P. 69(a)(2).
73. Cook, *supra* note 63, at 1.
74. Shelton, *supra* note 29, at 188.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

IV. CHINESE DRYWALL LITIGATION

A. Settlement and Default Judgment

From 2004 to 2006, a housing boom coupled with rebuilding efforts necessitated by Hurricanes Katrina, Rita, and Wilma led to a nationwide shortage of construction materials.[79] As a result, U.S. suppliers and builders imported substantial amounts of Chinese-manufactured drywall (Chinese drywall) to refurbish homes in coastal areas.[80] Shortly after installation, homeowners reported a variety of personal and property damages including respiratory problems, gas emissions, and surface corrosion.[81]

Thousands of homeowners filed negligence and breach of warranty actions in state and federal court against manufacturers, distributers, and suppliers of the drywall.[82] Given the commonality of facts underlying these suits, all federal cases were transferred and consolidated in 2009 for pretrial proceedings in the United States District Court for the Eastern District of Louisiana.[83] Discovery revealed that the drywall was predominately assembled by two foreign manufacturers: Taishan Gypsum Company, Limited (Taishan)—a company headquartered in China's Shandong Province and operated by the state-owned Assets Supervision and Administration Commission, and Knauf Plasterboard Company, Limited (Knauf)—the Chinese subsidiary of its multinational parent corporation based in Germany.[84] Knauf ultimately waived service of process under the Hague Convention and negotiated a court-approved $800 million settlement, which established a pilot remediation fund to compensate injured homeowners.[85] Conversely, Taishan ignored court orders and contested the district court's assertion of personal jurisdiction over the matter.[86] After prolonged delays, Taishan ultimately acquiesced

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79. *In re* Chinese Manufactured Drywall Prods. Liab. Litig. (*Chinese Drywall I*), 706 F. Supp. 2d 655, 659 (E.D. La. 2010).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*; *see also In re* Chinese Manufactured Drywall Prods. Liab. Litig. (*Chinese Drywall II*), 626 F. Supp. 2d 1346, 1347 (J.D.M.L. 2009) (mem.).

84. *Chinese Drywall I*, 706 F. Supp. 2d at 662, 666; *see also* Joaquin Sapien, *Documents Tie German Company to Chinese Subsidiary that Produced Defective Drywall*, PROPUBLICA (Aug. 25, 2010), http://www.propublica.org/article/documents-tie-german-company-to-chinese-subsidiary-defective-drywall. Financial reports and corporate emails indicated that Knauf's German parent-company was closely involved with its subsidiary's drywall manufacture, including overseeing quality control, finding raw materials, and responding to lawsuits.

85. *In re* Chinese Manufactured Drywall Prods. Liab. Litig. (*Chinese Drywall III*), 849 F. Supp. 2d 819 (E.D. La. 2012).

86. *Chinese Drywall I*, 706 F. Supp. 2d at 712.

to a $2.7 million default judgment, which the district court awarded to the original seven bellwether homeowners.[87]

After judgment was rendered in 2009, Taishan made a limited appearance in federal court and motioned to vacate the award on due process grounds.[88] Taishan challenged the court's "long-arm" basis for personal jurisdiction, alleging it neither solicited regular business nor maintained minimal business contacts in the United States.[89] Taishan argued it did not know the extent to which its Virginian trading partner, Venture Supply Incorporated (Venture), would distribute its drywall throughout the United States.[90] Rejecting this defense under a stream of commerce analysis, the district court determined that Taishan purposefully availed itself of the U.S. market by soliciting Venture as its exclusive American trading partner once the drywall generated profitable sales.[91] Taishan solicited American consumers when it manufactured drywall according to Venture's specifications to comply with U.S. commercial standards.[92] Consequently, the court determined that Taishan possessed "more than a mere awareness or expectation" that its drywall would be delivered, sold, and installed in Virginia.[93]

Reviewing the default judgment under an abuse of discretion standard, the United States Court of Appeal for the Fifth Circuit affirmed the district court's decision in January 2014, finding that Taishan failed to demonstrate good cause for its contempt of court.[94] Although Taishan had retained legal representation in China as well as the United States to investigate the matter, it dragged its feet for nearly a year after the class amended its complaint by refusing to engage with opposing counsel.[95] Thus, the court reasoned that mitigating factors occasionally afforded to foreign litigants in justifying delay did not excuse Taishan's willful neglect. [96]

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87. *Id.*
88. *Chinese Drywall III*, 894 F. Supp. 2d at 834.
89. *Id.*
90. *Id.*
91. *Id.* at 857.
92. *Id.* at 854.
93. *Id.* at 856.
94. *In re* Chinese Manufactured Drywall Prods. Liab. Litig. (*Chinese Drywall IV*), 742 F. Supp. 3d 576, 594 (5th Cir. 2014).
95. *Id.* at 595.
96. *Id.*

B. Recent Developments

In July 2014, plaintiffs moved for a judgment debtor examination in district court to identify Taishan's assets and execute the judgment, as the period for supervisory writ applications had expired.[97] Taishan subsequently fired its American attorney and refused to participate in any examinations.[98] In an unprecedented decision, the district court held Taishan in criminal, as well as civil, contempt by sanctioning a $40,000 penalty and enjoining Taishan from transacting any further business in the United States.[99] If Taishan violates the injunction, it must disgorge 25% of annual profits.[100] Federal district court Judge Eldon Fallon construed Taishan's indifference as a direct "affront to the court's dignity" that denied relief to thousands of homeowners.[101]

Within two weeks of the injunction, Florida residents Eduardo and Carmen Amorin filed a new class action in the Eastern District of Louisiana on behalf of over 3000 similarly situated homeowners, which named China's State-owned Assets Supervision and Administration Commission (SASAC) as a co-defendant with Taishan.[102] The complaint alleged that SASAC, due to its supervision and control over Taishan, was also complicit in the design and manufacture of the hazardous drywall.[103] Plaintiffs argued that its complaint against SASAC fell within the commercial exception to the Foreign Sovereign Immunities Act, which authorizes lawsuits against sovereign entities when the underlying dispute involves a commercial activity.[104]

In October 2014, Judge Fallon granted class certification to determine the scope and cost of remediation for nearly 4000 homeowners residing in Louisiana, Mississippi, Florida, Virginia, Texas, and Alabama.[105] Under a theory of corporate veil piercing, the court held Taishan affiliates liable to class members because they constituted "a single business enterprise" for the purposes of manufacturing the drywall

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97. Contempt Order at 2, *In re* Chinese Manufactured Drywall Prods. Liab. Litig. (*Chinese Drywall V*), MDL No. 2047, 2014 WL 7135657 (E.D. La. July 17, 2014).

98. *Id.*

99. *Id.* at 3.

100. *Id.*

101. *Id.*

102. Omnibus Class Action Complaint (XIX), Amorin v. State-Owned Assets Supervision & Admin. Comm'n of the State Council, No. 2:14-cv-01727 (E.D. La. filed July 29, 2014).

103. *Id.* at 5-6.

104. *Id.*; *see also* 28 U.S.C. § 1605(a)(2) (2012).

105. Findings of Fact & Conclusions of Law with Respect to Plaintiffs' Omnibus Motion for Class Certification at 34, *In re* Chinese Manufactured Prods. Liab. Litig. (*Chinese Drywall VI*), MDL No. 2047, 2014 WL 4809520 (E.D. La. Sept. 26, 2014).

at issue.[106] The Fifth Circuit has customarily capped classes at 150 plaintiffs, reasoning this threshold as the limit where additional joinder becomes impractical.[107] However, the district court in this case reasoned that the factual determination of class-wide property damages was common to all class members—namely the square foot cost of remediation and alternative living expenses.[108] The court determined that the property damage estimates and pertinent health problems were so similar among class members that judicial economy demanded certification.[109] Because liability had already been established through the default judgment, the court ordered the case into its final stages of damage assessment.[110]

In March 2015, the district court heard oral arguments regarding the plaintiffs' motion to preclude Taishan and its affiliates from participating in future proceedings.[111] Surprisingly, Taishan reappeared in court and pledged to pay the now five-year-old debt of $2.7 million plus postjudgment interest.[112] Taishan's counsel argued that its client's ignorance of the U.S. court system justified its apparent indifference to the lawsuit.[113] When addressing the plaintiffs' motion and Taishan's opposition, Judge Fallon pronounced to the courtroom:

> These individuals, the claimants, have been out of their homes for a long time. Some of these individuals have been and, as far as I know, are still living in tents in their backyard because they can't abandon the house. If they abandon the house, their insurers have told them they are going to cancel their fire insurance, so they live in the backyard and run in and out of the house to use the bathroom facilities. That's not fair to these folks. It's about 4,000 of them out there, and we have to get some resolution.[114]

The court concluded that Taishan must purge its contempt before it would rule on their role in future proceedings.[115]

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106. *Id.* at 20.
107. *Id.* at 23.
108. *Id.*
109. *Id.* at 34.
110. *Id.*
111. Transcript of Oral Argument at 22, *In re* Chinese Manufactured Prods. Liab. Litig. (*Chinese Drywall VII*), MDL No. 2047 (E.D. La. Mar. 15, 2015).
112. *Id.* at 23.
113. *Id.*
114. *Id.* at 37-38.
115. Minute Entry and Orders at 2, *Chinese Drywall VII*, MDL No. 2047.

V. CONGRESSIONAL EFFORTS

A. Foreign Manufacturers Legal Accountability Bill

The perception that foreign corporations operate with "offshore immunity" has harmed domestic companies by subjecting them to lawsuits as default defendants.[116] The Chinese drywall class action illustrates the competitive advantage offshore manufacturers maintain over their U.S. counterparts, who cannot likewise stonewall litigation to transfer assets beyond the court's jurisdiction. Unfortunately, even the prospect of toxic tort litigation can ruin businesses, especially when pollution exclusions in insurance policies provide a broad basis to deny coverage.[117] Indeed, Taishan's Virginian supplier went bankrupt and laid off its sixty-eight employees only months after the original complaint.[118]

To stem the tide of dangerous imports, Congresswoman Betty Sutton introduced the Foreign Manufacturers Legal Accountability Bill in February 2010 in an effort to simplify the personal jurisdiction dilemma.[119] The bill proposed that foreign manufacturers who export to the U.S. market must register an agent in the United States to accept service of process.[120] Registration would thereby confer jurisdiction upon whichever state the foreign company chose for a civil or regulatory proceeding.[121] Conversely, the customs duty would ban offshore companies who refused to register a domestic agent from exporting to the United States.[122] The House Committee on Energy and Commerce approved the bill; however, it never went to a vote.[123] A companion Senate bill died in similar fashion after its introduction.[124] Nearly

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116. *Id.*

117. *See, e.g.*, Evanston Ins. Co. v. Germano, No. 11-2082, 2013 WL 1141843 (4th Cir. Mar. 20, 2013) (stating that pollution exclusions in supplier and homebuilder's insurance policies applied to Chinese drywall claims); Granite State Ins. Co. v. Am. Bldg. Materials, No. 12-10979, 2013 WL 28430 (11th Cir. Jan. 3, 2013) (finding no duty for insurer to defend or indemnify under the policy's pollution exclusion).

118. *See* Josh Brown, *Norfolk Company That Imported Drywall Closes*, VIRGINIA-PILOT (July 10, 2009), http://hamptonroads.com/2009/07/norfolk-company-imported-drywall-closes#.

119. H.R. 4678, 111th Cong. (2010).

120. *Id.* § 3(a)(1).

121. *Id.* § 3(c)(1).

122. *Id.* § 4(a).

123. *See H.R. 4678 (111th): Foreign Manufacturers Legal Accountability Act of 2010*, GOVTRACKUS (2010), https://www.govtrack.us/congress/bills/111/hr4678. A bill is only the first step in the legislative process. Introduced bills and resolutions first go to committees that investigate, revise, and deliberate them prior to a House debate.

124. *See S. 1606 (111th): Foreign Manufacturers Legal Accountability Act of 2009*, GOVTRACKUS (2010), https://www.govtrack.us/congress/bills/111/s1606.

identical versions of this bill have not moved past committee for House debate during the last two congressional sessions.[125]

B. Market Implications

Some have labeled the bill as protectionist legislation, which conflicts with various obligations the United States has adopted under existing international trade agreements.[126] Aside from circumventing service of process under the Hague Convention, the bill may violate the nondiscrimination principle codified under the World Trade Organization's General Agreement on Tariffs and Trade (GATT).[127] The GATT facilitates the free flow of international commerce by reducing tariffs and eliminating trade preferences on a reciprocal and mutually advantageous basis.[128] Indeed, the bill exempts U.S.-owned manufacturers whose principal place of business is nonetheless located in foreign territories.[129] Another exemption for small foreign manufacturers could violate a GATT obligation to treat "like products" from all companies equally.[130] This de minimis preference might discourage sourcing from larger firms with an established safety track record in favor of smaller competitors with marginal international reputation.[131] Beyond discriminatory treatment, a customs duty that undermined public safety would defeat its entire purpose.

VI. INTERNATIONAL ARBITRATION: AN EQUITABLE SOLUTION

The ideal method for American consumers to hold foreign manufacturers accountable for their defective products is a topic of continued debate. As the Chinese drywall litigation illustrated, threshold disputes over personal jurisdiction can frustrate an already contentious process for years and deny plaintiffs their day in court. A treaty between China and the United States mandating the mutual enforcement of civil judgments would certainly relieve this problem. However, China

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125. *See generally* H.R. 3646, 112th Cong. (2011); H.R. 1910, 113th Cong. (2013).

126. *See* Daniel Griswold & Sallie James, *Consumer Safety Bill Could Beat Boomerang Against U.S. Manufacturers*, CATO INST. (Sept. 28, 2010), http://www.cato.org/publications/free-trade-bulletin/consumer-safety-bill-could-against-us-manufacturers.

127. *See* General Agreement on Tariffs and Trade art. I, § 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

128. *Id.*

129. Griswold & James, *supra* note 126; *see also* H.R. 4678, 111th Cong. § 5 (2010).

130. Griswold & James, *supra* note 126; *see* H.R. 4678, § 4; *see also* GATT, *supra* note 127, art. I.

131. Griswold & James, *supra* note 126, at 3.

realistically lacks motivation to alter the status quo.[132] If manufacturers based in China can use this virtual liability shield as a commercially competitive advantage, why would they consent to this bilateral treaty? Congress must protect American consumers and businesses in a way that Chinese courts will ultimately enforce against their own residents.

This Comment proposes that Congress amend the "commerce" portion of the U.S. Arbitration Act's first section[133] to mandate that arbitration agreements with foreign entities, who refuse to register an agent in the United States for service of process, must define American consumers as third party beneficiaries. For example, an unregistered Chinese manufacturer who contractually licenses a U.S. supplier to sell its products in the United States would consent to resolve all disputes "arising out of or relating to" the distribution agreement in arbitration with "buyer" listed as a third-party beneficiary.[134] This commercial contract would enable an American consumer to seek direct relief in arbitration, even though the product's manufacturer never participated in its ultimate sale.[135] Essentially, it compels foreign manufacturers who favor arbitration to warrant the merchantability of its product to third-party consumers. This customs alternative strikes an equitable balance by permitting foreign manufacturers to arbitrate claims in their chosen forum while consumers avoid costly preliminary battles over jurisdiction.[136]

A. Third-Party Interest in Arbitration

The fundamental objective of the U.S. Arbitration Act is to encourage efficient dispute resolution.[137] Party consent is a necessary component. Just as businesses make contractual arrangements according to their commercial interests, parties may also predetermine the forum that resolves disputes arising under contract. Arbitration agreements predetermine the jurisdiction and choice of law that will govern future

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132. Stephanie Glynn, *Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products—The Fund Concept*, 26 EMORY INT'L L. REV. 317, 354 (2012).

133. United States Arbitration Act, 9 U.S.C. § 2 (2012).

134. *Id.*

135. This is akin to a "direct action" statute in insurance law, which permits an injured plaintiff to directly sue a tortfeasor's insurer under its liability insurance policy, even though the victim was never in privity with the insurer who must participate in litigation. *See* LA. R.S. 22:1269 (2015).

136. *See* Davies v. Consol. Underwriters, 6 So. 2d 351, 357 (La. 1942). The Louisiana Supreme Court has endorsed direct action statutes on the rationale that liability insurance policies are primarily issued for the benefit of the public.

137. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985).

disputes.[138] Although these agreements delineate the scope of arbitration, the commercial reality is often less clear. Even a bilateral commercial contract can substantially implicate the rights and obligations of third parties. Should federal law limit contractual autonomy to account for these incidental parties?

National systems of civil procedure often afford mandatory third-party mechanisms in situations where a court determines that a nonlitigant is indispensable to the case.[139] For instance, the United States Federal Rules of Civil Procedure provide for intervention as a matter of right when applicants claim an interest in the case, and its disposition in their absence would impede an applicant's ability to protect that interest.[140] Mandatory intervention ensures that all claims arising from the same transaction or occurrence will be litigated before the same trier of fact to avoid inconsistent judgments.[141] Because arbitral awards are "valid, irrevocable, and enforceable"[142] when rendered, intervention should apply in a similar fashion, because these awards vest with the same res judicata power as ordinary judgments.[143] Large-scale construction projects are especially susceptible to concurrent proceedings because they often involve multiple parties and transactions. Thus, it is reasonable to impose certain contractual limitations when a foreign party refuses to register an agent for ordinary judicial service.

U.S. courts have upheld the rights of third-party beneficiaries when enforcing arbitration awards—irrespective of the chosen forum.[144] The United States Court of Appeals for the Second Circuit has affirmed that a third-party beneficiary was entitled to arbitrate against a state-owned company under the commercial exception to the Foreign Sovereign Immunities Act.[145] In *Cargill International S.A. v. M/T Pavel Dybenko*, a Dutch corporation purchased 7000 tons of soil bean oil from another Dutch supplier, who entered into a separate contract with a Russian shipping company—wholly owned by the former Soviet Union—to

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138. James M. Hosking, *The Third Party Non-Signatory's Ability To Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DIS. RES. L. J. 469, 476 (2004).

139. *Id.* at 490.

140. *See* FED. R. CIV. P. 24(a)(2); *see also* FED. R. CIV. P. 19(1) (providing for joinder of a mandatory party).

141. FED. R. CIV. P. 24(a)(2).

142. 9 U.S.C. § 2 (2012).

143. *Id.*

144. *See, e.g.*, Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1018 (2d Cir. 1993); Sarhank Grp. v. Oracle Corp., No. 01 Civ. 1285 (DAB), 2002 WL 31268635 (S.D.N.Y. Oct. 9, 2002).

145. *See Cargill Int'l S.A.*, 991 F.2d at 1018; *see also* 28 U.S.C. § 1605(a)(2) (2012).

arbitrate all disputes arising from their charter in New York.[146] The Dutch buyer claimed the oil was contaminated during shipment and joined its supplier in petitioning the United States District Court for the Southern District of New York to compel arbitration against the Russian freight company.[147] Finding that the district court could grant third-party-beneficiary status to the Dutch buyer, even though it was not a contractual party to the arbitration agreement, the Second Circuit proclaimed:

> The goal of the [New York] Convention, and the principal purpose underlying the American adoption and implementation of it, was to encourage recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.[148]

The Southern District Court of New York has also enforced an arbitral award against a U.S. parent company based on one of its subsidiary's contracts with a third party.[149] Even though the arbitration was conducted by an Egyptian tribunal, the federal court determined that a subsidiary's parent could be held jointly and severally liable under the New York Convention.[150] Under a veil-piercing analysis, the court reasoned that granting third-party beneficiary rights and obligations to an arbitration agreement did not contravene public policy.[151]

B. Implications for China

While this Comment's proposal has general ramifications for international commerce, one primary concern questions whether China would construe third-party beneficiaries in arbitration as a violation of public policy. Aside from the New York Convention's consistent enforcement rate, public policy objections nonetheless provide a "catch all" justification for refusing awards.[152]

Chinese law recognizes commercial autonomy by permitting choice of law provisions in contracts that involve foreign interests.[153] Arbitration agreements must specify the scope of their coverage and designate a

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146. *Cargill Int'l S.A.*, 991 F.2d at 1014.
147. *Id.* at 1015.
148. *Id.* at 1018 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974)).
149. *Sarhank Grp.*, 2002 WL 31268635, at *7.
150. *Id.*
151. *Id.*
152. Arbitral Awards Convention, *supra* note 38, art. V(2).
153. *See* General Principles of Civil Law of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) art. 145 (China).

forum that retains jurisdiction over all disputes arising under the contract.[154] China enacted unprecedented reform in 2005 by amending its arbitration law to allow foreign venues.[155] Chinese law also expressly provides that foreign nationals with professional knowledge in law, economics, and trade may serve as arbitrators.[156] Interestingly, Hong Kong followed other international institutions by passing an Arbitration Ordinance permitting a mechanism for third-party interpleader.[157] As a global leader in alternative dispute resolution, China's International Economic and Trade Arbitration Commission (CIETAC) headquartered in Beijing has promoted international arbitration since its inception in 1956.[158] CIETAC handles approximately 1300 arbitrations annually, which involve parties from more than fifty regions outside the Chinese mainland.[159]

Legal practitioners tend to believe that Chinese courts regularly invoke the public policy rationale as grounds to reject foreign arbitral awards; however, this is a misconception.[160] Over a decade ago, China's Supreme Court issued a notice mandating that lower tribunals could not summarily vacate foreign awards without its approval.[161] In fact, of the seventeen foreign awards that were denied for policy reasons and reported to the Supreme People's Court since 2000, only one was ultimately vacated on a res judicata basis.[162] For example, a Japanese company successfully compelled arbitration in the Supreme People's Court against a Chinese state-owned enterprise to collect a debt, despite

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154. Arbitration Law of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, entered into force Sept. 1, 1995) art. 16 (China).

155. Chua, *supra* note 62, at 144.

156. Arbitration Law of the People's Republic of China art. 67.

157. Hong Kong Arbitration Ordinance, (2011), Cap. 609 § 15, http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf (H.K.); *see* London Court of International Arbitration Rules art. 22.1 (2014) (allowing third-party applicants to join arbitration without unanimous consent of all parties); *see also* Vienna International Arbitral Centre Rules of Arbitration art. 14 (2013) (permitting third-party joinder).

158. *See Introduction*, CHINA INT'L ECON. & TRADE ARB. COMMISSION, http://www.cietax.org/index.cms (last visited June 24, 2015). CIETAC's over 20,000 concluded arbitrations have involved parties from more than 70 countries. *Id.*

159. *Id.*

160. Henry Chen & Ted Howes, *The Enforcement of Foreign Arbitration Awards in China*, 2 BLOOMBERG L. REP. ASIA PAC. 1, 3 (2009).

161. *Id.*

162. Xiaohong Xia, *Implementation of the New York Convention in China*, 1 INT'L COM. ARB. BRIEF 20, 22 (2011). In that case, the arbitration tribunal resolved a dispute between investors in a joint venture, by denying portions of a judgment the People's Court had already rendered.

policy objections and the Stockholm venue.[163] The Chinese corporation argued that the States Administration on Foreign Exchange, which regulates the flow of currency in China, prevented it from satisfying the debt.[164] Upon review, the Court overruled the lower tribunal's denial of the award, holding that the enforcement of a private obligation that happens to contradict an administrative regulation does not violate public policy.[165]

Furthermore, in a recent Hong Kong decision, an appellate court reiterated that public policy objections should be narrowly construed.[166] The court reasoned that an award must be "contrary to the fundamental conceptions of morality and justice of the forum" to justify its denial.[167] Specifically, the court limited public policy objections to the structural integrity of the arbitration proceedings, rather than the merits of the underlying dispute or quantity of damages.[168] Thus, Chinese courts have not only affirmed awards against state-owned enterprises but also narrowly considered public policy reasons for denying awards rendered in foreign venues.

C. Free Trade Objections

Scholars have suggested that regulation under the threat of an import ban, similar to the proposed Foreign Manufacturers Legal Accountability Bill, could encourage retaliatory tariffs abroad that would harm American exports.[169] Registering agents in every foreign country where U.S. companies export would increase production costs and invite lawsuits, which could be especially difficult to defend in emerging markets with undeveloped legal systems.[170] Because commercial parties increasingly manufacture with component parts constructed in several countries, U.S. companies often import cheaper raw materials and export products to diversify revenue streams and contend with global competitors.[171] When American companies and financiers invest in China-based manufacturing, shared assets and joint liability among

163. Chen & Howes, *supra* note 160, at 5.

164. *Id.*

165. *Id.* at 6; *see also* Tianrui Hotel Inv. Co. v. Hangzhou Yiju Hotel Mgmt. Co., [2010] Min Si Ta Zi No. 18 (Sup. People's Ct. 2010) (translated in http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=816).

166. Shanghai Fusheng Soya-Food Co. v. Pulmuone Holdings Co., HCCT 48/2012 (C.F.I. Apr. 25, 2014) (Legal Reference System) (H.K.).

167. *Id.*

168. *Id.*

169. Griswold & James, *supra* note 126, at 8.

170. *Id.*

171. *Id.*

international partners could incentivize quality controls without additional regulation.[172]

Others may also point to the Obama Administration's promotion of the Trans-Pacific Partnership,[173] which is currently under House debate, as clear evidence that heightened trade duties would not pass congressional scrutiny.[174] Proponents argue that the Partnership would open foreign markets for American goods and level the playing field by forcing Asian competitors to improve labor and environmental standards.[175] Conversely, labor unions contend that it will only benefit multinational corporations by lowering transaction costs while additional U.S. manufacturing jobs are lost to overseas competitors.[176] When discussing the United States' $318 billion trade deficit with China as of 2013, University of Pennsylvania Wharton School of Business's management professor Mauro Guillen speculated, "For every job we have lost to Mexico [since 2000], five jobs were lost to China."[177] Because the Partnership's notable membership excludes China, some have even suggested the United States must reduce tariffs to maintain commercial influence in the Pacific.[178]

Notwithstanding possible trade limitations, arbitration for incorporated third-party beneficiaries could serve as an equitable alternative for foreign manufacturers who refuse registration in the United States. With a globally successful enforcement rate, the New York Convention arguably represents the best contemporary mechanism for facilitating the "comity of nations."[179] A federal amendment would allow the United States to present a unified position to the world, because the Supreme Court has determined that the U.S. Arbitration Act preempts any state law that attempts to undermine the enforcement of an

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172. Jacques Delisle & Elizabeth Trujillo, *Consumer Protection in Transnational Contexts*, 58 AM. J. COMP. L. 135, 163 (2010).

173. *See* Peter Baker, *The Trans-Pacific Partnership and a President's Legacy*, N.Y. TIMES (June 14, 2015), http://www.nytimes.com/2015/06/15/world/asia/the-trans-pacific-trade-deal-and-a-presidents-legacy.html?_r=0. The Trans-Pacific Partnership would stitch together the United States with eleven other nations along the Pacific Rim, including Canada, Mexico, Japan, Vietnam, Malaysia, and Australia, creating a free-trade zone for about 40% of the world's economy by lowering tariffs and setting rules for resolving trade disputes.

174. *Id.*

175. *Id.*

176. *Id.*

177. Shom Sen, *Behind the Breakdown of the Trans-Pacific Partnership*, FORTUNE INSIDER (June 15, 2015), http://fortune.com/2015/06/15/behind-the-breakdown-of-the-trans-pacific-partnership.

178. Baker, *supra* note 173, at 2.

179. Zeynalova, *supra* note 14, at 169.

arbitration agreement.[180] Since the mid-1980s, the Supreme Court has confirmed, "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration."[181] Moreover, a dispute is not per se outside the scope of arbitration under federal law merely because it arises in tort.[182]

Third-party beneficiaries in arbitration could ensure that all complaints arising from an allegedly defective product would be collectively litigated to avoid inconsistent judgments. Legislation in the United States as well as China provides for joinder in arbitration proceedings as a mechanism necessitated by modern commercial dealings. U.S. and Chinese courts have narrowly construed public policy objections to arbitral awards and consistently affirmed awards rendered in foreign institutions. Amending the U.S. Arbitration Act to enable joinder of noncontractual parties may seem like an austere regulation on commerce; however, it only implicates those foreign entities who refuse registration to avoid ordinary service. The proposed amendment is not discriminatory because it applies regardless of nationality and merely puts offshore companies on an equal footing with domestic firms, who remain susceptible to service of process at all times. Equity dictates that manufacturers answer for their negligent products irrespective of their national origin.

VII. CONCLUSION

In a modern globalized world, commerce necessitates the interplay of international actors in various sectors of the economy. Increased access to foreign markets and the rise of multinational corporations have inherently challenged traditional notions of sovereignty. While nations must maintain the integrity of their respective court systems by enforcing the law, we do not live and work in a vacuum. As the Chinese drywall litigation demonstrated, a foreign manufacturer's product can have far-ranging effects on an immeasurable consumer market. We want to hold these companies accountable in a manner that does not diminish the global benefits of free trade. Arbitration strikes an equitable balance on

180. Southland Corp. v. Keating, 465 U.S. 1 (1984).

181. Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 626-27 (1985).

182. *See, e.g.*, Pierson v. Dean Witter Reynolds, Inc., 742 F.2d 334, 338 (7th Cir. 1984); McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 344 (11th Cir. 1984); Goodwin v. Elkins & Co., 730 F.2d 99, 110 (3d Cir. 1984); Acevedo Maldonado v. PPG Indus. Inc., 514 F.2d 614, 616 (1st Cir. 1975).

the international stage. Foreign parties retain their contractual right to negotiate the choice of law and forum that govern commercial disputes, limited only by their inability to exclude tort-related claims that arise as a direct result of those transactions. National courts of all stripes have enforced foreign arbitral awards within their own jurisdictions, regardless of public policy objections. Congressional representatives who want to do more than prevaricate when faced with consumer safety should consider arbitration as a reliable solution. Tort victims deserve their day in court, and it is our job to provide it.